



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

February 4, 2022

Sharon R. Flanagan
Sidley Austin LLP

Re: DaVita Inc. (the "Company")
Incoming letter dated February 4, 2022

Dear Ms. Flanagan:

This letter is in regard to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the New York City Carpenters Pension Fund (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Your letter indicates that the Proponent has withdrawn the Proposal and that the Company therefore withdraws its February 2, 2022 request for a no-action letter from the Division. Because the matter is now moot, we will have no further comment.

Copies of all of the correspondence related to this matter will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Edward J. Durkin
United Brotherhood of Carpenters
and Joiners of America



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February 2, 2022

By Email

Shareholderproposals@sec.gov
Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, D.C. 20549

Re: DaVita Inc. - Shareholder Proposals Submitted on behalf of the New York City
Carpenters Pension Fund

Dear Ladies and Gentlemen:

On behalf of DaVita Inc. (“DaVita” or the “Company”) and pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended, we hereby request confirmation that the staff (the “Staff”) of the Securities and Exchange Commission (the “Commission” or the “SEC”) will not recommend enforcement action if, in reliance on Rule 14a-8, DaVita excludes the proposal submitted on December 17, 2021 (together with the supporting statement, the “Proposal”) on behalf of the New York City Carpenters Pension Fund (the “Proponent”), from the proxy materials (the “2022 Proxy Materials”) for DaVita’s 2022 annual shareholders’ meeting, which DaVita expects to file in definitive form with the SEC on or about April 25, 2022.

Pursuant to Rule 14a-8(j),

- (a) a copy of the Proposal is attached hereto as Exhibit A;
- (b) a copy of all relevant correspondence exchanged with the Proponent with respect to the Proposal is attached hereto as Exhibit B;
- (c) a copy of the opinion of the Company’s Delaware counsel is attached hereto as Exhibit C; and

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(d) a copy of this letter is being sent to notify the Proponent of DaVita's intention to omit the Proposal from the 2022 Proxy Materials.

Pursuant to *Staff Legal Bulletin No. 14D* (Nov. 7, 2008), this letter and its exhibits are being submitted to shareholderproposals@sec.gov.

On behalf of DaVita, we hereby request that the Staff concur with the omission of the Proposal from the 2022 Proxy Materials for the reasons set forth in this letter.

THE PROPOSAL

The Proposal states:

Resolved: That the shareholders of DaVita Inc. request that the Board amend the Company's proxy access bylaw to add a trigger mechanism that would activate the bylaw's proxy access right at a lower level of eligibility. Specifically, the trigger event would be the presence of a "holdover" director on the Board, that is, an incumbent director who was not re-elected at the most recent annual meeting but continues to serve on the Board because his or her resignation was not accepted by the Board. When the triggering event is present, a new lower eligibility requirement of 1% ownership of outstanding shares held for two consecutive years to submit director nominations would be applicable. Additionally, the amended proxy access bylaw should allow cumulative voting rights in any contested election created using the triggered proxy access right.

ARGUMENT

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

Rule 14-8(i)(2) permits a company to omit from its proxy materials a stockholder 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 C (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 that "the Board amend the Company's proxy access bylaw to... allow cumulative voting rights in any contested election created using the triggered proxy access right." Section 109(b) of the DGCL states that:

The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the

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corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

As more fully described in the Delaware Counsel Opinion, the phrase “not inconsistent with law” or similar variants of that phrase used in the provisions of the DGCL have been interpreted to mean that the provision must “not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.” *See Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. Ch. 1952); *Jones Apparel Group, Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 846 (Del. Ch. 2004) (finding that a provision will be invalidated if it “vitiates or contravenes a mandatory rule of our corporate code or common law”). Thus, “[a] bylaw that is inconsistent with any statute or rule of common law . . . is void.” *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985). For the reasons set forth below, the bylaw amendment request in the Proposal would violate Section 214 of the DGCL, and thus would be invalid and void under the DGCL.

Cumulative voting can only be adopted by an amendment to the Company’s Restated Certificate of Incorporation (the “Charter”). Specifically, Section 214 of the DGCL provides that a Delaware corporation may provide the corporation’s stockholders with cumulative voting rights only through its certificate of incorporation. *See 8 Del. C. §214* (stating that “*the certificate of incorporation*” may provide for cumulative voting) (*emphasis added*); *see also The Standard Scale & Supply Corp. v. Chappel*, 141 A. 191 (Del. 1928) (shares voted cumulatively in an election of directors counted on a “straight” basis because the certificate of incorporation did not provide for cumulative voting); *McIlquham v. Feste*, 2001 WL 1497179, at *5 (Del. Ch. Nov. 16 2001) (noting that “because the [defendant company’s] certificate of incorporation does not permit cumulative voting, the nominees receiving a plurality of the votes cast will be elected”). Here, the Charter does not provide for cumulative voting with respect to director elections. Consequently, because Delaware law requires cumulative voting be implemented only in the corporation’s certificate of incorporation, the adoption of cumulative voting through an amendment to the Company’s Amended and Restated Bylaws (the “Bylaws”) would violate Section 214 of the DGCL.

The Board would also violate the DGCL if it were required to amend the Charter to allow for cumulative voting rights in a contested director election. The Board cannot implement the Proposal by amending the Charter because, under Section 242 of the DGCL, the Board cannot unilaterally amend the Charter.

As more fully explained in the Delaware Counsel Opinion, the DGCL requires a two-step process by the Board and the stockholders to amend the Charter. Pursuant to Section 242 of the DGCL, in order for a corporation to amend its charter, the board of directors must first adopt a resolution setting forth the amendment proposed, declare the advisability of the amendment and

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call a meeting at which the stockholders may vote on the amendment. Second, a majority of the outstanding stock entitled to vote on the amendment must affirmatively vote in favor of the amendment to the corporation's certificate of incorporation.¹ Only if these two steps are taken in the specified order does the Company have the power to file a Certificate of Amendment with the office of the Secretary of State of the State of Delaware to effectuate the amendment. The Delaware Supreme Court has required strict compliance with this two-step procedure:

[I]t is significant that two discrete corporate events must occur in precise sequence to amend the certificate of incorporation under 8 Del. C. §242: First, the board of directors must adopt a resolution declaring the advisability of the amendment and calling for a stockholder vote. Second, a majority of the outstanding stock entitled to vote must vote in favor.²

The Staff has permitted the exclusion of proposals that involve either the unilateral action of stockholders or the board of directors to amend company charters when this action would be contrary to applicable state law that prescribes the approval of both the board of directors and stockholders in order to effectuate such amendments. For example, in *The Stanley Works* (avail. Feb. 2, 2009), the Staff permitted the exclusion of a proposal that called for “the articles of incorporation to be amended to provide that directors shall be elected by the shares represented in person or by proxy at any meeting for the election of directors at which a quorum is present,” in reliance on Rules 14a-8(i)(2) and 14a-8(i)(6). Stanley Works argued that under the laws of Connecticut, its state of incorporation, Stanley Works’ charter may not be amended by action only of the stockholders and without the necessary prior approval of the board. This position was supported by an opinion submitted by Stanley Works’ Connecticut counsel. In a similar way, the Staff has permitted the exclusion of proposals that request the board to unilaterally amend the company’s charter, contrary to state law that requires stockholder action. For example, in *eBay Inc.* (avail. Apr. 1, 2020), the Staff permitted the exclusion of a proposal to “reform the structure of the board of directors letting the employees elect at least 20% of the board members.” Based on the opinion of eBay’s Delaware counsel, eBay could not implement such proposal without violating certain provisions of the DGCL. In *PayPal Holdings, Inc.* (avail. Mar. 9, 2018), the Staff permitted the exclusion of a proposal that asked the board of directors to amend the

¹ See 8 Del. Co. § 242(b)(1).

² *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996); see also *Gantler v. Stephens* 2008 Del. Ch. LEXIS 20, at *45 n. 81 (Del. Ch. Feb. 14, 2008) (“A board must submit a proposed amendment of the certificate of incorporation to the shareholders for a vote, and it will not be effective unless ‘a majority of the outstanding stock entitled to vote thereon’ votes in favor of the amendment.”); *Lions Gate Entm’t Corp. v. Image Entm’t Inc.*, 2006 Del. Ch. LEXIS 108, at *23-*24 (Del. Ch. June 5, 2006) (“Because the Charter Amendment Provision purports to give the...board the power to amend the charter unilaterally without shareholder vote, it contravenes Delaware law and is invalid.”); *Kiang v. Smith’s Food Drug Centers, Inc.*, 1997 Del. Ch. LEXIS 73, at *53-*54 (Del. Ch. May 13, 1997) (“Pursuant to 8 Del. Co. § 242, amendment of corporate certificate requires board of directors to adopt resolution which declares the advisability of the amendment and calls for shareholder vote. Thereafter in order for the amendment to take effect majority of outstanding stock must vote in its favor.”).

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company's proxy access bylaws and associated documents, noting PayPal's Delaware counsel opinion that the implementation of the proposal would cause PayPal to violate state law. In *Fortune Brands, Inc.* (avail. Jan. 6, 2010), the Staff permitted the exclusion of a proposal that required the board of directors to unilaterally amend the charter to remove a prohibition on stockholder action by written consent, noting the opinion of the company's Delaware counsel that implementing the proposal would cause the company to violate Delaware law.³

As in *Stanley Works, eBay, PayPal* and *Fortune Brands*, unilateral amendment of the Charter is in direct contravention of the two-step process required by Section 242 of the DGCL. Also, if the Company were required to amend the Bylaws to allow for cumulative voting, the Company would violate Section 214 of the DGCL. As such, the Proposal, if implemented, would cause the Company to violate the DGCL; therefore, the Company believes the Proposal may be excluded in reliance on Rule 14a-8(i)(2).

II. The Proposals 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 stockholder proposal from its proxy materials if the company lacks the power or authority to implement the proposal. As discussed above and in the Delaware Counsel Opinion, the Company cannot implement the Proposal by amending the Charter without violating Section 242 of the DGCL because the Board cannot unilaterally amend the Charter. Moreover, the Company cannot implement the Proposal

³ See also *Bristol-Myers Squibb Company* (avail. Mar. 14, 2008) (permitting the exclusion of a proposal that recommended that the board adopt cumulative voting under Rule 14a-8(i)(2) noting the company's counsel's opinion that implementing such proposal would cause the company to violate state law); *Exxon Mobil Corporation* (avail. Mar. 24, 2008) (permitting the exclusion of a proposal that the company adopt cumulative voting under Rule 14a-8(i)(2) noting the company's counsel's opinion that implementing the proposal would cause the company to violate state law); *Time Warner Inc.* (avail. Feb. 26, 2008) (permitting the exclusion of a proposal that urged the company to adopt cumulative voting under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) noting the company's counsel's opinion that implementing the proposal would cause the company to violate state law); *The Boeing Company* (avail. Feb. 20, 2008) (permitting the exclusion of a proposal that urged the board to adopt cumulative voting under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) noting the opinion of the company's counsel that implementing the proposal would cause the company to violate Delaware law); *AT&T, Inc.* (avail. Feb. 19, 2008) (permitting the exclusion of a proposal for the company to amend its bylaws and any other appropriate governing documents to "lift restrictions on shareholder ability to act by written consent" under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) noting the company's Delaware counsel's opinion that the board of the company cannot amend its certificate of incorporation without violating state law); *Xerox Corporation* (avail. Feb. 23, 2004) (permitting the exclusion of a proposal requesting that "the company's board of directors amend the company's certificate of incorporation to reinstate the rights of the shareholders to take action by written consent and to call special meetings under Rule 14a-8(i)(2) because the board of directors cannot unilaterally amend the company's certificate of incorporation under New York law"); *Burlington Resources Inc.* (avail. Feb. 7, 2003) (concurring that a company incorporated in Delaware may exclude a proposal that requested that "the board of directors amend the certificate of incorporation to reinstate the rights of shareholders to take action by written consent and to call special meetings").

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by amending its Bylaws because Section 214 of the DGCL provides that a Delaware corporation may provide the corporation's stockholders with cumulative voting rights only through its certificate of incorporation. As a result, the Company lacks legal authority and practical ability to implement the Proposal.

The Staff has consistently allowed stockholder proposals to be excluded under both Rules 14a-8(i)(6) and 14a-8(i)(2) 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 *The Boeing Company* (avail. Feb. 20, 2008), the Staff permitted the exclusion of a proposal requesting that the board of directors adopt cumulative voting under Rule 14a-8(i)(2) and Rule 14a-8(i)(6), citing the opinion of the company's counsel that implementing the proposal would cause the company to violate the DGCL. In *AT&T, Inc.* (avail. Feb. 19, 2008), the Staff permitted the exclusion of a proposal requesting the company to amend its bylaws and any other appropriate governing documents to "lift restrictions on shareholder ability to act by written consent" under Rule 14a-8(i)(2) and Rule 14a-8(i)(6), citing the opinion of the company's counsel that the board of directors of the company could not amend its certificate of incorporation without violating the DGCL.

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

III. The Proposal May Be Excluded Under Rule 14a-8(c) and Rule 14a-8(f)(1) Because the Proponent Has Exceeded the One-Proposal Limitation by Combining Multiple Proposals.

The Company may exclude the Proposal from its 2022 Proxy Materials under Rule 14a-8(f)(1) because the Proponent has combined multiple shareholder proposals into a single submission in violation of Rule 14a-8(c) and, after being notified by the Company of such defect, did not cure it. Specifically, Sentences 1, 2 and 3 of the Proposal request that the Company amend its proxy access bylaw to include a trigger mechanism. By contrast, sentence 4 of the Proposal requests the use of cumulative voting in specified circumstances. Sentences 1, 2 and 3 address an amendment to the Bylaws that focuses on proxy access, whereas sentence 4 would require an amendment to the Charter that focuses on the voting standard.

In a letter sent on January 5, 2022, the Company notified the Proponent that its submission violated Rule 14a-8(c) in that the first element of the Proposal relates to an amendment of the Company's proxy access bylaw to include a trigger mechanism and that the second element relates to the use of cumulative voting in specified circumstances. In its letter,

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the Company notified the Proponent that the Proponent could correct this procedural deficiency by reducing the number of submitted proposals to one. See Exhibit B.

Rule 14a-8(c) provides that each person may submit only one proposal per shareholders' meeting. The Staff has consistently recognized that Rule 14a-8(c) permits the exclusion of proposals combining "separate and distinct" elements that lack a single well-defined unifying concept, even if the elements are presented as part of a single program and relate to the same general subject matter. For example, in *Bank of America Corporation* (avail. Mar. 7, 2012), the Staff concurred with the exclusion of a proposal related to the inclusion of shareholder nominations for director in the company's proxy materials that consisted of seven elements. Six of the elements related to the nominations themselves, but one of the elements related to a requirement that such nominations not be considered a change in control. The company noted that, notwithstanding that all of the elements of the proposal were related to the subject matter of director nominations, implementation of the element regarding the change-in-control analysis would require separate and distinct actions. The Staff agreed, specifically noting that the change-in-control element was a "separate and distinct matter" from the rest of the proposal and, therefore, that all of the proposals could be excluded under Rule 14a-8(c). The Staff also concurred with the exclusion of substantially similar proposals on this basis in *Textron Inc.* (avail. Mar. 7, 2012) and *Goldman Sachs Group, Inc.* (avail. Mar. 7, 2012).

Similarly, in *Parker Hannifin Corp.* (avail. Sept. 4, 2009), the Staff concurred in the exclusion of a proposal that sought to create a "Triennial Executive Pay Vote program" that consisted of three elements: (i) a triennial executive pay vote to approve the compensation of the company's executive officers; (ii) a triennial executive pay vote ballot that would provide shareholders an opportunity to register their approval or disapproval of three components of the executives' compensation; and (iii) a triennial forum that would allow shareholders to comment on and ask questions about the company's executive compensation policies and practices. The company argued that while the first two elements were clearly interconnected, implementation of the third part would require completely distinct and separate actions, although related to the subject matter of executive compensation. The Staff concurred with exclusion, specifically noting that the third element of the proposed "Triennial Executive Pay Vote program" was a "separate and distinct matter" from the first and second elements of the proposed program. In addition, in *PG&E Corp.* (avail. Mar. 11, 2010), the Staff concurred with exclusion of a proposal asking that, pending completion of certain studies of a specific power plant site, the company: (i) mitigate potential risks encompassed by those studies; (ii) defer any request for or expenditure of public or corporate funds for license renewal at the site; and (iii) not increase production of certain waste at the site beyond the levels then authorized. Notwithstanding that the proponent argued that the steps in the proposal would avoid circumvention of state law in the operation of the specific power plant, the Staff specifically noted that "the proposal relating to license renewal involves a separate and distinct matter from the proposals relating to mitigating risks and

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production level.” *See also Streamline Health Solutions, Inc.* (avail. Mar. 23, 2010) (concurring in exclusion of proposals where a “proposal relating to director independence involve[d] a separate and distinct matter from . . . proposals relating to the number of directors, the conditions for changing the number of directors, and the voting threshold for election of directors at the upcoming annual meeting”); *Duke Energy Corp.* (avail. Feb. 27, 2009) (concurring in the exclusion of a proposal requiring company’s directors to own a requisite amount of the company’s stock, to disclose all conflicts of interest, and to be compensated only in the form of the company’s stock); *Morgan Stanley* (avail. Feb. 4, 2009) (concurring with the exclusion of a proposal requesting stock ownership guidelines for director candidates, new conflict of interest disclosures, and restrictions on director compensation); *General Motors Corp.* (avail. Apr. 9, 2007) (concurring in the exclusion of a proposal seeking shareholder approval for the restructuring of the company through numerous transactions); *Centra Software, Inc.* (avail. Mar. 31, 2003) (concurring in the exclusion of a proposal requesting amendments to the bylaws to require separate meetings of the independent directors and that the chairman of the board not be a company officer or employee, where the company argued the proposals would amend “quite different provisions” of the bylaws and were therefore unrelated).

Like the proposals in the precedent discussed above, the Proposal contains elements that seek to require amendment of the proxy access bylaws and are clearly a separate matter from the elements in the proposal that seek to require the use of cumulative voting in specified circumstances. Besides the fact that the implementation of cumulative voting would require amendment to the Charter, it is clearly of a subject matter that is distinct from a trigger mechanism in a proxy access bylaw. The trigger mechanism requested by the Proposal involves the eligibility requirements of stockholders, whereas the request for cumulative voting requires the alteration of the voting standard. Thus, the Proposal contains multiple proposals in contravention of Rule 14a-8(c).

For these reasons, the Proposal, in its entirety, may be excluded from the Company’s 2022 Proxy Materials under Rule 14a-8(f)(1) and Rule 14a-8(c), as it combines “separate and distinct” elements that lack a single well-defined unifying concept.

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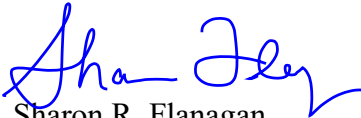
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CONCLUSION

For the foregoing reasons, on behalf of DaVita, we request your confirmation that the Staff will not recommend any enforcement action to the Commission if the Proposal is omitted from the 2022 Proxy Materials for the reasons described in this letter.

If the Staff has any questions, or if for any reason the Staff does not agree that DaVita may omit the Proposal from its 2022 Proxy Materials, please contact me at (415) 772-1271 or sflanagan@sidley.com.

Sincerely yours,



Sharon R. Flanagan

Enclosure: Exhibits

cc: Edward J. Durkin (edurkin@carpenters.org)

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Exhibit A

The Proposal

[See attached.]

TRIGGERED PROXY ACCESS PROPOSAL

Resolved: That the shareholders of DaVita Inc. request that the Board amend the Company's proxy access bylaw to add a trigger mechanism that would activate the bylaw's proxy access right at a lower level of eligibility. Specifically, the trigger event would be the presence of a "holdover" director on the Board, that is, an incumbent director who was not re-elected at the most recent annual meeting but continues to serve on the Board because his or her resignation was not accepted by the Board. When the triggering event is present, a new lower eligibility requirement of 1% ownership of outstanding shares held for two consecutive years to submit director nominations would be applicable. Additionally, the amended proxy access bylaw should allow cumulative voting rights in any contested election created using the triggered proxy access right.

Supporting Statement: DaVita Inc. ("Company") currently has in place a corporate bylaw provision that provides certain shareholders the right to submit Board nominations for inclusion in the Company's proxy statement. The bylaw contains industry standard provisions relating to ownership eligibility requirements, limits on the number of submitted nominees, and submission timelines. Specifically, an eligible shareholder (or a group of shareholders not to exceed twenty) must have owned 3% or more of the Company's outstanding shares for at least three years as of the date of written notice of nomination. The number of nominees that can be submitted shall not exceed 20% of the number of Directors serving on the Board. Shareholders can exercise this nominee submission at any annual meeting of shareholders without preconditions.

This "triggered" proxy access proposal adds features to the existing proxy access right which would make the proxy access right more accessible to shareholders and enhance the election prospects of shareholder-sponsored Board nominees. The "trigger" feature would apply in those circumstances where one or more Directors that failed to achieve re-election continue as "holdover" directors following the Board's decision not to accept the resignation of those un-elected Directors. In this circumstance, the "trigger" feature would make the director nomination right more accessible by lowering the holding eligibility requirements to 1% or more of the Company's outstanding shares continuously held for at least two years. The rationale for the "trigger" is to enhance shareholders' Board accountability rights to create a short-slate contest with cumulative voting rights when the Board does not accept the resignation of an un-elected "holdover" director. Further, shareholders would be allowed to cumulate their votes in a short-slate contest facilitated by the "trigger" feature. Cumulative voting is compatible with a plurality vote standard used in contested elections and would enhance shareholder prospects of electing one or more shareholder-sponsored nominees. The Company's current proxy access right, as presently crafted, sets very demanding eligibility requirements that make it highly unlikely that the director nomination right will ever be used. The moderation of proxy access eligibility requirements in the circumstances described make it a more meaningful and accessible governance tool.

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Exhibit B

Correspondence Regarding the Proposal

[See attached.]

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
NEW YORK CITY & VICINITY DISTRICT COUNCIL OF CARPENTERS

JOSEPH A. GEIGER
Executive Secretary - Treasurer

PAUL CAPURSO
President /Asst EST

DAVID CARABALLOSO
Vice President Pro Tem /Asst EST



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www.nycdistrictcouncil.com

December 16, 2021

Samantha A. Caldwell
Corporate Secretary
DaVita Inc.
2000 16th Street
Denver, Colorado 80202

Dear Ms. Caldwell:

I hereby submit the enclosed shareholder proposal ("Proposal") on behalf of the New York City Carpenters Pension Fund ("Fund"), for inclusion in the DaVita Inc. ("Company") proxy statement to be circulated in conjunction with the next annual meeting of shareholders. The Proposal relates to the Proxy Access issue and is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission proxy regulations.

The Fund is the beneficial owner of shares of the Company's common stock, with a market value of at least \$25,000, which shares have been held continuously for more than a year prior to and including the date of the submission of the Proposal. Verification of this ownership by the record holder of the shares will be sent under separate cover. The Fund intends to hold the shares through the date of the Company's next annual meeting of shareholders. Either the undersigned or a designated representative will present the Fund's Proposal for consideration at the annual meeting of shareholders.

If you would like to discuss the Proposal, please contact Ed Durkin at PII or PII. Mr. Durkin will be available to discuss the proposal on January 6 from noon to 5:00PM (ET) or at another mutually agreeable date and time. Please forward any correspondence related to the proposal to Mr. Durkin at United Brotherhood of Carpenters, Corporate Affairs Department, 101 Constitution Avenue, NW, Washington D.C. 20001, or at the email address above.

Sincerely,

PII

Joseph A. Geiger
Fund Co-Chair - Trustee

cc. Edward J. Durkin
Enclosure

TRIGGERED PROXY ACCESS PROPOSAL

Resolved: That the shareholders of DaVita Inc. request that the Board amend the Company's proxy access bylaw to add a trigger mechanism that would activate the bylaw's proxy access right at a lower level of eligibility. Specifically, the trigger event would be the presence of a "holdover" director on the Board, that is, an incumbent director who was not re-elected at the most recent annual meeting but continues to serve on the Board because his or her resignation was not accepted by the Board. When the triggering event is present, a new lower eligibility requirement of 1% ownership of outstanding shares held for two consecutive years to submit director nominations would be applicable. Additionally, the amended proxy access bylaw should allow cumulative voting rights in any contested election created using the triggered proxy access right.

Supporting Statement: DaVita Inc. ("Company") currently has in place a corporate bylaw provision that provides certain shareholders the right to submit Board nominations for inclusion in the Company's proxy statement. The bylaw contains industry standard provisions relating to ownership eligibility requirements, limits on the number of submitted nominees, and submission timelines. Specifically, an eligible shareholder (or a group of shareholders not to exceed twenty) must have owned 3% or more of the Company's outstanding shares for at least three years as of the date of written notice of nomination. The number of nominees that can be submitted shall not exceed 20% of the number of Directors serving on the Board. Shareholders can exercise this nominee submission at any annual meeting of shareholders without preconditions.

This "triggered" proxy access proposal adds features to the existing proxy access right which would make the proxy access right more accessible to shareholders and enhance the election prospects of shareholder-sponsored Board nominees. The "trigger" feature would apply in those circumstances where one or more Directors that failed to achieve re-election continue as "holdover" directors following the Board's decision not to accept the resignation of those unelected Directors. In this circumstance, the "trigger" feature would make the director nomination right more accessible by lowering the holding eligibility requirements to 1% or more of the Company's outstanding shares continuously held for at least two years. The rationale for the "trigger" is to enhance shareholders' Board accountability rights to create a short-slate contest with cumulative voting rights when the Board does not accept the resignation of an unelected "holdover" director. Further, shareholders would be allowed to cumulate their votes in a short-slate contest facilitated by the "trigger" feature. Cumulative voting is compatible with a plurality vote standard used in contested elections and would enhance shareholder prospects of electing one or more shareholder-sponsored nominees. The Company's current proxy access right, as presently crafted, sets very demanding eligibility requirements that make it highly unlikely that the director nomination right will ever be used. The moderation of proxy access eligibility requirements in the circumstances described make it a more meaningful and accessible governance tool.

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Stephanie Berberich

From: Stephanie Berberich
Sent: Wednesday, January 5, 2022 6:08 PM
To: PII
Cc: Samantha Caldwell (PII @davita.com)
Subject: DaVita Inc. Stockholder Proposal
Attachments: DVA - United Carpenters Proposal - Deficiency Letter (1-5-22).pdf

Tracking:	Recipient	Delivery
	PII	
	Samantha Caldwell (PII @davita.com)	Delivered: 1/5/2022 6:08 PM

Dear Edward,

I am writing to you on behalf of Samantha Caldwell, DaVita Inc.'s Corporate Secretary, to confirm receipt of the New York City Carpenters Pension Fund's intent to present a stockholder proposal. As directed in the proposal's cover letter, I have addressed this correspondence to you rather than the signatory of the letter, Joseph Geiger. Attached please find a deficiency notice relating to the proposal, which will also be delivered to your office via Federal Express. Please don't hesitate to reach out if you have any questions.

In addition, we would welcome the opportunity to meet with you to discuss your proposal and better understand your perspective on proxy access and cumulative voting. Would you be available to meet next week, perhaps on January 14 any time after 1:30pm ET?

Kind regards,

Stephanie

Stephanie Berberich
Associate General Counsel

Securities, Corporate
Governance and Finance

O: PII | M: PII
PII @davita.com





January 5, 2022

VIA EMAIL AND FEDEX

United Brotherhood of Carpenters
Corporate Affairs Department
101 Constitution Avenue, NW
Washington, DC 20001
Attn: Edward J. Durkin

PII

Re: Letter Regarding Stockholder Proposal

Dear Mr. Durkin:

This letter confirms receipt of correspondence submitted on behalf of the New York City Carpenters Pension Fund (the “Fund”) that gives notice of the Fund’s intent to present a stockholder proposal at the 2022 Annual Meeting of Stockholders of DaVita Inc. (the “Company,” “we” or “our”).

In accordance with the regulations of the U.S. Securities and Exchange Commission (the “SEC”), we are required to notify the Fund of any eligibility or procedural deficiencies related to the stockholder proposal.

Proof of Ownership

Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that, in order to be eligible to submit a stockholder proposal under Rule 14-8, stockholder proponents must supply proof of requisite ownership pursuant to such rule of a company’s shares entitled to vote on the proposal. The Fund has not met this requirement, as more fully explained below.

Rule 14a-8(b)(1)(i) provides that, to be eligible to submit a proposal for the 2022 Annual Meeting of Stockholders, the Fund must have continuously held (A) at least \$2,000 in market value of the Company’s securities entitled to vote on the proposal for at least three years; or (B) at least \$15,000 in market value of the Company’s securities entitled to vote on the proposal for at least two years; or (C) at least \$25,000 in market value of the Company’s securities entitled to vote on the proposal for at least one year.

As an alternative to the ownership requirements in Rule 14a-8(b)(1)(i) described above, Rule 14a-8(b)(3) provides that if the Fund continuously held at least \$2,000 of the Company’s securities entitled to vote on the proposal for at least one year as of January 4, 2021, and the Fund has continuously maintained a minimum investment of at least \$2,000 of such securities from

January 4, 2021 through the date the proposal was submitted to the Company (*i.e.*, December 16, 2021), then the Fund would be eligible to submit a proposal for the 2022 Annual Meeting of Stockholders, provided that the Fund provides the required documentation of such ownership, further described below.

According to our records, the Fund is not a registered holder of the Company's common stock. As explained in Rule 14a-8(b), if the Fund is not a registered holder of the Company's common stock, the Fund may provide proof of ownership (whether relying on the ownership requirements of Rule 14a-8(b)(1)(i) or Rule 14a-8(b)(3)) by submitting either:

- a written statement from the record holder of the Fund's shares (usually a bank or broker) verifying that the Fund continuously held the requisite amount of shares of the Company's common stock pursuant to Rule 14a-8(b) for the one-, two-, or three-year period (as applicable) preceding and including the date the Fund submitted the proposal; or
- if the Fund has filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents or updated forms, reflecting the Fund's ownership of the requisite amount of shares of the Company's common stock pursuant to Rule 14a-8(b) for the one-, two-, or three-year period (as applicable) preceding and including the date the Fund submitted the proposal, a copy of the schedule and/or form, any subsequent amendments reporting a change in the Fund's ownership level and a written statement that the Fund continuously held the required amount of shares for the requisite holding periods.

If the Fund intends to demonstrate ownership by submitting a written statement from the "record" holder of its shares, please note that most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company (the "DTC"), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletins No. 14F, dated October 18, 2011 ("SLB 14F") and 14G, dated October 16, 2012 ("SLB 14G"), only DTC participants or affiliated DTC participants are viewed as record holders of securities that are deposited at DTC. The Fund can confirm whether its broker or bank is a DTC participant by asking its broker or bank or by checking DTC's participant list, which is available at <http://www.dtcc.com/client-center/dtc-directories>. You can obtain proof of ownership from the DTC participant through which the securities are held, as follows:

- If the Fund's broker or bank is a DTC participant, then the Fund should submit a written statement from its broker or bank verifying that the Fund continuously held the requisite amount of shares of the Company's common stock pursuant to Rule 14a-8(b) for the one-, two-, or three-year period (as applicable) preceding and including the date the Fund submitted the proposal, or, if the Fund is relying on Rule 14a-8(b)(3), for at least one year as of January 4, 2021 and through December 16, 2021.

- If the Fund's broker or bank is not a DTC participant, then the Fund should submit proof of ownership from the DTC participant through which the shares are held verifying that the Fund continuously held the requisite amount of shares of the Company's common stock pursuant to Rule 14a-8(b) for the one-, two-, or three-year period (as applicable) preceding and including the date the Fund submitted the proposal, or, if the Fund is relying on Rule 14a-8(b)(3), for at least one year as of January 4, 2021 and through December 16, 2021. The Fund should be able to find out the identity of the DTC participant by asking its broker or bank. If the Fund's broker is an introducing broker, the Fund may also be able to learn the identity and telephone number of the DTC participant through its account statements, because the clearing broker identified on the Fund's account statements will generally be a DTC participant. If the DTC participant that holds the Fund's shares is not able to confirm your individual holdings but is able to confirm the holdings of its broker or bank, then the Fund should satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that, for the one-, two-, or three-year period (as applicable) preceding and including the date the Fund submitted the proposal, or, if the Fund is relying on Rule 14a-8(b)(3), for at least one year as of January 4, 2021 and through December 16, 2021, the requisite amount of shares of the Company's common stock were continuously held: (1) one from the Fund's broker or bank confirming its ownership and (2) the other from the DTC participant confirming the broker or bank's ownership.

Multiple Proposals

Furthermore, pursuant to Rule 14a-8(c), each proponent may submit no more than one proposal, directly or indirectly, to a company for a particular stockholders' meeting. The Company believes that the Fund's proposal actually consists of two separate proposals. Specifically, the first part of the proposal relates to a request to amend the Company's proxy access bylaw to add a trigger mechanism if there are "holdover" directors on the board of directors. The second part of the proposal relates to the use of cumulative voting "in any contested election created using the triggered proxy access right." The Fund may correct this procedural deficiency modifying the proposal to include either (i) a request to amend the Company's proxy access bylaw to add a trigger mechanism if there are "holdover" directors on the Board or (ii) a request for the use of cumulative voting in specified circumstances.

* * *

Please direct any response to the Company as follows:

Samantha A. Caldwell
Corporate Secretary
DaVita Inc.
2000 16th Street
Denver, Colorado 80202
Email: PII @davita.com

United Brotherhood of Carpenters

January 5, 2022

Page 4

We would appreciate a response by January 26, 2022. For reference, I have enclosed copies of Rule 14a-8, SLB 14F and SLB 14G.

Sincerely,

PII [REDACTED]

Samantha A. Caldwell
Corporate Secretary

Enclosures

EXHIBIT A
Rule 14a-8

Title 17: Commodity and Securities Exchanges

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

§ 240.14a-8 Shareholder proposals.

This section addresses when a company must include a shareholder’s proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company’s proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to “you” are to a shareholder seeking to submit the proposal.

(a) Question 1: What is a proposal? A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company’s shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company’s proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word “proposal” as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?

(1) To be eligible to submit a proposal, you must satisfy the following requirements:

(i) You must have continuously held:

(A) At least \$2,000 in market value of the company’s securities entitled to vote on the proposal for at least three years; or

(B) At least \$15,000 in market value of the company’s securities entitled to vote on the proposal for at least two years; or

(C) At least \$25,000 in market value of the company’s securities entitled to vote on the proposal for at least one year; or

(D) The amounts specified in paragraph (b)(3) of this section. This paragraph (b)(1)(i)(D) will expire on the same date that § 240.14a-8(b)(3) expires; and

(ii) You must provide the company with a written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the shareholders’ meeting for which the proposal is submitted; and

(iii) You must provide the company with a written statement that you are able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. You must include your contact information as well as business days and specific times that you are available to discuss the proposal with the company. You must identify times that are within the regular business

hours of the company's principal executive offices. If these hours are not disclosed in the company's proxy statement for the prior year's annual meeting, you must identify times that are between 9 a.m. and 5:30 p.m. in the time zone of the company's principal executive offices. If you elect to co-file a proposal, all cofilers must either:

- (A) Agree to the same dates and times of availability, or
 - (B) Identify a single lead filer who will provide dates and times of the lead filer's availability to engage on behalf of all co-filers; and
- (iv) If you use a representative to submit a shareholder proposal on your behalf, you must provide the company with written documentation that:

- (A) Identifies the company to which the proposal is directed;
- (B) Identifies the annual or special meeting for which the proposal is submitted;
- (C) Identifies you as the proponent and identifies the person acting on your behalf as your representative;
- (D) Includes your statement authorizing the designated representative to submit the proposal and otherwise act on your behalf;
- (E) Identifies the specific topic of the proposal to be submitted;
- (F) Includes your statement supporting the proposal; and
- (G) Is signed and dated by you.

(v) The requirements of paragraph (b)(1)(iv) of this section shall not apply to shareholders that are entities so long as the representative's authority to act on the shareholder's behalf is apparent and self-evident such that a reasonable person would understand that the agent has authority to submit the proposal and otherwise act on the shareholder's behalf.

(vi) For purposes of paragraph (b)(1)(i) of this section, you may not aggregate your holdings with those of another shareholder or group of shareholders to meet the requisite amount of securities necessary to be eligible to submit a proposal.

(2) One of the following methods must be used to demonstrate your eligibility to submit a proposal:

(i) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the meeting of shareholders.

(ii) If, like many shareholders, you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(A) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held at least \$2,000, \$15,000, or \$25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively. You must also include your own written statement that you intend to continue to hold the requisite amount of securities,

determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the shareholders' meeting for which the proposal is submitted; or

(B) The second way to prove ownership applies only if you were required to file, and filed, a Schedule 13D (§ 240.13d-101), Schedule 13G (§ 240.13d-102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter), and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents or updated forms, demonstrating that you meet at least one of the share ownership requirements under paragraph (b)(1)(i)(A) through (C) of this section. If you have filed one or more of these documents with the SEC, you may demonstrate your eligibility to submit a proposal by submitting to the company:

- (1)** A copy of the schedule(s) and/or form(s), and any subsequent amendments reporting a change in your ownership level;
- (2)** Your written statement that you continuously held at least \$2,000, \$15,000, or \$25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively; and
- (3)** Your written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the company's annual or special meeting.

(3) If you continuously held at least \$2,000 of a company's securities entitled to vote on the proposal for at least one year as of January 4, 2021, and you have continuously maintained a minimum investment of at least \$2,000 of such securities from January 4, 2021 through the date the proposal is submitted to the company, you will be eligible to submit a proposal to such company for an annual or special meeting to be held prior to January 1, 2023. If you rely on this provision, you must provide the company with your written statement that you intend to continue to hold at least \$2,000 of such securities through the date of the shareholders' meeting for which the proposal is submitted. You must also follow the procedures set forth in paragraph (b)(2) of this section to demonstrate that:

- (i)** You continuously held at least \$2,000 of the company's securities entitled to vote on the proposal for at least one year as of January 4, 2021; and
- (ii)** You have continuously maintained a minimum investment of at least \$2,000 of such securities from January 4, 2021 through the date the proposal is submitted to the company.
- (iii)** This paragraph (b)(3) will expire on January 1, 2023.

(c) Question 3: How many proposals may I submit? Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting.

(d) Question 4: How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) Question 5: What is the deadline for submitting a proposal?

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q (§ 249.308a of this chapter), or in shareholder reports of investment companies under

§ 270.30d-1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under § 240.14a-8 and provide you with a copy under Question 10 below, § 240.14a-8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) Question 8: Must I appear personally at the shareholders' meeting to present the proposal?

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

(1) Improper under state law: If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Note to paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) Violation of law: If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) Violation of proxy rules: If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) Personal grievance; special interest: If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) Relevance: If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) Absence of power/authority: If the company would lack the power or authority to implement the proposal;

(7) Management functions: If the proposal deals with a matter relating to the company's ordinary business operations;

(8) Director elections: If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

(9) Conflicts with company's proposal: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to paragraph (i)(9): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) Substantially implemented: If the company has already substantially implemented the proposal;

Note to paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter) or any successor to Item 402 (a “say-on-pay vote”) or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by § 240.14a-21(b) of this chapter a single year (i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by § 240.14a-21(b) of this chapter.

(11) Duplication: If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company’s proxy materials for the same meeting;

(12) Resubmissions. If the proposal addresses substantially the same subject matter as a proposal, or proposals, previously included in the company’s proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

- (i)** Less than 5 percent of the votes cast if previously voted on once;
- (ii)** Less than 15 percent of the votes cast if previously voted on twice; or
- (iii)** Less than 25 percent of the votes cast if previously voted on three or more times.

(13) Specific amount of dividends: If the proposal relates to specific amounts of cash or stock dividends.

(j) Question 10: What procedures must the company follow if it intends to exclude my proposal?

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

- (i)** The proposal;
- (ii)** An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and
- (iii)** A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) Question 11: May I submit my own statement to the Commission responding to the company’s arguments?

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) Question 12: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) Question 13: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, § 240.14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before its files definitive copies of its proxy statement and form of proxy under § 240.14a-6.

[48 FR 38222, Aug. 23, 1983, as amended at 50 FR 48181, Nov. 22, 1985; 51 FR 42062, Nov. 20, 1986; 52 FR 21936, June 10, 1987; 52 FR 48983, Dec. 29, 1987; 63 FR 29106, 29119, May 28, 1998, as corrected at 63 FR 50622, 50623, Sept. 22, 1998; 72 FR 4148, 4168, Jan. 29, 2007; 72 FR 70450, 70456, Dec. 11, 2007; 73 FR 934, 977, Jan. 4, 2008; 75 FR 56668, 56782, Sept. 16, 2010; 75 FR 64641, Oct. 20, 2010; 76 FR 6010, 6045, Feb. 2, 2011; 76 FR 58100, Sept. 20, 2011; 85 FR 70240, 70294, Nov. 4, 2020]

EXHIBIT B
SLB 14F



**U.S. Securities and Exchange Commission
Division of Corporation Finance
Securities and Exchange Commission**

Shareholder Proposals

Staff Legal Bulletin No. 14F (CF)

Action: Publication of CF Staff Legal Bulletin

Date: October 18, 2011

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the “Division”). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the “Commission”). Further, the Commission has neither approved nor disapproved its content.

Contacts: For further information, please contact the Division’s Office of Chief Counsel by calling (202) 551-3500 or by submitting a web-based request form at https://tts.sec.gov/cgi-bin/corp_fin_interpretive.

A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- Brokers and banks that constitute “record” holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- Common errors shareholders can avoid when submitting proof of ownership to companies;
- The submission of revised proposals;
- Procedures for withdrawing no-action requests regarding proposals submitted by multiple proponents; and

- The Division’s new process for transmitting Rule 14a-8 no-action responses by email.

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commission’s website: [SLB No. 14](#), [SLB No. 14A](#), [SLB No. 14B](#), [SLB No. 14C](#), [SLB No. 14D](#) and [SLB No. 14E](#).

B. The types of brokers and banks that constitute “record” holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Eligibility to submit a proposal under Rule 14a-8

To be eligible to submit a shareholder proposal, a shareholder must have continuously held at least \$2,000 in market value, or 1%, of the company’s securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. The shareholder must also continue to hold the required amount of securities through the date of the meeting and must provide the company with a written statement of intent to do so.¹

The steps that a shareholder must take to verify his or her eligibility to submit a proposal depend on how the shareholder owns the securities. There are two types of security holders in the U.S.: registered owners and beneficial owners.² Registered owners have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or its transfer agent. If a shareholder is a registered owner, the company can independently confirm that the shareholder’s holdings satisfy Rule 14a-8(b)’s eligibility requirement.

The vast majority of investors in shares issued by U.S. companies, however, are beneficial owners, which means that they hold their securities in book-entry form through a securities intermediary, such as a broker or a bank. Beneficial owners are sometimes referred to as “street name” holders. Rule 14a-8(b)(2)(i) provides that a beneficial owner can provide proof of ownership to support his or her eligibility to submit a proposal by submitting a written statement “from the ‘record’ holder of [the] securities (usually a broker or bank),” verifying that, at the time the proposal was

¹ See Rule 14a-8(b).

² For an explanation of the types of share ownership in the U.S., see Concept Release on U.S. Proxy System, Release No. 34-62495 (July 14, 2010) [75 FR 42982] (“Proxy Mechanics Concept Release”), at Section II.A. The term “beneficial owner” does not have a uniform meaning under the federal securities laws. It has a different meaning in this bulletin as compared to “beneficial owner” and “beneficial ownership” in Sections 13 and 16 of the Exchange Act. Our use of the term in this bulletin is not intended to suggest that registered owners are not beneficial owners for purposes of those Exchange Act provisions. See Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982], at n.2 (“The term ‘beneficial owner’ when used in the context of the proxy rules, and in light of the purposes of those rules, may be interpreted to have a broader meaning than it would for certain other purpose[s] under the federal securities laws, such as reporting pursuant to the Williams Act.”).

submitted, the shareholder held the required amount of securities continuously for at least one year.³

2. The role of the Depository Trust Company

Most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency acting as a securities depository. Such brokers and banks are often referred to as "participants" in DTC.⁴ The names of these DTC participants, however, do not appear as the registered owners of the securities deposited with DTC on the list of shareholders maintained by the company or, more typically, by its transfer agent. Rather, DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants. A company can request from DTC a "securities position listing" as of a specified date, which identifies the DTC participants having a position in the company's securities and the number of securities held by each DTC participant on that date.⁵

3. Brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), we took the position that an introducing broker could be considered a "record" holder for purposes of Rule 14a-8(b)(2)(i). An introducing broker is a broker that engages in sales and other activities involving customer contact, such as opening customer accounts and accepting customer orders, but is not permitted to maintain custody of customer funds and securities.⁶ Instead, an introducing broker engages another broker, known as a "clearing broker," to hold custody of client funds and securities, to clear and execute customer trades, and to handle other functions such as issuing confirmations of customer trades and customer account statements. Clearing brokers generally are DTC participants; introducing brokers generally are not. As introducing brokers generally are not DTC participants, and therefore typically do not appear on DTC's securities position listing, *Hain Celestial* has required companies to accept proof of ownership letters from brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the company is unable to verify the positions against its own or its transfer agent's records or against DTC's securities position listing.

³ If a shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5 reflecting ownership of the required amount of shares, the shareholder may instead prove ownership by submitting a copy of such filings and providing the additional information that is described in Rule 14a-8(b)(2)(ii).

⁴ DTC holds the deposited securities in "fungible bulk," meaning that there are no specifically identifiable shares directly owned by the DTC participants. Rather, each DTC participant holds a pro rata interest or position in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant – such as an individual investor – owns a pro rata interest in the shares in which the DTC participant has a pro rata interest. See Proxy Mechanics Concept Release, at Section II.B.2.a.

⁵ See Exchange Act Rule 17Ad-8.

⁶ See Net Capital Rule, Release No. 34-31511 (Nov. 24, 1992) [57 FR 56973] ("Net Capital Rule Release"), at Section II.C.

In light of questions we have received following two recent court cases relating to proof of ownership under Rule 14a-8⁷ and in light of the Commission’s discussion of registered and beneficial owners in the Proxy Mechanics Concept Release, we have reconsidered our views as to what types of brokers and banks should be considered “record” holders under Rule 14a-8(b)(2)(i). Because of the transparency of DTC participants’ positions in a company’s securities, we will take the view going forward that, for Rule 14a-8(b)(2)(i) purposes, only DTC participants should be viewed as “record” holders of securities that are deposited at DTC. As a result, we will no longer follow *Hain Celestial*.

We believe that taking this approach as to who constitutes a “record” holder for purposes of Rule 14a-8(b)(2)(i) will provide greater certainty to beneficial owners and companies. We also note that this approach is consistent with Exchange Act Rule 12g5-1 and a 1988 staff no-action letter addressing that rule,⁸ under which brokers and banks that are DTC participants are considered to be the record holders of securities on deposit with DTC when calculating the number of record holders for purposes of Sections 12(g) and 15(d) of the Exchange Act.

Companies have occasionally expressed the view that, because DTC’s nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants, only DTC or Cede & Co. should be viewed as the “record” holder of the securities held on deposit at DTC for purposes of Rule 14a-8(b)(2)(i). We have never interpreted the rule to require a shareholder to obtain a proof of ownership letter from DTC or Cede & Co., and nothing in this guidance should be construed as changing that view.

How can a shareholder determine whether his or her broker or bank is a DTC participant?

Shareholders and companies can confirm whether a particular broker or bank is a DTC participant by checking DTC’s participant list, which is currently available on the Internet at <http://www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf>.

What if a shareholder’s broker or bank is not on DTC’s participant list?

The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held. The shareholder should be able to find out who this DTC participant is by asking the shareholder’s broker or bank.⁹

⁷ See *KBR Inc. v. Chevedden*, Civil Action No. H-11-0196, 2011 U.S. Dist. LEXIS 36431, 2011 WL 1463611 (S.D. Tex. Apr 4, 2011); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010). In both cases, the court concluded that a securities intermediary was not a record holder for purposes of Rule 14a-8(b) because it did not appear on a list of the company’s non-objecting beneficial owners or on any DTC securities position listing, nor was the intermediary a DTC participant.

⁸ *Techne Corp.* (Sept. 20, 1988).

⁹ In addition, if the shareholder’s broker is an introducing broker, the shareholder’s account statements should include the clearing broker’s identity and telephone number. See Net Capital Rule Release, at Section II.C.(iii). The clearing broker will generally be a DTC participant.

If the DTC participant knows the shareholder's broker or bank's holdings, but does not know the shareholder's holdings, a shareholder could satisfy Rule 14a-8(b)(2)(i) by obtaining and submitting two proof of ownership statements verifying that, at the time the proposal was submitted, the required amount of securities were continuously held for at least one year – one from the shareholder's broker or bank confirming the shareholder's ownership, and the other from the DTC participant confirming the broker or bank's ownership.

How will the staff process no-action requests that argue for exclusion on the basis that the shareholder's proof of ownership is not from a DTC participant?

The staff will grant no-action relief to a company on the basis that the shareholder's proof of ownership is not from a DTC participant only if the company's notice of defect describes the required proof of ownership in a manner that is consistent with the guidance contained in this bulletin. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

C. Common errors shareholders can avoid when submitting proof of ownership to companies

In this section, we describe two common errors shareholders make when submitting proof of ownership for purposes of Rule 14a-8(b)(2), and we provide guidance on how to avoid these errors.

First, Rule 14a-8(b) requires a shareholder to provide proof of ownership that he or she has “continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal” (emphasis added).¹⁰ We note that many proof of ownership letters do not satisfy this requirement because they do not verify the shareholder's beneficial ownership for the entire one-year period preceding and including the date the proposal is submitted. In some cases, the letter speaks as of a date *before* the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the shareholder's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Second, many letters fail to confirm continuous ownership of the securities. This can occur when a broker or bank submits a letter that confirms the shareholder's beneficial ownership only as of a specified date but omits any reference to continuous ownership for a one-year period.

We recognize that the requirements of Rule 14a-8(b) are highly prescriptive and can cause inconvenience for shareholders when submitting proposals. Although our administration of Rule 14a-8(b) is constrained by the terms of the rule, we believe that shareholders can avoid the

¹⁰ For purposes of Rule 14a-8(b), the submission date of a proposal will generally precede the company's receipt date of the proposal, absent the use of electronic or other means of same-day delivery.

two errors highlighted above by arranging to have their broker or bank provide the required verification of ownership as of the date they plan to submit the proposal using the following format:

“As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities].”¹¹

As discussed above, a shareholder may also need to provide a separate written statement from the DTC participant through which the shareholder’s securities are held if the shareholder’s broker or bank is not a DTC participant.

D. The submission of revised proposals

On occasion, a shareholder will revise a proposal after submitting it to a company. This section addresses questions we have received regarding revisions to a proposal or supporting statement.

1. A shareholder submits a timely proposal. The shareholder then submits a revised proposal before the company’s deadline for receiving proposals. Must the company accept the revisions?

Yes. In this situation, we believe the revised proposal serves as a replacement of the initial proposal. By submitting a revised proposal, the shareholder has effectively withdrawn the initial proposal. Therefore, the shareholder is not in violation of the one-proposal limitation in Rule 14a-8(c).¹² If the company intends to submit a no-action request, it must do so with respect to the revised proposal.

We recognize that in Question and Answer E.2 of SLB No. 14, we indicated that if a shareholder makes revisions to a proposal before the company submits its no-action request, the company can choose whether to accept the revisions. However, this guidance has led some companies to believe that, in cases where shareholders attempt to make changes to an initial proposal, the company is free to ignore such revisions even if the revised proposal is submitted before the company’s deadline for receiving shareholder proposals. We are revising our guidance on this issue to make clear that a company may not ignore a revised proposal in this situation.¹³

¹¹ This format is acceptable for purposes of Rule 14a-8(b), but it is not mandatory or exclusive.

¹² As such, it is not appropriate for a company to send a notice of defect for multiple proposals under Rule 14a-8(c) upon receiving a revised proposal.

¹³ This position will apply to all proposals submitted after an initial proposal but before the company’s deadline for receiving proposals, regardless of whether they are explicitly labeled as “revisions” to an initial proposal, unless the shareholder affirmatively indicates an intent to submit a second, *additional* proposal for inclusion in the company’s proxy materials. In that case, the company must send the shareholder a notice of defect pursuant to Rule 14a-8(f)(1) if it intends to exclude either proposal from its proxy materials in reliance on Rule 14a-8(c). In light of this guidance, with respect to proposals or revisions received before a company’s deadline for submission, we will no longer follow *Layne Christensen Co.* (Mar. 21, 2011) and other prior staff no-action letters in which we took the view that a proposal would violate the Rule 14a-8(c) one-proposal limitation if such proposal is submitted to a company after the company has either submitted a Rule 14a-8 no-action request to exclude an earlier proposal submitted by the same proponent or notified the proponent that the earlier proposal was excludable under the rule.

2. A shareholder submits a timely proposal. After the deadline for receiving proposals, the shareholder submits a revised proposal. Must the company accept the revisions?

No. If a shareholder submits revisions to a proposal after the deadline for receiving proposals under Rule 14a-8(e), the company is not required to accept the revisions. However, if the company does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, as required by Rule 14a-8(j). The company's notice may cite Rule 14a-8(e) as the reason for excluding the revised proposal. If the company does not accept the revisions and intends to exclude the initial proposal, it would also need to submit its reasons for excluding the initial proposal.

3. If a shareholder submits a revised proposal, as of which date must the shareholder prove his or her share ownership?

A shareholder must prove ownership as of the date the original proposal is submitted. When the Commission has discussed revisions to proposals,¹⁴ it has not suggested that a revision triggers a requirement to provide proof of ownership a second time. As outlined in Rule 14a-8(b), proving ownership includes providing a written statement that the shareholder intends to continue to hold the securities through the date of the shareholder meeting. Rule 14a-8(f)(2) provides that if the shareholder "fails in [his or her] promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of [the same shareholder's] proposals from its proxy materials for any meeting held in the following two calendar years." With these provisions in mind, we do not interpret Rule 14a-8 as requiring additional proof of ownership when a shareholder submits a revised proposal.¹⁵

E. Procedures for withdrawing no-action requests for proposals submitted by multiple proponents

We have previously addressed the requirements for withdrawing a Rule 14a-8 no-action request in SLB Nos. 14 and 14C. SLB No. 14 notes that a company should include with a withdrawal letter documentation demonstrating that a shareholder has withdrawn the proposal. In cases where a proposal submitted by multiple shareholders is withdrawn, SLB No. 14C states that, if each shareholder has designated a lead individual to act on its behalf and the company is able to demonstrate that the individual is authorized to act on behalf of all of the proponents, the company need only provide a letter from that lead individual indicating that the lead individual is withdrawing the proposal on behalf of all of the proponents.

Because there is no relief granted by the staff in cases where a no-action request is withdrawn following the withdrawal of the related proposal, we recognize that the threshold for withdrawing a no-action request need not be overly burdensome. Going forward, we will process a withdrawal

¹⁴ See, e.g., Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994].

¹⁵ Because the relevant date for proving ownership under Rule 14a-8(b) is the date the proposal is submitted, a proponent who does not adequately prove ownership in connection with a proposal is not permitted to submit another proposal for the same meeting on a later date.

request if the company provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the proposal on behalf of each proponent identified in the company's no-action request.¹⁶

F. Use of email to transmit our Rule 14a-8 no-action responses to companies and proponents

To date, the Division has transmitted copies of our Rule 14a-8 no-action responses, including copies of the correspondence we have received in connection with such requests, by U.S. mail to companies and proponents. We also post our response and the related correspondence to the Commission's website shortly after issuance of our response.

In order to accelerate delivery of staff responses to companies and proponents, and to reduce our copying and postage costs, going forward, we intend to transmit our Rule 14a-8 no-action responses by email to companies and proponents. We therefore encourage both companies and proponents to include email contact information in any correspondence to each other and to us. We will use U.S. mail to transmit our no-action response to any company or proponent for which we do not have email contact information.

Given the availability of our responses and the related correspondence on the Commission's website and the requirement under Rule 14a-8 for companies and proponents to copy each other on correspondence submitted to the Commission, we believe it is unnecessary to transmit copies of the related correspondence along with our no-action response. Therefore, we intend to transmit only our staff response and not the correspondence we receive from the parties. We will continue to post to the Commission's website copies of this correspondence at the same time that we post our staff no-action response.

¹⁶ Nothing in this staff position has any effect on the status of any shareholder proposal that is not withdrawn by the proponent or its authorized representative.

EXHIBIT C
SLB 14G



**U.S. Securities and Exchange Commission
Division of Corporation Finance
Securities and Exchange Commission**

Shareholder Proposals

Staff Legal Bulletin No. 14G (CF)

Action: Publication of CF Staff Legal Bulletin

Date: October 16, 2012

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the “Division”). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the “Commission”). Further, the Commission has neither approved nor disapproved its content.

Contacts: For further information, please contact the Division’s Office of Chief Counsel by calling (202) 551-3500 or by submitting a web-based request form at https://tts.sec.gov/cgi-bin/corp_fin_interpretive.

A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- the parties that can provide proof of ownership under Rule 14a-8(b) (2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- the manner in which companies should notify proponents of a failure to provide proof of ownership for the one-year period required under Rule 14a-8(b)(1); and
- the use of website references in proposals and supporting statements.

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commission’s website: [SLB No. 14](#), [SLB No. 14A](#), [SLB No. 14B](#), [SLB No. 14C](#),

SLB No. 14D, SLB No. 14E and SLB No. 14F.

B. Parties that can provide proof of ownership under Rule 14a-8(b) (2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Sufficiency of proof of ownership letters provided by affiliates of DTC participants for purposes of Rule 14a-8(b)(2)(i)

To be eligible to submit a proposal under Rule 14a-8, a shareholder must, among other things, provide documentation evidencing that the shareholder has continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. If the shareholder is a beneficial owner of the securities, which means that the securities are held in book-entry form through a securities intermediary, Rule 14a-8(b)(2)(i) provides that this documentation can be in the form of a "written statement from the 'record' holder of your securities (usually a broker or bank)...."

In SLB No. 14F, the Division described its view that only securities intermediaries that are participants in the Depository Trust Company ("DTC") should be viewed as "record" holders of securities that are deposited at DTC for purposes of Rule 14a-8(b)(2)(i). Therefore, a beneficial owner must obtain a proof of ownership letter from the DTC participant through which its securities are held at DTC in order to satisfy the proof of ownership requirements in Rule 14a-8.

During the most recent proxy season, some companies questioned the sufficiency of proof of ownership letters from entities that were not themselves DTC participants, but were affiliates of DTC participants.¹ By virtue of the affiliate relationship, we believe that a securities intermediary holding shares through its affiliated DTC participant should be in a position to verify its customers' ownership of securities. Accordingly, we are of the view that, for purposes of Rule 14a-8(b)(2)(i), a proof of ownership letter from an affiliate of a DTC participant satisfies the requirement to provide a proof of ownership letter from a DTC participant.

2. Adequacy of proof of ownership letters from securities intermediaries that are not brokers or banks

We understand that there are circumstances in which securities intermediaries that are not brokers or banks maintain securities accounts in the ordinary course of their business. A shareholder who holds securities through a securities intermediary that is not a broker or bank can satisfy Rule 14a-8's documentation requirement by submitting a proof of ownership letter from that securities intermediary.² If the securities intermediary is not a DTC participant or an affiliate of a DTC participant, then the shareholder will also need to obtain a proof of ownership letter from the DTC participant or an affiliate of a DTC participant that can verify the holdings of the securities intermediary.

¹ An entity is an "affiliate" of a DTC participant if such entity directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the DTC participant.

² Rule 14a-8(b)(2)(i) itself acknowledges that the record holder is "usually," but not always, a broker or bank.

C. Manner in which companies should notify proponents of a failure to provide proof of ownership for the one-year period required under Rule 14a-8(b)(1)

As discussed in Section C of SLB No. 14F, a common error in proof of ownership letters is that they do not verify a proponent's beneficial ownership for the entire one-year period preceding and including the date the proposal was submitted, as required by Rule 14a-8(b)(1). In some cases, the letter speaks as of a date *before* the date the proposal was submitted, thereby leaving a gap between the date of verification and the date the proposal was submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the proponent's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Under Rule 14a-8(f), if a proponent fails to follow one of the eligibility or procedural requirements of the rule, a company may exclude the proposal only if it notifies the proponent of the defect and the proponent fails to correct it. In SLB No. 14 and SLB No. 14B, we explained that companies should provide adequate detail about what a proponent must do to remedy all eligibility or procedural defects.

We are concerned that companies' notices of defect are not adequately describing the defects or explaining what a proponent must do to remedy defects in proof of ownership letters. For example, some companies' notices of defect make no mention of the gap in the period of ownership covered by the proponent's proof of ownership letter or other specific deficiencies that the company has identified. We do not believe that such notices of defect serve the purpose of Rule 14a-8(f).

Accordingly, going forward, we will not concur in the exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) on the basis that a proponent's proof of ownership does not cover the one-year period preceding and including the date the proposal is submitted unless the company provides a notice of defect that identifies the specific date on which the proposal was submitted and explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the defect. We view the proposal's date of submission as the date the proposal is postmarked or transmitted electronically. Identifying in the notice of defect the specific date on which the proposal was submitted will help a proponent better understand how to remedy the defects described above and will be particularly helpful in those instances in which it may be difficult for a proponent to determine the date of submission, such as when the proposal is not postmarked on the same day it is placed in the mail. In addition, companies should include copies of the postmark or evidence of electronic transmission with their no-action requests.

D. Use of website addresses in proposals and supporting statements

Recently, a number of proponents have included in their proposals or in their supporting statements the addresses to websites that provide more information about their proposals. In some cases, companies have sought to exclude either the website address or the entire proposal due to the reference to the website address.

In SLB No. 14, we explained that a reference to a website address in a proposal does not raise the concerns addressed by the 500-word limitation in Rule 14a-8(d). We continue to be of this view

and, accordingly, we will continue to count a website address as one word for purposes of Rule 14a-8 (d). To the extent that the company seeks the exclusion of a website reference in a proposal, but not the proposal itself, we will continue to follow the guidance stated in SLB No. 14, which provides that references to website addresses in proposals or supporting statements could be subject to exclusion under Rule 14a-8(i)(3) if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules, including Rule 14a-9.³

In light of the growing interest in including references to website addresses in proposals and supporting statements, we are providing additional guidance on the appropriate use of website addresses in proposals and supporting statements.⁴

1. References to website addresses in a proposal or supporting statement and Rule 14a-8(i)(3)

References to websites in a proposal or supporting statement may raise concerns under Rule 14a-8(i)(3). In SLB No. 14B, we stated that the exclusion of a proposal under Rule 14a-8(i)(3) as vague and indefinite may be appropriate if 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. In evaluating whether a proposal may be excluded on this basis, we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.

If a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would raise concerns under Rule 14a-9 and would be subject to exclusion under Rule 14a-8(i)(3) as vague and indefinite. By contrast, if shareholders and the company can understand with reasonable certainty exactly what actions or measures the proposal requires without reviewing the information provided on the website, then we believe that the proposal would not be subject to exclusion under Rule 14a-8(i)(3) on the basis of the reference to the website address. In this case, the information on the website only supplements the information contained in the proposal and in the supporting statement.

2. Providing the company with the materials that will be published on the referenced website

We recognize that if a proposal references a website that is not operational at the time the proposal is submitted, it will be impossible for a company or the staff to evaluate whether the website

³ Rule 14a-9 prohibits statements in proxy materials which, at the time and in the light of the circumstances under which they are made, are false or misleading with respect to any material fact, or which omit to state any material fact necessary in order to make the statements not false or misleading.

⁴ A website that provides more information about a shareholder proposal may constitute a proxy solicitation under the proxy rules. Accordingly, we remind shareholders who elect to include website addresses in their proposals to comply with all applicable rules regarding proxy solicitations.

reference may be excluded. In our view, a reference to a non-operational website in a proposal or supporting statement could be excluded under Rule 14a-8(i)(3) as irrelevant to the subject matter of a proposal. We understand, however, that a proponent may wish to include a reference to a website containing information related to the proposal but wait to activate the website until it becomes clear that the proposal will be included in the company's proxy materials. Therefore, we will not concur that a reference to a website may be excluded as irrelevant under Rule 14a-8(i)(3) on the basis that it is not yet operational if the proponent, at the time the proposal is submitted, provides the company with the materials that are intended for publication on the website and a representation that the website will become operational at, or prior to, the time the company files its definitive proxy materials.

3. Potential issues that may arise if the content of a referenced website changes after the proposal is submitted

To the extent the information on a website changes after submission of a proposal and the company believes the revised information renders the website reference excludable under Rule 14a-8, a company seeking our concurrence that the website reference may be excluded must submit a letter presenting its reasons for doing so. While Rule 14a-8(j) requires a company to submit its reasons for exclusion with the Commission no later than 80 calendar days before it files its definitive proxy materials, we may concur that the changes to the referenced website constitute "good cause" for the company to file its reasons for excluding the website reference after the 80-day deadline and grant the company's request that the 80-day requirement be waived.

Stephanie Berberich

From: Microsoft Outlook
To: PII [REDACTED]
Sent: Wednesday, January 5, 2022 6:08 PM
Subject: Relayed: DaVita Inc. Stockholder Proposal

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

PII [REDACTED]

Subject: DaVita Inc. Stockholder Proposal



DaVita Inc.
Stockholder Prop...

Stephanie Berberich

From: Kelli Bodnar
Sent: Friday, January 7, 2022 9:39 AM
To: Stephanie Berberich
Subject: Fwd: FedEx Shipment 775671441784: Your package has been delivered

Your package has been delivered.

Thanks
Kelli

Begin forwarded message:

From: TrackingUpdates@fedex.com
Date: January 7, 2022 at 9:37:20 AM MST
To: Kelli Bodnar [PII]@davita.com>
Subject: FedEx Shipment 775671441784: Your package has been delivered
Reply-To: trackingmail@fedex.com

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OBTAIN PROOF OF DELIVERY

TRACKING NUMBER	775671441784
FROM	DaVita Denver HQ 2000 16th Street Denver, CO, US, 80202
TO	United Brotherhood of Carpenters Ed Durkin, Corporate Affairs Dept 101 Constitution Avenue, NW WASHINGTON, DC, US, 20001
SHIP DATE	Wed 1/05/2022 05:42 PM
DELIVERED TO	Guard/Security Station
PACKAGING TYPE	FedEx Envelope
ORIGIN	Denver, CO, US, 80202
DESTINATION	WASHINGTON, DC, US, 20001
SPECIAL HANDLING	Deliver Weekday
NUMBER OF PIECES	1
TOTAL SHIPMENT WEIGHT	0.50 LB
SERVICE TYPE	FedEx Priority Overnight

Stephanie Berberich

From: Beggy, Michael J <PII >
Sent: Saturday, January 15, 2022 12:32 PM
To: Stephanie Berberich
Cc: Ed Durkin; PII
Subject: New York City Carpenters
Attachments: Davita 1-15-22.pdf

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Hi Stephanie,

Please see attached for the New York City Carpenters Pension Fund.

Thank you,
Mike

Mike Beggy

BNY Mellon Asset Servicing

One Mellon Center

Room 4040

Pittsburgh, PA 15258

Phone: PII Fax: PII

PII

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Stephanie Berberich

From: Stephanie Berberich
Sent: Saturday, January 15, 2022 2:39 PM
To: 'Beggy, Michael J'
Cc: Ed Durkin; PII
Subject: RE: New York City Carpenters

Thank you, Mike. Confirming receipt.

Stephanie Berberich
Associate General Counsel

O: PII M: PII
PII @davita.com

From: Beggy, Michael J [mailto:PII]
Sent: Saturday, January 15, 2022 12:32 PM
To: Stephanie Berberich <PII @davita.com>
Cc: Ed Durkin <PII >; PII
Subject: New York City Carpenters

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Hi Stephanie,

Please see attached for the New York City Carpenters Pension Fund.

Thank you,
Mike

Mike Beggy
BNY Mellon Asset Servicing
One Mellon Center
Room 4040
Pittsburgh, PA 15258
Phone: PII Fax: PII
PII

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Stephanie Berberich

From: Samantha Caldwell
Sent: Friday, January 28, 2022 5:55 PM
To: PII
Subject: DaVita Inc. - Follow Up

Dear Ed,

I hope this email finds you well. I wanted to follow up with you to confirm that we have received your proof of ownership of DaVita stock, as forwarded by Michael Beggy of BNY Mellon on January 15, 2022. I would also like to reiterate our request to meet with you or other members of the UBC team to discuss your proposal. I have good availability on Monday, January 31st and Tuesday, February 1 if you might also have an opening on either of those days. If not, I can try to accommodate your schedule to find another time that works for you next week.

Best,
Samantha

Samantha A. Caldwell
VP, Corporate Secretary & Associate General Counsel - Corporate
DaVita Inc.
2000 16th Street
Denver, CO 80202
Phone: PII
Email: PII [@davita.com](mailto:PII@davita.com)

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Shareholderproposals@sec.gov

February 2, 2022

Page 12

Exhibit C

Delaware Counsel Opinion

[See attached.]

February 2, 2022

DaVita Inc.
2000 16th Street
Denver, Colorado 80202

Re: Stockholder Proposal on behalf of New York City Carpenters Pension Fund

Ladies and Gentlemen:

We have acted as special Delaware counsel to DaVita Inc., a Delaware corporation (the “Company”), in connection with a stockholder proposal (the “Proposal”) that has been submitted to the Company on behalf of the New York City Carpenters Pension Fund (the “Proponent”) for the 2022 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 Restated Certificate of Incorporation of the Company as filed with the Secretary of State of the State of Delaware on November 1, 2016 (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 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: That the shareholders of DaVita Inc. request that the Board amend the Company’s proxy access bylaw to add a trigger mechanism that would activate the bylaw’s proxy access right at a lower level of eligibility. Specifically, the trigger event would be the presence of a “holdover” director on the Board, that is, an incumbent director who was not re-elected at the most recent annual meeting but continues to serve on the Board because his or her resignation was not accepted by the Board. When the triggering event is present, a new lower eligibility requirement of 1% ownership of outstanding shares held for two consecutive years to submit director nominations would be applicable. Additionally, the amended proxy access bylaw should allow cumulative voting rights in any contested election created using the triggered proxy access right.”

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 Proposal requests that the Bylaws be amended to allow for cumulative voting by stockholders in the election of directors under certain circumstances. Section 109(b) of the General Corporation Law of the State of Delaware (the “General Corporation Law”), which governs the contents of a Delaware corporation’s bylaws, provides:

The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

8 *Del. C.* § 109(b) (emphasis added). The phrase “not inconsistent with law” or similar variants of that phrase used in the provisions of the General Corporation Law have been interpreted to mean that the provision must “not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.” See *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. Ch. 1952); *Jones Apparel Gp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 846 (Del. Ch. 2004) (finding that a provision will be invalidated if it “vitiates or contravenes a mandatory rule of our corporate code or common law”). Thus, “[a] bylaw that is inconsistent with any statute or rule of common law . . . is void.” *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985). For the reasons set forth below, the bylaw amendment requested in the Proposal would violate Section 214 of the General Corporation Law, and thus would be invalid and void under the General Corporation Law.

Section 214 of the General Corporation Law addresses cumulative voting by stockholders and provides:

The *certificate of incorporation* of any corporation may provide that at all elections of directors of the corporation, or at elections held under specified circumstances, each holder of stock or of any class or classes or of a series or series thereof shall be entitled to as many votes as shall equal the number of votes which (except for such provision as to cumulative voting) such holder would be entitled to cast for the election of directors with respect to such holder’s shares of stock multiplied by the number of directors to be elected by such holder, and that such holder may cast all of such votes for a single director or may distribute them among the number to be voted for, or for any 2 or more of them as such holder may see fit.

8 *Del. C.* § 214 (emphasis added). Thus, Section 214 of the General Corporation Law provides that the certificate of incorporation of a Delaware corporation may provide the corporation’s stockholders with cumulative voting rights in the election of directors. See, e.g., 1 Robert S. Saunders et al., *Folk on the Delaware General Corporation Law*, § 214.1, at 7-158 (2022-1 Supp.) (“Section 214 permits a corporation to confer cumulative voting rights in its certificate of incorporation.”).

Under Delaware law, a corporation may only provide its stockholders with the right to cumulative voting through a specific provision of its certificate of incorporation. A corporation may not authorize such right through any other means, including a bylaw provision or board-adopted policy. In *Standard Scale & Supply Corp. v. Chappel*, 141 A. 191 (Del. 1928), the Delaware Supreme Court found that ballots for the election of directors of Standard Scale & Supply Company (“Standard”) that had been voted cumulatively had to be counted on a straight vote basis since Standard’s certificate of incorporation did not provide for cumulative voting. The Court stated:

The laws of Delaware only allow cumulative voting where the same may be provided by the certificate of incorporation. It is conceded

that the certificate of incorporation of the company here concerned does not so provide We think the Chancellor was entirely correct in determining that the ballots . . . should be counted as straight ballots[.]

Id. at 192; *see also McIlquham v. Feste*, 2001 WL 1497179, at *5 (Del. Ch. Nov. 16, 2001) (“Finally, because the MMA certificate of incorporation does not permit cumulative voting, the nominees for director receiving a plurality of the votes cast will be elected.”); *Palmer v. Arden-Mayfair, Inc.*, 1978 WL 2506, at *2 (Del. Ch. July 6, 1978); (“In addition, since the certificate of incorporation of Arden-Mayfair does not provide for the election of directors by cumulative voting, its directors are elected by straight ballot.”); 2 David A. Drexler et al., *Delaware Corporation Law & Practice* § 25.05, at 25-8 to 25-9 (2019) (“Under Section 214, a corporation may adopt in its certificate of incorporation cumulative voting either at all elections or those held under specified circumstances, *but unless the charter so provides, conventional voting is applicable.*” (emphasis added)); 5 William Meade Fletcher et. al., *Fletcher Cyclopedia of Corporations* § 2048, at 251 (2015) (providing that “[m]ost jurisdictions have opted for provisions under which shareholders do not have cumulative voting rights *unless authorized by the articles of incorporation*” and citing Delaware as one such jurisdiction (emphasis added)); 2 *Model Business Corporation Act, Official Comment to Section 7.28*, at 7-192 (5th ed. 2020) (“Most jurisdictions allow but do not require a corporation to have cumulative voting for directors. Permissive clauses take one of two forms: either *the statutory provision allows cumulative voting only if the articles of incorporation expressly so provide (opt-in)*, or in fewer jurisdictions the statutory provision grants cumulative voting unless the articles of incorporation provide otherwise (opt-out). Thus, the foregoing authorities confirm that Section 214 of the General Corporation Law requires that cumulative voting may be implemented exclusively by a provision in the certificate of incorporation and not through a bylaw.

The Delaware courts have repeatedly held that where the General Corporation Law provides that a particular type of voting or governance mechanism may be implemented by a provision in the corporation’s certificate of incorporation and does not specify some other means of implementation, then the only means of implementing such mechanism is by a provision in the certificate of incorporation, and that a bylaw provision purporting to provide for such implementation conflicts with the applicable provision of the General Corporation Law and thus is invalid and void. For example, Section 228 of the General Corporation Law provides that stockholders may act by written consent “[u]nless otherwise provided in the certificate of incorporation.” 8 *Del. C.* § 228(a). In *Datapoint Corp. v. Plaza Securities Co.*, 496 A.2d 1031 (Del. 1985), the Delaware Supreme Court held that a bylaw provision that purported to limit stockholder action by written consent was invalid. The Court stated:

This appeal by Datapoint Corporation from an order of the Court of Chancery, preliminarily enjoining its enforcement of a bylaw adopted by Datapoint’s board of directors, presents an issue of first impression in Delaware: whether a bylaw designed to limit the taking of corporate action by written shareholder consent in lieu of a stockholders’ meeting conflicts with 8 *Del. C.* § 228, and thereby

is invalid. The Court of Chancery ruled that Datapoint's bylaw was unenforceable because its provisions were in direct conflict with the power conferred upon shareholders by 8 Del. C. § 228. We agree and affirm.

Id. at 1032-33 (footnotes omitted).

Similarly, in *Frechter v. Zier*, 2017 WL 345142, at *4 (Del. Ch. Jan. 24, 2017), the Court of Chancery invalidated a bylaw purporting to impose a supermajority voting requirement on stockholders' right to remove directors on grounds that it was inconsistent with Section 141(k) of the General Corporation Law, which provides that "[a]ny director . . . may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors." 8 Del. C. § 141(k) (emphasis added). The court reasoned in part that Section 102(b)(4) of the General Corporation Law permits the certificate of incorporation to impose voting standards greater than those set forth in the General Corporation Law, but the bylaws cannot. *Frechter*, 2017 WL 345142, at *2 n.19. Likewise, in *Choupak v. Rivkin*, 2015 WL 1589610, at *19-20 (Del. Ch. Apr. 6, 2015), *aff'd*, 129 A.3d 232 (Del. 2015), the Court of Chancery held that a contractual provision that purported to confer a right to receive "preferred stock" was invalid because Sections 102(a)(4) and 151(a) require such "preferences [to be] clearly spelled out in the certificate of incorporation (or by a separate resolution authorized by the corporate charter)." Read in concert, these authorities provide that where a specific governance or voting mechanism may only be implemented by a certificate of incorporation provision, a corporate bylaw, policy or other agreement is ineffective under Delaware law to implement the mechanism. *See also Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998) (invalidating a provision in a rights plan which restricted the ability of a future board of directors of Quickturn Design Systems to exercise its managerial duties under Section 141(a) on the basis that the contested provision was not contained in Quickturn's certificate of incorporation); *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1191 (Del. Ch. 1998) (invalidating a provision in a stockholder rights plan which purported to give directors different voting rights since "[a]bsent express language in the charter, nothing in Delaware law suggests that some directors of a public corporation may be created less equal than other directors").

The Company's Certificate of Incorporation presently does not provide for cumulative voting. Implementation of cumulative voting would require an amendment to the Certificate of Incorporation. Any such amendment could only be effected in accordance with Section 242 of the General Corporation Law which requires that any amendment to the certificate of incorporation be approved by the board of directors, declared advisable and then submitted to the stockholders for adoption thereby. 8 Del. C. § 242. Thus, the Board cannot unilaterally amend the Certificate of Incorporation to provide for cumulative voting as requested by the Proposal.

As described above, a bylaw purporting to allow stockholders to cumulate votes in the election of directors, as requested by the Proposal, would violate Section 214 of the General Corporation Law and thus would be invalid and void under Delaware law. Therefore, 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, the Company lacks the power and authority to implement the Proposal. Indeed, the staff of the U.S. Securities and Exchange Commission has repeatedly recognized that companies do not have the power and authority to implement proposals that violate state law.¹

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,

Richard S. Taylor; Ayer, P.A.

CSB/JJV/BTM

¹ See, e.g., *Schering-Plough Corp.*, SEC No-Action Letter (Mar. 27, 2008); *Bank of America Corp.*, SEC No-Action Letter (Feb. 26, 2008); *Xerox Corp.*, SEC No-Action Letter (Feb. 23, 2004); *Burlington Resources Inc.*, SEC No-Action Letter (Feb. 7, 2003).



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February 4, 2022

By Email

Shareholderproposals@sec.gov
Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, D.C. 20549

Re: DaVita Inc. - Shareholder Proposal Submitted on behalf of the New York City
Carpenters Pension Fund

Dear Ladies and Gentlemen:

On behalf of DaVita Inc. (“DaVita” or the “Company”) we hereby inform the staff of the Securities and Exchange Commission that the Company withdraws its request for no-action relief dated February 2, 2022 to exclude a proposal submitted on December 17, 2021 (together with the supporting statement, the “Proposal”) on behalf of the New York City Carpenters Pension Fund (the “Proponent”) from the proxy materials (the “2022 Proxy Materials”) for DaVita’s 2022 annual shareholders’ meeting because the Proponent has withdrawn the Proposal. The Proponent’s withdrawal of the Proposal is discussed in a letter from Kristin O’Brien, a representative of the Proponent, attached hereto as Exhibit A. Accordingly, the Company will not include the Proposal in the 2022 Proxy Materials for its 2022 annual shareholders’ meeting. We would be happy to provide any additional information and answer any questions regarding this matter. Should you have any questions, please contact me at (415) 772-1271 or sflanagan@sidley.com.

Sincerely yours,

Sharon R. Flanagan

Enclosure: Exhibits

cc: Edward J. Durkin **PII**
Kristin O’Brien **PII**

SIDLEY

Shareholderproposals@sec.gov
February 4, 2022
Page 2

Exhibit A

[See attached.]

**NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS
BENEFIT FUNDS**

UNION

TRUSTEES

Joseph A. Geiger
Co-Chairman

Paul Capurso
David Carabaloso
Michael P. Cavanaugh
John Sheehy

Kristin O'Brien, LMSW, CEBS
Executive Director

PII
Telephone: PII

MANAGEMENT

TRUSTEES

David T. Meberg
Co-Chairman

John DeLollis
Kevin O'Callaghan
John O'Hare
Michael Salgo

SENT VIA EMAIL – PII @davita.com

February 3, 2022

Samantha A. Caldwell
Corporate Secretary
DaVita Inc.
2000 16th Street
Denver, Colorado 80202

RE: Shareholder Proposal Withdrawal Letter

Dear Ms. Caldwell:

On behalf of the New York City Carpenters Pension Fund ("Fund"), I hereby withdraw the Proxy Access shareholder proposal submitted by the Fund on December 16, 2021. As a long-term holder of DaVita Inc. common stock, we hope to engage in future dialogue with the Company on this and other important governance topics.

Sincerely,

PII

Kristin O'Brien, LMSW, CEBS
Executive Director

cc. Edward J. Durkin