



SIDLEY AUSTIN LLP  
ONE SOUTH DEARBORN STREET  
CHICAGO, IL 60603  
+1 312 853 7000  
+1 312 853 7036 FAX

AMERICA • ASIA PACIFIC • EUROPE

GGERSTMAN@SIDLEY.COM  
+1 312 853 2060

January 28, 2020

***Via Electronic Mail***

U.S. Securities and Exchange Commission  
Office of Chief Counsel  
Division of Corporation Finance  
100 F Street NE  
Washington, DC 20549

Re: eBay Inc. – Stockholder Proposal submitted by Jing Zhao

This letter is submitted on behalf of eBay Inc., a Delaware corporation (“eBay” or the “Company”), pursuant to Rule 14a-8 under the Securities Exchange Act of 1934 (the “Exchange Act”), to notify the Securities and Exchange Commission (the “Commission”) of eBay’s intention to exclude from its proxy materials for its 2020 Annual Meeting of Stockholders (the “2020 Annual Meeting”) a stockholder proposal (the “Proposal”) and statement in support thereof received from Jing Zhao (the “Proponent”). This letter is being submitted with the Commission within the time period required under Rule 14a-8(j).

Pursuant to Staff Legal Bulletin No. 14D (November 7, 2008), this letter and its exhibits are being submitted via email to *shareholderproposals@sec.gov*. A copy of this letter and its exhibits will also be sent to the Proponent.

The Company hereby respectfully requests confirmation that the staff of the Division of Corporation Finance (the “Staff”) will not recommend to the Commission that enforcement action be taken if eBay excludes the Proposal from its 2020 Annual Meeting proxy materials for the reasons set forth below.

**THE PROPOSAL**

The Proposal sets forth the following resolution to be voted on by stockholders at the 2020 Annual Meeting:

“Resolved: stockholders recommend that eBay Inc. reform the structure of the board of directors letting the employees elect at least 20% of the board members.

### **Supporting Statement**

American corporate governance needs improvement but cannot improve without employees' participation. For example, one of the governance problems is America's ballooning executive compensation cancer, which is not sustainable for the economy.

Section 953(b) of the Dodd-Frank Act directed the SEC to amend Item 402 of Regulation S-K to require each company to disclose the annual total compensation of the CEO, the median of the annual total compensation of all employees (except the CEO), and the ratio of these two amounts (CEO pay ratio). In 2018, eBay's CEO pay ratio jumped further higher to 152 to 1 (2019 Proxy Statement p. 92) from 144 to 1 in 2017 (2018 Proxy Statement p. 86). This is against the spirit of the Congress act and the SEC regulation. Compared with big European and Japanese companies where the CEO pay ratios are less than 20 to 1, America's CEOs are overpaid too much.

Nationwide, "Median compensation for 132 chief executives of S&P 500 companies reached \$12.4 million in 2018, up from \$11.7 million for the same group in 2017, according to a Wall Street Journal analysis." (March 17, 2019). "CEOs rake in 940% more than 40 years ago, while average workers earn 12% more" (CBSNEWS August 14, 2019).

Currently eBay has 15 board members. If there are more than 3 board members being elected by and from the employees and some of them serving in the Compensation Committee, this cancer and other governance problems can be effectively healed."

A copy of the Proposal and the supporting statement is set forth in Exhibit A.

### **BASES FOR EXCLUSION OF THE PROPOSAL**

The Company believes that it may omit the Proposal from its proxy materials for the 2020 Annual Meeting under (i) Rule 14a-8(i)(2) because implementing the Proposal would cause the Company to violate state law; (ii) Rule 14a-8(i)(6) because the Company lacks the power or authority to implement the Proposal; and (iii) Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite such that it is inherently misleading in violation of Rule 14a-9.

**I. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Its Implementation Would Cause the Company to Violate State Law.**

Rule 14a-8(i)(2) permits a company to omit from its proxy materials a shareholder proposal if the “proposal would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject.” As further discussed in the opinion of the Company’s Delaware counsel, Richards, Layton & Finger, PA, which is attached hereto as Exhibit B (the “Delaware Counsel Opinion”), the Company cannot implement the Proposal without violating certain provisions of the Delaware General Corporation Law (the “DGCL”).

The Proposal requests the Company to “reform the structure of the board of directors letting the employees elect at least 20% of the board members.” The proposed action would be contrary to Sections 211(b) and 212(a) of the DGCL, pursuant to which directors are elected by stockholders and each stockholder is entitled one vote for each share of capital stock held by such stockholder.<sup>1</sup> The election of directors by stockholders is also reflected in Article VI of the Charter and Section 2.2. of the Bylaws.<sup>2</sup> The Proposal is asking that a non-stockholder group be granted the right to vote for a certain percentage of the Board. As a Delaware corporation, only the Company’s shareholders, pursuant to Section 211(b) of the DGCL, are entitled to elect directors and the DGCL does not permit a corporation to modify this requirement in its governing documents.

The Staff has consistently permitted the exclusion of a shareholder proposal where the implementation of the proposal would cause the company to violate the state law to which it is subject.<sup>3</sup> In *Dominion Resources, Inc.* (Jan. 14, 2015), the Staff

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<sup>1</sup> Section 211(b) of the DGCL provides “. . . an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws.” Section 212(a) of the DGCL provides “Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder.”

<sup>2</sup> The Charter is available at the following hyperlink:  
<https://www.sec.gov/Archives/edgar/data/1065088/000119312512191579/d344479dex31.htm>. The Bylaws are available at the following hyperlink:  
<https://www.sec.gov/Archives/edgar/data/1065088/000106508819000006/ebay123118ex302.htm>.

<sup>3</sup> See, e.g., *The Goldman Sachs Group, Inc.* (Feb. 1, 2016) (concurring with the exclusion of a proposal asking that the compensation committee of the company’s board of directors be reformed to include individuals who are not members of the company’s board of directors as violating applicable state law); *Abbott Laboratories* (Feb. 1, 2013) (concurring with the exclusion of a proposal requesting the company’s board of directors to replace all voting requirements in the company’s charter and bylaws with the voting standard of a majority of the votes cast for and against the proposal or the voting standard closest thereto as violating applicable state law); *Johnson & Johnson* (Feb. 16, 2012) (concurring with the exclusion of a proposal requesting that the board disqualify members who fail to receive certain levels of stockholder votes from serving on the compensation committee as a violation of state law impermissibly limiting the

allowed the exclusion of a proposal that requested a director be appointed by the Board without a stockholder vote, in violation of applicable state law. The proposal in *Dominion Resources* specifically requested that the company “appoint” at least one expert independent director. The company’s response, as supported by the opinion of the company’s counsel, stated that implementation of the proposal would cause the company to violate the Virginia Stock Corporation Act, which provides that, other than temporary appointments to fill vacancies, the directors have no authority to appoint directors. Similar to the situation in *Dominion Resources*, this Proposal is seeking to give a non-stockholder group the authority to elect directors in violation of applicable state law.

Allowing the Company’s employees to elect directors, as requested in the Proposal, would violate the DGCL. Accordingly, the Company believes that the Proposal is excludable under Rule 14a-8(i)(2).

**II. The Proposal May Be Excluded Under Rule 14a-8(i)(6) Because the Company Lacks the Power or Authority to Implement the Proposal.**

Rule 14a-8(i)(6) provides that a company may properly omit a shareholder proposal from its proxy materials if the company lacks the power or authority to implement the proposal. As discussed above and more broadly in the Delaware Counsel Opinion, the Company cannot implement the Proposal without violating Sections 211(b) and 212(a) of the DGCL, as well as its Charter and Bylaws, and therefore lacks the authority to implement the Proposal.

The Staff has consistently allowed shareholder proposals to be excluded under both Rules 14a-8(i)(2) and 14a-8(i)(6) when the implementation of the proposal would violate state corporate law and, accordingly, the company lacks the authority to implement the proposal. For example, in *Trans World Entertainment Corporation* (May 2, 2019), the Staff permitted the exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of a proposal requesting that the company’s bylaws be amended to provide for an elevated quorum requirement, citing the opinion of the company’s counsel that such action would violate the New York Business Corporation Law, which prescribes that such elevated quorum requirement may only be provided in the charter, the amendment of which requires board action and shareholder approval. In *IDACORP, Inc.* (Mar. 13, 2012), the Staff permitted the exclusion under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) of a proposal requesting the board to amend the company’s bylaws to require a majority voting standard for uncontested director elections and plurality voting standard for contested

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decision-making authority of the board to select committee members in the exercise of their fiduciary duties).

elections, citing the opinion of the company's counsel that the board cannot do so without violating the Idaho Business Corporation Act, which prescribes a plurality voting as the default standard, absent a contrary provision in a company's charter.<sup>4</sup>

Just as in the precedents cited above, implementation of the Proposal would cause the Company to violate applicable state law, and the Company lacks the power or authority under Delaware law to implement the Proposal. Accordingly, the Company believes that the Proposal is excludable under both Rule 14a-8(i)(2) and Rule 14a-8(i)(6).

### **III. The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because It Is Impermissibly Vague and Indefinite.**

Rule 14a-8(i)(3) provides that a company may exclude a shareholder proposal from its proxy materials if the proposal or supporting statement is contrary to any of the Commission's proxy rules. The Staff consistently has taken the position that vague and indefinite shareholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because "neither the shareholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."<sup>5</sup> The Staff has further explained that a shareholder proposal can be sufficiently misleading and therefore excludable under Rule 14a-8(i)(3) when the company and its shareholders might interpret the proposal differently such that "any action ultimately taken by the [c]ompany upon implementation [of the proposal] could be significantly different from the actions envisioned by the shareholders voting on the proposal." *Fuqua Industries, Inc.* (Mar. 12, 1991).

The Staff has articulated that when the terms of a proposal are unclear and the proponent fails to provide adequate guidance on how such uncertainties should be resolved, that proposal may be excluded as vague and indefinite under Rule 14a-8(i)(3).<sup>6</sup>

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<sup>5</sup> Staff Legal Bulletin No. 14B (September 15, 2004).

<sup>6</sup> See, e.g., *Bank of America Corp.* (Mar. 12, 2013) (concurring in the exclusion of a proposal regarding the exploration of "extraordinary transactions that could enhance shareholder value" where the definition of "extraordinary transactions" was inconsistent and unclear throughout the proposal and the supporting statement); *Verizon Communications Inc.* (Feb. 21, 2008) (concurring with the exclusion of a proposal regarding formulas for short- and long-term incentive-based executive compensation where the methods of calculation provided were inconsistent with each other); *International Business Machines Corp.* (Feb. 2, 2005) (concurring in the exclusion of a proposal regarding executive compensation because the identity of the affected executives was uncertain and subject to multiple interpretations); *Peoples Energy Corp.* (Nov. 23, 2004, *recon. denied* Dec. 10, 2004) (concurring in the exclusion of a proposal where the term "reckless neglect" was uncertain and subject to multiple interpretations); *Norfolk Southern Corp.* (Feb. 13, 2002) (concurring in the exclusion of a proposal requesting that the board of directors "provide for a shareholder vote and ratification, in all future elections of Directors, candidates with solid background, experience and

The danger in presenting such proposals to shareholders is that, due to the lack of guidance with respect to these uncertainties, the company could not “determine with any reasonable certainty exactly what actions or measures the proposal requires,” and therefore the proposal might be implemented in a way that could be “significantly different from the actions envisioned by the shareholders voting on the proposal.”<sup>7</sup> The Staff has also concurred with the exclusion of proposals as vague and indefinite where they call for a determination based on specific standards but where such determination “would have to be made without guidance from the proposal.”<sup>8</sup>

Here, the Proposal is requesting a major revision to the way directors are elected at the Company – by giving employees the power to elect at least 20% of the board members. The Proposal and the supporting statement do not provide any guidance whatsoever on how this goal should be accomplished. This omission is particularly concerning here, since to “reform the structure of the board of directors letting the employees elect at least 20% of the board members” would be impermissible under the Delaware General Corporation Law, as further discussed in Parts I and II above.

At best, to implement the Proposal’s objective would require a work-around to effectuate its objective, but the Proposal does not address whether a work-around would be permissible, nor does it contain any ideas as how to “reform the structure of the board.” As a result, it is impossible to determine what steps the Proponent would like the Company to take in order to implement the Proposal.

The lack of any information as to how the Proposal could be implemented may result in actions taken by the Company that do not align with the shareholders’

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records of demonstrated performance in key managerial positions within the transportation industry” as vague and indefinite because it did not provide adequate guidance to resolve potential inconsistencies and ambiguities with respect to its criteria).

<sup>7</sup> See *Jefferies Group, Inc.* (Feb. 11, 2008, *recon. denied* Feb. 25, 2008) (concurring in the exclusion of a proposal where the “resolved” clause sought an advisory vote on the company’s executive compensation policies, yet the supporting statement and the proponent stated that the effect of the proposal would be to provide a vote on the adequacy of the compensation disclosures); *JPMorgan Chase & Co.* (Jan. 31, 2008) (concurring in the exclusion of a proposal that sought to prohibit restrictions on “the shareholder right to call a special meeting, compared to the standard allowed by applicable law on calling a special meeting” where the applicable state law did not affirmatively provide any shareholder right to call special meetings, nor did it set any default “standard” for such shareholder-called meetings).

<sup>8</sup> *Joseph Schlitz Brewing Co.* (Mar. 21, 1977). See, also, *Safescript Pharmacies, Inc.* (Feb. 27, 2004) (permitting the exclusion of a proposal requesting that options be expensed in accordance with The Financial Accounting Standards Board guidelines without specifying which of two alternative methods should be used); *Pfizer Inc.* (Feb. 18, 2003) (permitting the exclusion of a proposal requesting that options be made at the “highest stock price” without specifying the method to be used to determine such price).

Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
January 28, 2020  
Page 7

expectations. As in *Fuqua*, “any action ultimately taken by the company upon implementation of the proposal could be significantly different from the actions envisioned by the shareholders voting on the proposal.” As a result, the Company believes that the Proposal may be excluded from the proxy materials for the 2020 Annual Meeting as vague and indefinite pursuant to Rule 14a-8(i)(3).

### CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff confirm that it will take no action if the Company excludes the Proposal from its proxy materials for the 2020 Annual Meeting.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. If you have any questions regarding this request or desire additional information, please contact the undersigned at (312) 853-2060 or by email at [ggerstman@sidley.com](mailto:ggerstman@sidley.com).

Sincerely,



Gary Gerstman

### Attachments

cc: Marie Oh Huber, eBay Inc.  
Jing Zhao

**Exhibit A**  
(see attached)

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November 5, 2019

eBay Inc.

Corporate Secretary

2025 Hamilton Avenue, San Jose,

California 95125

(via certified mail & [ir@ebay.com](mailto:ir@ebay.com), [mhuber@ebay.com](mailto:mhuber@ebay.com), Rome, Marc [mrome@ebay.com](mailto:mrome@ebay.com),  
Lorenz, Diana [dilorenz@ebay.com](mailto:dilorenz@ebay.com))

Re: Proposal to 2020 Stockholders Meeting

Dear Secretary:

Enclosed please find my stockholder proposal for inclusion in our company's proxy materials for the 2020 annual meeting of stockholders and a letter confirming my eBay shares. I will continuously hold these shares through the 2020 annual meeting of stockholders.

Again, I request that you provide an email to receive proposals from stockholders.

Should you have any questions, please contact me at \*\*\*

or

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Yours truly,



Jing Zhao

Enclosure: Stockholder proposal

Letter of shares

## **Stockholder Proposal on Board Structure Reform**

Resolved: stockholders recommend that eBay Inc. reform the structure of the board of directors letting the employees elect at least 20% of the board members.

### **Supporting Statement**

American corporate governance needs improvement but cannot improve without employees' participation. For example, one of the governance problems is America's ballooning executive compensation cancer, which is not sustainable for the economy.

Section 953(b) of the Dodd-Frank Act directed the SEC to amend Item 402 of Regulation S-K to require each company to disclose the annual total compensation of the CEO, the median of the annual total compensation of all employees (except the CEO), and the ratio of these two amounts (CEO pay ratio). In 2018, eBay's CEO pay ratio jumped further higher to 152 to 1 (2019 Proxy Statement p. 92) from 144 to 1 in 2017 (2018 Proxy Statement p. 86). This is against the spirit of the Congress act and the SEC regulation. Compared with big European and Japanese companies where the CEO pay ratios are less than 20 to 1, America's CEOs are overpaid too much.

Nationwide, "Median compensation for 132 chief executives of S&P 500 companies reached \$12.4 million in 2018, up from \$11.7 million for the same group in 2017, according to a Wall Street Journal analysis." (March 17, 2019). "CEOs rake in 940% more than 40 years ago, while average workers earn 12% more" (CBSNEWS August 14, 2019).

Currently eBay has 15 board members. If there are more than 3 board members being elected by and from the employees and some of them serving in the Compensation Committee, this cancer and other governance problems can be effectively healed.

11/05/2019

Jing Zhao  
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Re: Your TD Ameritrade Account Ending in \*\*\*

Dear Jing Zhao,

Thank you for allowing me to assist you today. Our records indicate that you have continuously held 100 shares of Ebay Inc.(EBAY) since October 28, 2016 until today 11/5/2019.

If we can be of any further assistance, please let us know. Just log in to your account and go to the Message Center to write us. You can also call Client Services at 800-669-3900. We're available 24 hours a day, seven days a week.

Sincerely,

A handwritten signature in black ink that reads 'Catherine Venditte'.

Catherine Venditte  
Resource Specialist  
TD Ameritrade

This information is furnished as part of a general information service and TD Ameritrade shall not be liable for any damages arising out of any inaccuracy in the information. Because this information may differ from your TD Ameritrade monthly statement, you should rely only on the TD Ameritrade monthly statement as the official record of your TD Ameritrade account.

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**Exhibit B**  
(see attached)

January 28, 2020

eBay Inc.  
2025 Hamilton Avenue  
San Jose, California 95125

Re: Stockholder Proposal on behalf of Jing Zhao

Ladies and Gentlemen:

We have acted as special Delaware counsel to eBay Inc., a Delaware corporation (the "Company"), in connection with a stockholder proposal (the "Proposal") that has been submitted to the Company by Jing Zhao (the "Proponent") for the 2020 annual meeting of stockholders of the Company (the "Annual Meeting"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware.

For the purpose of rendering our opinion as expressed herein, we have been furnished with and have reviewed the following documents: (i) the Amended and Restated Certificate of Incorporation of the Company as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on April 27, 2012, as amended by the Certificates of Merger as filed with the Secretary of State on September 6, 2012, April 1, 2013 and August 14, 2013, as amended by the Certificate of Ownership and Merger as filed with the Secretary of State on October 1, 2013, as amended by the Certificates of Merger as filed with the Secretary of State on February 19, 2014 and June 2, 2014, as amended by the Certificate of Ownership and Merger as filed with the Secretary of State on May 18, 2015, as amended by the Change of Registered Agent of the Company as filed with the Secretary of State on July 21, 2015, as amended by the Certificate of Ownership and Merger as filed with the Secretary of State on May 12, 2017, as amended by the Certificate of Amendment to the Amended and Restated Certificate of Incorporation as filed with the Secretary of State on June 4, 2019, as amended by the Certificate of Ownership and Merger as filed with the Secretary of State on November 26, 2019 (collectively, the "Certificate of Incorporation"); (ii) the Amended and Restated Bylaws of the Company (the "Bylaws"); and (iii) the Proposal.

With respect to the foregoing documents, we have assumed: (i) the authenticity of all documents submitted to us as originals; (ii) the conformity to authentic originals of all documents submitted to us as copies; (iii) the genuineness of all signatures and the legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. We have not reviewed any document other than the documents listed above

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for purposes of rendering this opinion, and we assume that there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. In addition, we have conducted no independent factual investigation of our own but rather have relied solely on the foregoing documents, the statements and information set forth therein and the additional factual matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

## **THE PROPOSAL**

The Proposal states the following:

“Resolved: stockholders recommend that eBay Inc. reform the structure of the board of directors letting the employees elect at least 20% of the board members.”

We have been advised that the Company is considering excluding the Proposal from the Company’s proxy statement for the Annual Meeting under, among other reasons, Rules 14a-8(i)(2) and 14a-8(i)(6) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when “the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject.” Rule 14a-8(i)(6) allows a proposal to be omitted if “the company would lack the power or authority to implement the proposal.” In this connection, you have requested our opinion as to whether, under Delaware law, (i) the implementation of the Proposal, if adopted by the Company’s stockholders, would violate Delaware law, and (ii) the Company has the power and authority to implement the Proposal.

For the reasons set forth below, the Proposal, in our opinion, (i) would violate Delaware law if implemented and (ii) is beyond the power and authority of the Company to implement.

## **DISCUSSION**

### **I. The Proposal would violate Delaware law if implemented.**

The Company is a Delaware corporation governed by the General Corporation Law of the State of Delaware (the “General Corporation Law”). The General Corporation Law provides that directors of Delaware corporations are elected by the stockholders.<sup>1</sup> The General Corporation

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<sup>1</sup> With respect to newly created directorships and vacancies occurring between annual meetings only, the General Corporation Law permits such newly created directorships and vacancies to be filled either by the stockholders or by a majority of the directors still in office, although less than a quorum, unless otherwise provided in the certificate of incorporation or bylaws. 8 *Del. C.* § 223. The language “unless otherwise provided in the certificate of incorporation or bylaws” in Section 223 of the General Corporation Law permits corporations, in its governing documents, to prescribe the procedures, quorum and required vote for directors to

Law does not permit a corporation to modify this requirement (*i.e.*, to permit persons other than stockholders to elect directors) in its governing documents. In that connection, Section 211(b) of the General Corporation Law provides that:

“[u]nless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors .... Stockholders may, unless the certificate of incorporation otherwise provides, act by written consent to elect directors.”

8 *Del. C.* § 211(b)<sup>2</sup>; *see also* 8 *Del. C.* § 216(3) (unless the certificate of incorporation or bylaws otherwise provide for a larger vote, “[d]irectors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors”); 8 *Del. C.* § 212(a) (“each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder”).

The Delaware courts have also consistently held that the right to elect directors is a fundamental stockholder right. *See McIlquham v. Feste*, 2002 WL 244859, at \*6 (Del. Ch. Feb. 13, 2002) (“The right of stockholders to elect directors is a fundamental component of stockholder authority.”). For example, the Supreme Court of the State of Delaware has stated that:

“[t]he most fundamental principles of corporate governance are a function of the allocation of power within a corporation between its stockholders and its board of directors. The stockholders’ power is the right to vote on specific matters, in particular, in an election of directors. The power of managing the corporate enterprise is vested in the shareholders’ duly elected representatives. Accordingly,

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fill newly created directors or vacancies or to restrict the filling of newly created directorships and vacancies to only the stockholders or to only the majority of directors still in office. *Canmore Consultants Ltd. v. L.O.M. Med. Int’l, Inc.*, 2013 WL 5274380, at \*4 (Del. Ch. Sept. 19, 2013) (noting that the language of Section 223(a) permits a corporation, through its governing documents, to entirely eliminate the authority of directors to appoint other directors to fill newly created directorships or vacancies); *Siegman v. Tri-Star Pictures, Inc.*, 1989 WL 48746, at \*6 (Del. Ch. May 5, 1989) (noting that the language of Section 223 permits a corporation through its governing documents to vest exclusive authority in the board of directors to fill newly created directorships and vacancies in between annual meetings of stockholders). Section 223 of the General Corporation Law was added “to allow the representatives of the stockholders—the elected directors—to fill both newly created directorships and vacancies created between yearly meetings, saving the expense and distraction of special meetings between annual meetings for purposes of filling board vacancies.” *Canmore Consultants Ltd.*, 2013 WL 5274380, at \*3. As a result, Section 223 does not permit corporations to grant persons other than stockholders or their duly elected representatives (*i.e.*, the board of directors) the ability to fill newly created directorships or vacancies on the board.

<sup>2</sup> The language “unless the certificate of incorporation otherwise provides” refers to a corporation’s ability to eliminate or restrict the ability of its stockholders to act by written consent in lieu of a meeting of stockholders in its certificate of incorporation. *See* 8 *Del. C.* § 228.

while these ‘fundamental tenets of Delaware corporate law provide for a separation of control and ownership,’ the stockholder franchise has been characterized as the ‘ideological underpinning’ upon which the legitimacy of the directors managerial power rests. Maintaining a proper balance in the allocation of power between the stockholders’ right to elect directors and the board of directors’ right to manage the corporation is dependent upon the stockholders’ unimpeded right to vote effectively in an election of directors. This Court has repeatedly stated that, if the stockholders are not satisfied with the management or actions of their elected representatives on the board of directors, the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election.”

*MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126–27 (Del. 2003) (footnotes omitted); *see also Strougo v. Hollander*, 111 A.3d 590, 595 n. 21 (Del. Ch. 2015) (“Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell and to sue.”); *Rohe Leo E. Strine, Jr., Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 Colum. L.Rev. 449, 453–54 (2014) (“In American corporate law, only stockholders get to elect directors, vote on corporate transactions and charter amendments, and sue to enforce the corporation’s compliance with the corporate law and the directors’ compliance with their fiduciary duties.”). As a result, Delaware courts will carefully review and will consistently strike down board action which interferes with the stockholders’ right to elect directors. *See Pell v. Kill*, 135 A.3d 764, 786 (Del. Ch. 2016) (the Delaware courts “have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors”); *see also Esopus Creek Value LP v. Haus*, 913 A.2d 593, 602 (Del. Ch. 2006) (the Delaware courts “consistently strike down board actions that inequitably circumvent the proper exercise of the stockholder franchise.”).

The Proposal requests that the board of directors of the Company take action such that a certain number of directors would not be elected by the stockholders of the Company but instead would be elected by the employees of the Company regardless of whether such employees are also stockholders of the Company. For the reasons stated above, a provision in a Delaware corporation’s certificate of incorporation or bylaws purporting to grant the right to elect directors to persons other than stockholders would violate Delaware law. As a result, the Proposal, if implemented, would violate Delaware law.

## **II. The Proposal is beyond the power and authority of the Company to implement.**

As set forth in Section I above, the Proposal, if implemented, would violate Delaware law. Therefore, in our view, there are no actions that could be taken by the board of directors of the Company that would permit directors to be elected annually by persons other than the stockholders of the Company. Therefore, the Company lacks the power and authority to

implement the Proposal. Indeed, the Staff has repeatedly recognized that companies do not have the power and authority to implement proposals that violate state law.<sup>3</sup>

### CONCLUSION

Based upon and subject to the foregoing and subject to the limitations stated herein, it is our opinion that the Proposal, if implemented, would violate Delaware law and that the Company lacks the power and authority to implement the Proposal.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

*Richards, Layton & Fingers, P.A.*

MG/JJV

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<sup>3</sup> See, e.g., *Schering-Plough Corp.* (Mar. 27, 2008); *Bank of America Corp.* (Feb. 26, 2008); *Xerox Corp.* (Feb. 23, 2004); *Burlington Resources Inc.* (Feb. 7, 2003).