Weil, Gotshal & Manges LLP

Lyuba Goltser
767 Fifth Avenue
New York, NY 10153

Lyuba.Goltser@weil.com
212-310-8048 (tel)
212-310-8007 (fax)

January 30, 2024

SUBMITTED ONLINE (www.sec.gov/forms/shareholder-proposal)

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

Re: WEX Inc.
Exclusion of Stockholder Proposal Submitted by United Brotherhood of Carpenters and Joiners of America
Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen:

On behalf of WEX Inc. ("WEX" or the "Company"), pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are submitting this letter to inform you of the Company's intention to exclude from its proxy statement and form of proxy to be filed and distributed in connection with its 2024 Annual Meeting of Stockholders (collectively, the "2024 Proxy Materials") a stockholder proposal (the "Proposal") and supporting statement submitted by the United Brotherhood of Carpenters and Joiners of America (the "Proponent").

In accordance with Staff Legal Bulletin No. 14D (November 7, 2008) ("SLB 14D"), the Company is submitting electronically to the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") this letter and related correspondence between the Company and the Proponent no later than eighty (80) calendar days before the Company intends to file its definitive 2024 Proxy Materials with the Commission. Pursuant to Rule 14a-8(j), a copy of this letter and its exhibits also is being sent to the Proponent. Rule 14a-8(k) and SLB No. 14D provide that a proponent is required to send the company a copy of any correspondence that the proponent elects to submit to the Commission or the Staff. Accordingly, we hereby inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff relating to the Proposal, the Proponent should concurrently furnish a copy of that correspondence to the undersigned by e-mail.

THE PROPOSAL

The Proposal sets forth in the following resolution to be voted on at the 2024 Annual Meeting of Stockholders:

> **Resolved:** That the shareholders of WEX, Inc. ("Company") hereby request that the board of directors take the necessary action to adopt a director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director's failure to receive the required shareholder majority vote support in an uncontested election. The proposed resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a "holdover" director, the resignation bylaw shall stipulate that should a "holdover" director fail to be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

A copy of the Proposal and supporting statement is attached hereto as Exhibit A. Other correspondence relating to the Proposal is attached hereto as Exhibit B. A copy of the Company's Amended and Restated Certificate of Incorporation (the "Charter") is attached hereto as Exhibit C.

BASES FOR EXCLUSION

We hereby request that the Staff concur in our view that the Proposal may be excluded from the 2024 Proxy Materials pursuant to the following bases for exclusion:

(i) Rules 14a-8(b) and 14a-8(f)(1) of the Exchange Act because the Proponent has failed to provide, within 14 days of the receipt of the Company's request, the requisite proof of continuous share ownership in response to the Company's proper requests for that information;

(ii) Rule 14a-8(i)(2) because the Proposal would require the Company to violate Delaware law; and

(iii) Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal.

BACKGROUND

On December 11, 2023, the Proponent submitted the Proposal to the Company via overnight USPS. The initial submission of the Proposal did not provide verification of the Proponent's ownership of the requisite amount of the Company's common stock (the "Ownership Deficiency"). Rather, the Proposal stated that "[v]erification of this ownership by the record holder of common stock, State Street Bank and Trust Company, will be sent under separate cover."

After reviewing its stock records, which did not indicate that the Proponent was a registered owner of the Company's common stock, the Company informed the Proponent of the Ownership Deficiency by email on December 20, 2023, which the Proponent did not acknowledge. Subsequently, the Company informed the Proponent of the Ownership Deficiency in a letter sent by FedEx overnight mail and by email on December 21, 2023 (the "Deficiency Letter," which along with related correspondence with the Proponent, is attached hereto as Exhibit B) and David Minasian, on behalf of the Proponent, confirmed receipt on December 22, 2023. The Deficiency Letter was sent to the Proponent within 14 calendar days of the date the Company received the Proposal. Among other things, the Deficiency Letter informed the Proponent of the eligibility requirements of Rule 14a-8(b), that the Ownership Deficiency could be remedied by providing the Company proof of the Proponent's ownership of a sufficient number of shares of the Company's common stock and that such proof of ownership must be provided to the Company within 14 days of receipt of the letter.

Pursuant to Rule 14a-8(f)(1), the Proponent's response to the Deficiency Letter to cure the Ownership Deficiency was required to be postmarked or transmitted to the Company by January 5, 2024. However, as of the date of this letter, the Company has not received from the Proponent any documentation relating to proof of Proponent's ownership of shares of the Company's common stock.

ANALYSIS

I. The Proposal May Be Excluded Under Rules 14a-8(b) and 14a-8(f)(1) for Failure to Establish the Requisite Eligibility To Submit the Proponent's Proposal

The Company may exclude the Proposal under Rule 14a-8(f)(1) because the Proponent failed to substantiate its eligibility to submit the Proposal in compliance with Rule 14a-8. Rule 14a-8(b)(1) provides, in part, that to be eligible to submit a proposal for an annual meeting, a shareholder proponent must have continuously held: (i) at least $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years; (ii) at least $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or (iii) at least $25,000 in market value of the company's shares entitled to vote on the proposal for at least one year.

Staff Legal Bulletin No. 14 (July 13, 2001) ("SLB 14") specifies that when the shareholder is not the registered holder, the shareholder "is responsible for proving his or her eligibility to submit a proposal to the company," which the shareholder may do by one of the two ways provided in Rule 14a-8(b)(2). See Section C.1.c., SLB 14. Rule 14a-8(f)(1) permits a company to exclude a shareholder proposal from the company's proxy materials if the proponent fails to comply with the eligibility or procedural requirements under Rule 14a-8, including if the proponent fails to provide such proof of ownership, provided that the company notifies the proponent in writing of such deficiency within 14 calendar days of receiving the proposal and the proponent fails to adequately correct it. A proponent's response to such notice of deficiency must be postmarked or transmitted electronically to the company no later than 14 days from the date the proponent receives the notice of deficiency.

As detailed above, as of the date of this letter, the Company has not received from the Proponent any documentation relating to proof of the Proponent's ownership of shares of the Company's common stock. Consequently, the Proponent has not demonstrated eligibility under Rule 14a-8 to submit the Proposal. The Staff has consistently concurred with the exclusion of shareholder proposals when proponents have failed, following a timely and proper request by a company, to timely furnish evidence of eligibility to submit the shareholder proposal pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1). *See Home Depot Inc.* (avail. March 9, 2023); *Cisco Systems, Inc. (*avail. Aug. 6, 2021); *AT&T Inc. (Steiner)* (avail. Dec. 23, 2020); *Huntsman Corp.* (avail. Jan 16, 2020); *Exxon Mobil Corp.* (avail. Feb. 13, 2017); *Cisco Systems, Inc.* (avail. Jul. 11, 2011).

The Company satisfied its obligation under Rule 14a-8(f)(1) to timely notify the Proponent of the Ownership Deficiency by timely providing the Proponent with the Deficiency Notice, clearly identifying the deficiency and specifically setting forth the requirement that the Proponent include a written statement from the record holder of the shares of the Company's common stock beneficially owned by the Proponent. *See* Exhibit B. The Deficiency Notice also included copies of SLB 14D, SLB 14F, SLB 14G and SLB 14L. The Proponent failed to provide any documentary evidence of ownership of shares of the Company's common stock to cure the Ownership Deficiency, and has therefore not demonstrated eligibility under Rule 14a-8 to submit the Proposal.

Accordingly, we ask that the Staff concur that the Company may exclude the Proposal from the 2024 Proxy Materials under Rule 14a-8(b) and Rule 14a-8(f)(1).

II. The Proposal May Be Excluded Under Rule 14a-8(i)(2) because the Proposal Would Require the Company to Violate Delaware Law

Rule 14a-8(i)(2) permits a company to exclude a proposal if its implementation would cause the company to violate state, federal or foreign law applicable to the company. The Company is incorporated under the laws of the State of Delaware. The Proposal, if approved by stockholders, may cause the Company to violate Delaware law. As more fully explained in the legal opinion of Morris, Nichols, Arsht & Tunnell LLP (the "Delaware Legal Opinion") attached hereto as Exhibit D, the Proposal, if adopted, would require the board of directors of the Company (the "Board"), as currently constituted and in the future, to accept a holdover director's previously tendered resignation absent "compelling reasons" not to. The imposition of a "compelling reasons" standard for accepting director resignations is inconsistent with Delaware law, which imposes on directors a fiduciary duty to base their decisions on a good faith belief that such decisions are in the best interest of the corporation and its stockholders. The Proposal would require directors to accept another director's resignation, even when the directors believe, in good faith, that accepting the resignation would not be in the best the interests of the Company and its stockholders, unless the directors were to determine that other factors, beyond the best interests of the Company and its stockholders, present "compelling reasons" to reject the resignation. As explained in the Delaware Legal Opinion, under Delaware law, the Board may not adopt a bylaw that mandates a substantive decision on the part of the Board without regard to

the application of the directors' fiduciary duties. By limiting the Board's ability to reject a director's resignation in the exercise of its fiduciary duty, the Proposal would do precisely that.

The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(2) of proposals that would cause companies to violate state law by impermissibly infringing on the managerial authority of the Board and prevent directors from discharging their fiduciary duties to the company. For example, in *Bank of America Corp.* (Feb. 23, 2012), the Staff permitted exclusion of a proposal under Rule 14a-8(i)(2) that requested the company take action, including amending the bylaws and any other actions needed, to "minimize" the indemnification rights afforded to directors. In its response to the company's no-action request, the Staff stated that "implementation of the proposal would cause Bank of America to violate state law," where the supplied opinion of counsel had opined that the proposal violated Section 141(a) of the Delaware General Corporation Law (the "DGCL") by removing from the board its ability to determine whether (and to what extent) to provide indemnification to the company's directors. *See also Johnson & Johnson* (Feb. 16, 2012) (permitting exclusion of a proposal under Rule 14a-8(i)(2) that would have required adoption of a bylaw that would disqualify directors from service on the company's compensation committee if they received "no" or "withhold" votes in excess of 10% of the votes cast, where the supplied legal opinion opined that the proposal violated state law by interfering with the exclusive grant of authority given to the board of directors to appoint directors to committees of the board); *Gillette Company* (March 10, 2003) (permitting exclusion of a proposal seeking a board policy establishing procedures for implementing shareholder proposals that receive majority support, where the supplied legal opinion argued the proposal would force the board to implement shareholder proposals without considering their merit and that to do so would remove from the board the judgment required to satisfy its duties under Delaware law).

Section 141(a) of the DGCL provides that the business and affairs of a Delaware corporation are to be managed by the board of directors except as otherwise provided in the DGCL or in a company's certificate of incorporation. Because the Company's Charter does not provide for management of the Company by persons other than directors, the Board possesses the full power and authority to manage the business and affairs of the Company. The Delaware courts have held that a bylaw that purports to mandate a substantive decision on the part of the board of directors without regard to the application of the directors' fiduciary duties violates Section 141(a). *See, e.g.*, *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008) (holding that a proposed stockholder adopted bylaw that mandated that the board of directors reimburse a stockholder for its expenses in running a proxy contest to elect a minority of the members of the board of directors would violate Delaware law because it mandated reimbursement of proxy expenses even in circumstances where a proper application of fiduciary principles would preclude doing so).

The Proposal requests the adoption of a bylaw that, if implemented, would limit the Board's current and future ability to exercise its managerial power and concomitant fiduciary duties to the Company and its stockholders. As explained in the Delaware Legal Opinion, the decision whether to accept or reject a director resignation after a failed reelection vote presents fundamental governance issues that lay at the heart of management. The Proposal would eliminate the power of the Company's current and future directors to reject a director resignation

absent one or more "compelling reasons," even where the Board believes, in the good faith exercise of its fiduciary duties under Delaware law, that accepting the resignation would be contrary to the interests of the Company and its stockholders.

Imposing a "compelling reasons" standard restricts the Board's decision-making authority under the DGCL and the Charter with respect to conditional director resignations. By imposing such a standard, the Proposal impermissibly binds future directors on matters involving the management of the Company. The Board should consider and balance a number of factors in deciding whether to accept a resignation, including the underlying reasons for the director's failure to receive a majority vote for re-election, the tenure and qualifications of the director, the director's past and expected future contributions to the Board and the overall composition of the Board, including whether accepting the resignation would cause the Company to fail to meet the requirements of any law, rule or regulation applicable to the Company. The Proposal requests the adoption of a bylaw that would mandate current and future directors of the Company to make determinations based on a "compelling reasons" standard that has meaning only if it would require the directors to accept a resignation in circumstances where application of their fiduciary duties would cause them to decide otherwise.

The Proponent has not, in the Proposal or supporting statement, defined what constitutes a "compelling reason." Historically, Delaware courts have applied a "compelling" justification standard only in extreme cases where directors interfere with stockholder voting rights. The compelling justification standard is so onerous that it is virtually never satisfied. If a "compelling reasons" standard were imposed, the Board would be bound to accept resignations in most circumstances, contrary to Delaware case law holding that directors must use their "best judgment" on matters of board composition. As stated in the Delaware Legal Opinion, a "compelling reason" standard would impermissibly restrict the Board in deciding how to address a resignation and could require the Board to accept a resignation when their fiduciary duties require otherwise, which would violate Delaware law.

III. The Proposal may be Excluded Under Rule 14a-8(i)(6) because the Company Lacks the Power to Implement the Proposal

Rule 14a-8(i)(6) allows a company to exclude a proposal if the company would lack the power or authority to implement the proposal. As described above, the Proposal would, if implemented, cause the Company to violate Delaware law. The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(6) of proposals that would cause the company to violate the law of the jurisdiction of its incorporation. *See Arlington Asset Investment Corp.* (April 23, 2021) (permitting exclusion of a proposal that would violate Virginia law); *eBay Inc.* (April 1, 2020) (permitting exclusion of a proposal that would violate Delaware law); *Trans World Entertainment Inc.* (May 2, 2019) (permitting exclusion of a proposal that would violate New York law); *IDACORP, Inc.* (March 23, 2012) (permitting exclusion of a proposal that would violate Idaho law); *NiSource, Inc.* (March 22, 2010) (permitting exclusion of a proposal that would violate Indiana law); *Schering-Plough Corp.* (March 27, 2008) (permitting exclusion of a proposal that would violate New Jersey law); *AT&T Inc.* (Feb. 19, 2008) (permitting exclusion of a proposal that would violate Delaware law); *Noble Corp.* (Jan. 19, 2007) (permitting exclusion of a proposal that would violate Cayman Islands law).

CONCLUSION

For the foregoing reasons, we believe that the Proponent's Proposal may be omitted from the 2024 Proxy Materials and respectfully request that the Staff confirm that it will not recommend enforcement action if the Proponent's Proposal is excluded.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. If we can be of any further assistance in this matter, please do not hesitate to contact me at lyuba.goltser@weil.com or (212) 310-8048.

Sincerely,

Lyuba Goltser

Cc: Hilary Rapkin (WEX Inc.)
Andrew L. Schwarcz (WEX Inc.)
Joseph Byrne
David Minasian

Attachments

EXHIBIT A

NORTH ATLANTIC STATES REGIONAL COUNCIL OF CARPENTERS

United Brotherhood of Carpenters and Joiners of America

750 DORCHESTER AVENUE
BOSTON, MA 02125-1132

TELEPHONE (617) 268-3400
FAX (617) 268-0442

JOSEPH BYRNE
EXECUTIVE SECRETARY - TREASURER

SENT VIA OVERNIGHT USPS

December 11, 2023

Hilary Rapkin
Chief Legal Officer and
Corporate Secretary
WEX, Inc.
1 Hancock Street
Portland, ME 04101

Dear Ms. Rapkin:

I hereby submit the enclosed shareholder proposal ("Proposal") on behalf of the North Atlantic States Carpenters Pension Fund ("Fund"), for inclusion in the WEX, Inc. ("Company") proxy statement to be circulated in conjunction with the next annual meeting of shareholders. The Proposal relates to the issue of director resignations 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, State Street Bank and Trust Company, 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 David Minasian at [redacted] Mr. Minasian will be available to discuss the proposal on Tuesday, December 26, or Tuesday, January 9, 2024, from 1:00PM to 5:00PM (ET) either day or other mutually agreeable date and time. Please forward any correspondence related to the proposal to Mr. Minasian, North Atlantic States Regional Council, 29 Endicott Street, Worcester, MA 01610 or at the email address above.

Sincerely,

Joseph Bryne
Fund Trustee

cc. David Minasian
Edward J. Durkin

Enclosure

Director Election Resignation Bylaw Proposal

Resolved: That the shareholders of WEX, Inc. ("Company") hereby request that the board of directors take the necessary action to adopt a director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director's failure to receive the required shareholder majority vote support in an uncontested election. The proposed resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a "holdover" director, the resignation bylaw shall stipulate that should a "holdover" director fail to be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

Supporting Statement: The Proposal requests that the Board establish a director resignation bylaw to enhance director accountability. The Company has established in its bylaws a majority vote standard for use in an uncontested director election, an election in which the number of nominees equal the number of open board seats. Under applicable state corporate law, a director's term extends until his or her successor is elected and qualified, or until he or she resigns or is removed from office. Therefore, an incumbent director who fails to receive the required vote for election under a majority vote standard continues to serve as a "holdover" director until the next annual meeting. A Company governance policy currently addresses the continued status of an incumbent director who fails to be re-elected by requiring such director to tender his or her resignation for Board consideration.

The new director resignation bylaw will set a more demanding standard of review for addressing director resignations then that contained in the Company's resignation governance policy. The resignation bylaw will require the reviewing directors to articulate a compelling reason or reasons for not accepting a tendered resignation and allowing an unelected director to continue to serve as a "holdover" director. Importantly, if a director's resignation is not accepted and he or she continues as a "holdover" director but again fails to be elected at the next annual meeting of shareholders, that director's new tendered resignation will be automatically effective 30 days following the election vote certification. While providing the Board latitude to accept or not accept the initial resignation of an incumbent director that fails to receive majority vote support, the amended bylaw will establish the shareholder vote as the final word when a continuing "holdover" director is not re-elected. The Proposal's enhancement of the director resignation process will establish shareholder voting in director elections as a more consequential governance right.

EXHIBIT B

---------- Forwarded message ---------
From: **Andy Schwarcz** <[redacted]>
Date: Wed, Dec 20, 2023 at 4:03 PM
Subject: Shareholder Proposal
To: <[redacted]>

Mr. Minasian,

WEX Inc. is in receipt of the shareholder proposal submitted on behalf of the North Atlantic States Carpenters Pension Fund for inclusion in our proxy materials for the 2024 annual meeting of stockholders. The accompanying letter from John Byrne directed me to you to schedule a call to discuss the proposal for certain times on December 26, 2023 or January 9, 2024. I will reach out to schedule such a call once we are in receipt of the ownership verification information required by SEC Rule 14a-8, which we understand is being provided under separate cover. We intend to send a formal notice of deficiency under separate cover by tomorrow if we still have not received verification.

Sincerely,

WEX Inc.

Andy Schwarcz

Andrew L. "Andy" Schwarcz
Vice President, Securities and Corporate Governance, **WEX Inc.** **(NYSE: WEX)**
3102 West End Avenue, Suite 1150, Nashville, TN 37203
Phone [redacted]
Email: [redacted]

From:	Andy Schwarcz
To:	Descovich, Kaitlin; Goltser, Lyuba; Matthew Finkelstein; Timothy Bergeron; Sara Trickett
Subject:	Fwd: Copy of Notice of Deficiency
Date:	Friday, December 22, 2023 10:42:15 AM
Attachments:	Notice of Deficiency_December 21 2023.pdf Exhibit A - to Notice of Deficiency.pdf

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FYI

Andrew L. "Andy" Schwarcz
Vice President, Securities and Corporate Governance, **WEX Inc.** **(NYSE: WEX)**
3102 West End Avenue, Suite 1150, Nashville, TN 37203
Phone [redacted]
Email: [redacted]

---------- Forwarded message ---------
From: **David Minasian** [redacted]>
Date: Fri, Dec 22, 2023 at 6:21 AM
Subject: RE: Copy of Notice of Deficiency
To: Andy Schwarcz [redacted]>

Andy,

I wanted to acknowledge receipt of the email and letter. I have forwarded a copy to Ed Durkin and have CC'd him on the email as well.

Ed Durkin [redacted]

Thank you,

David

From: Andy Schwarcz <[redacted]>
Sent: Thursday, December 21, 2023 3:26 PM
To: David Minasian <[redacted]>
Subject: Copy of Notice of Deficiency

Mr. Minasian.

As per my email of yesterday and given the fact that we have not yet received verification of the North Atlantic States Carpenters Pension Fund's ("Fund) holdings in WEX Inc., we have sent today, via FedEx for delivery tomorrow (Friday the 22nd), a Notice of Deficiency to Joseph Byrne, the Fund Trustee who sent the proposal on behalf of the Fund.

Attached to this email please find a copy of such Notice and the corresponding Exhibit. I am not in possession of the email address of Edward Durkin, who was copied on your original email. Would you please forward me his email address so that I can email him a copy of the Notice of Deficiency as well.

Thank you for your attention to this matter.

WEX Inc.

Andy Schwarcz

Andrew L. "Andy" Schwarcz

Vice President, Securities and Corporate Governance, **WEX Inc.** **(NYSE: WEX)**

3102 West End Avenue, Suite 1150, Nashville, TN 37203

Phone [redacted]

Email: [redacted]

WEX
1 Hancock Street
Portland, Maine
04101

December 21, 2023

VIA FEDERAL EXPRESS
Joseph Byrne
750 Dorchester Avenue
Boston, MA 02125-1132

Re: Notice of Deficiency

Dear Mr. Byrne,

WEX Inc. ("WEX" or the "Company") received your letter and the shareholder proposal (the "Proposal") submitted on behalf of the North Atlantic States Carpenters Pension Fund (the "Fund") on December 12, 2023 for inclusion in the Company's proxy materials for its 2024 Annual Meeting of Stockholders (the "2024 Annual Meeting") pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

The letter accompanying the Proposal indicated that State Street Bank and Trust Company would provide verification of the Fund's ownership of WEX securities, as required by the proxy rules of the U.S. Securities and Exchange Commission (the "SEC"). To date, we have not received such verification and, based on our review of the information in your letter, our records, and regulatory materials, we are unable to conclude that the Fund has held the requisite amount of WEX securities for the requisite amount of time, as required by Rule 14a-8. Therefore, the Proposal contains a procedural deficiency, which SEC regulations require us to bring to the Fund's attention. Unless this deficiency can be remedied with confirming documentation in the proper time frame, as discussed below, the Fund will not be eligible to submit the Proposal for inclusion in our proxy materials for the 2024 Annual Meeting.

The Fund may remedy this deficiency by providing a written statement from the record holder of its shares (usually a bank or broker) and a participant in the Depository Trust Company (DTC) verifying that, at the time the Proposal was submitted, the Fund had continuously owned (i) at least $2,000 in market value of WEX's securities entitled to vote on the proposal for at least three years; or (ii) at least $15,000 in market value of WEX's securities entitled to vote on the proposal for at least two years; or (iii) at least $25,000 in market value of WEX's securities entitled to vote on the proposal for at least one year. For information regarding the acceptable methods of proving the Fund's continuous ownership of the minimum number of WEX securities, please see Exchange Act Rule 14a-8(b)(2) in Exhibit A. For reference, the SEC's Staff Legal Bulletin Nos. 14, 14D, 14F, 14G and 14L provide additional guidance with respect to the standard for proof of ownership and are also included in Exhibit A hereto.

A response on the Fund's behalf may be directed to my attention at andy.schwarcz@wexinc.com. The SEC rules require that the documentation be postmarked or transmitted electronically to us no later than 14 calendar days from the date you receive this letter. Once we receive the additional documentation relating to the procedural deficiencies noted above, we will be in a position to determine whether the Proposal is procedurally eligible for inclusion in the proxy materials for the 2024 Annual Meeting. The failure to correct the deficiencies within this timeframe will provide the Company with a basis to exclude the Proposal from the Company's proxy materials for the 2024 Annual Meeting. We also reserve the right to submit a no-action request to the staff of the SEC, as appropriate, with respect to this Proposal for any of the foregoing reasons stated in this notice or for any other reason.

If you have any questions with respect to the foregoing, please contact me at the above noted email address.

Sincerely,

Andy Schwarcz
Vice President, Securities and
Corporate Governance
WEX Inc.

CC:
Hilary Rapkin
David Minasian ([redacted])
Edward Durkin

Enclosures

Exhibit A
(see attached)

EXHIBIT C

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION

OF

WEX INC.

WEX Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware, does hereby certify that the name of the corporation is WEX Inc. and the original certificate of incorporation of the corporation was filed with the Secretary of State of the State of Delaware on February 16, 2005 under the name Wright Express Corporation. This Amended and Restated Certificate of Incorporation, having been duly adopted in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware (the "DGCL"), restates, integrates and amends the certificate of incorporation of the Corporation as follows:

ARTICLE I

The name of the Corporation is WEX Inc.

ARTICLE II

The address of the registered office of the Corporation in the State of Delaware is 2711 Centerville Road, Suite 400, in the City of Wilmington, County of New Castle. The name of its registered agent at that address is CORPORATION SERVICE COMPANY.

ARTICLE III

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the DGCL.

ARTICLE IV

(A) Authorized Capital Stock. The total number of shares of stock which the Corporation shall have authority to issue is 185,000,000 shares of capital stock, consisting of (i) 175,000,000 shares of common stock, par value $0.01 per share (the "Common Stock") and (ii) 10,000,000 shares of preferred stock, par value $0.01 per share (the "Preferred Stock").

(B) Common Stock. The shares of Common Stock of the Corporation shall be of one and the same class. Except as may be limited by Article X hereof, the holders of Common stock shall have one vote per share of Common Stock on all matters on which holders of Common Stock are entitled to vote.

(C) Preferred Stock. The Board of Directors is hereby expressly authorized to provide for the issuance of all or any shares of the Preferred Stock in one or more classes or series, and to fix for each such class or series such voting powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special rights and such qualifications, limitations or restrictions thereof, as shall be stated and expressed in the resolution or resolutions adopted by the Board of Directors providing for the issuance of such class or series, including, without limitation, the authority to provide that any such class or series may be (i) subject to redemption at such time or times and at such price or prices; (ii) entitled to receive dividends (which may be cumulative or non-cumulative) at such rates, on such conditions, and at such times, and payable in preference to, or in such relation to, the dividends payable on any other class or classes or any other series; (iii) entitled to such rights upon the dissolution of, or upon any distribution of the assets of, the Corporation; or (iv) convertible into, or exchangeable for, shares of any other class or classes of stock, or of any other series of the same or any other class or classes of stock, of the Corporation at such price or prices or at such rates of exchange and with such adjustments; all as may be stated in such resolution or resolutions.

(D) Power to Sell and Purchase Shares. Subject to the requirements of applicable law, the Corporation shall have the power to issue and sell all or any part of any shares of any class of stock herein or hereafter authorized to such persons, and for such consideration, as the Board of Directors shall from time to time, in its discretion, determine, whether or not greater consideration could be received upon the issue or sale of the same number of shares of another class, and as otherwise permitted by law. Subject to the requirements of applicable law, the Corporation shall have the power to purchase any shares of any class of stock herein or hereafter authorized from such persons, and for such consideration, as the Board of Directors shall from time to time, in its discretion, determine, whether or not less consideration could be paid upon the purchase of the same number of shares of another class, and as otherwise permitted by law.

ARTICLE V

The following provisions are inserted for the management of the business and the conduct of the affairs of the Corporation, and for further definition, limitation and regulation of the powers of the Corporation and of its directors and stockholders:

(A) The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors.

(B) The Board of Directors shall consist of one or more members, the exact number of which shall be determined in the manner set forth in the By-Laws.

(C) Until the election of directors at the annual meeting scheduled to be held in 2024, the Board of Directors shall be divided into classes with directors in each class having the term of office specified in this Article V(C). The term of the initial Class I directors shall terminate at the election of directors at the 2006 annual meeting; the term of the initial Class II directors shall terminate at the election of directors at the 2007 annual meeting; and the term of the initial Class III directors shall terminate at the election of directors at the 2008 annual meeting. At each succeeding annual meeting of stockholders beginning in 2006, successors to the class of directors whose term expires at that annual meeting shall be elected for a three-year term. Notwithstanding the foregoing, commencing with the election of directors at the annual meeting scheduled to be held in 2022, the successor of each director whose term expires at such meeting shall be elected for a term expiring at the annual meeting scheduled to be held in 2023; for the election of directors at the annual meeting scheduled to be held in 2023, the successor of each director whose term expires at such meeting shall be elected for a term expiring at the annual meeting scheduled to be held in 2024; and for the election of directors at the annual meeting scheduled to be held in 2024, each director shall be elected for a term expiring at the next succeeding annual meeting. Commencing with the election of directors at the annual meeting scheduled to be held in 2024 and for the election of directors at each annual meeting thereafter, the classification of the Board of Directors shall cease, and directors shall thereupon be elected for a term expiring at the next annual meeting of stockholders. Until the election of directors at the annual meeting scheduled to be held in 2024, if the authorized number of directors is increased or decreased, any newly created or eliminated directorships resulting from such increase or decrease shall be apportioned by the Board of Directors among the classes of directors, but in no case will a decrease in the authorized number of directors shorten the term of any incumbent director.

(D) The term of each director shall continue until his or her successor shall be elected and shall qualify, subject, however, to prior death, resignation, retirement, disqualification or removal from office.

(E) Subject to the terms of any one or more classes or series of Preferred Stock, any newly created directorship that results from an increase in the authorized number of directors shall be filled by a majority of the Board of Directors then in office, provided that a quorum is present, and any vacancy occurring on the Board of Directors shall be filled by a majority of the Board of Directors then in office, even if less than a quorum, or by a sole remaining director. Until the election of directors at the annual meeting scheduled to be held in 2024, a director elected to fill a newly created directorship resulting from an increase in the authorized number of directors shall hold office until the next election of the class for which such director shall have been chosen. Any director elected to fill a vacancy shall be elected for the unexpired term of his or her predecessor. Subject to the rights, if any, of the holders of shares of Preferred Stock then outstanding, until the election of directors at the annual meeting scheduled to be held in 2024, any or all of the directors of the Corporation may be removed from office at any time, but only for cause and only by

the affirmative vote of the holders of at least 60% of the voting power of the Corporation's then issued and outstanding capital stock entitled to vote at the election of directors. Thereafter, any director of the Corporation may be removed from office at any time, with or without cause, by the affirmative vote of the holders of a majority of the shares of capital stock then entitled to vote at an election of directors. Notwithstanding the foregoing, whenever the holders of any one or more classes or series of Preferred Stock issued by the Corporation shall have the right, voting separately by class or series, to elect directors at an annual or special meeting of stockholders, the election, term of office, filling of vacancies and other features of such directorships shall be governed by the terms of this Certificate of Incorporation applicable thereto, and such directors so elected shall not be divided into classes pursuant to this Article V unless expressly provided by such terms.

(F) In addition to the powers and authority hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the Corporation, subject, nevertheless, to the provisions of the DGCL, this Certificate of Incorporation, and any By-Laws adopted by the stockholders; provided, however, that no By-Laws hereafter adopted by the stockholders shall invalidate any prior act of the directors which would have been valid if such By-Laws had not been adopted.

ARTICLE VI

No director shall be personally liable to the Corporation or any of its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the DGCL as the same exists or may hereafter be amended. If the DGCL is amended hereafter to authorize the further elimination or limitation of the liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent authorized by the DGCL, as so amended. Any repeal or modification of this Article VI shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification with respect to acts or omissions occurring prior to such repeal or modification.

ARTICLE VII

The Corporation shall indemnify its directors and officers to the fullest extent authorized or permitted by law, as now or hereafter in effect, and such right to indemnification shall continue as to a person who has ceased to be a director or officer of the Corporation and shall inure to the benefit of his or her heirs, executors and personal and legal representatives; provided, however, that, except for proceedings to enforce rights to indemnification, the Corporation shall not be obligated to indemnify any director or officer (or his or her heirs, executors or personal or legal representatives) in connection with a proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of Directors. The right to indemnification conferred by this Article VII shall include the right to be paid by the Corporation the expenses incurred in defending or otherwise participating in any proceeding in advance of its final disposition upon receipt by the Corporation of an undertaking by or on behalf of the director or officer receiving advancement to repay the amount advanced if it shall ultimately be determined that such person is not entitled to be indemnified by the Corporation under this Article VII.

The Corporation may, to the extent authorized from time to time by the Board of Directors, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Article VII to directors and officers of the Corporation.

The rights to indemnification and to the advancement of expenses conferred in this Article VII shall not be exclusive of any other right which any person may have or hereafter acquire under this Certificate of Incorporation, the By-Laws of the Corporation, any statute, agreement, vote of stockholders or disinterested directors or otherwise.

Any repeal or modification of this Article VII shall not adversely affect any rights to indemnification and to the advancement of expenses of a director or officer of the Corporation existing at the time of such repeal or modification with respect to any acts or omissions occurring prior to such repeal or modification.

ARTICLE VIII

Any action required or permitted to be taken by the stockholders of the Corporation after February 22, 2005 must be effected at a duly called annual or special meeting of stockholders of the Corporation, and the ability of the stockholders to consent in writing to the taking of any action is hereby specifically denied.

ARTICLE IX

(A) Meetings of stockholders may be held within or without the State of Delaware, as the By-Laws may provide. The books of the Corporation may be kept (subject to any provision contained in the DGCL) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the By-Laws of the Corporation.

(B) Unless otherwise required by law, Special Meetings of Stockholders, for any purpose or purposes, may be called by either (i) the Non-Executive Chairman of the Board of Directors or the Chairman of the Board of Directors, if there be one, (ii) the President or (iii) the Board of Directors. The ability of the stockholders to call a Special Meeting of Stockholders after February 22, 2005 is hereby specifically denied.

ARTICLE X

(A) If, prior to the close of business on the business day immediately preceding the date of any stockholders' meeting at which any Control Holder, as of the Record Date for such meeting, would be entitled (without regard to this Article X) to vote with respect to any matter, any such Control Holder has not provided the Corporation with written evidence satisfactory to the Corporation, in its sole discretion, that such Control Holder has obtained all Approval(s) that may be required by statute, regulation, or interpretation of the appropriate banking regulatory agency, or that such approvals are not so required, or, if prior to such meeting the Utah Department of Financial Institutions ("UDFI") or the Federal Deposit Insurance Corporation ("FDIC") shall have so requested, none of the shares of capital stock over which such Control Holder exercises voting power or control shall be deemed to be present at such meeting, including, without limitation, for purposes of determining whether or not a quorum exists, and none of such shares of capital stock shall be entitled to vote at such meeting on any matter. Every reference in this Certificate of Incorporation to a majority or other proportion of stock or voting stock (or the holders thereof) for any purpose, shall be deemed to refer to such majority or other proportion of the stock or voting stock (or the holders thereof) after giving effect to this Article X.

(B) The Board of Directors shall have the right to demand that any person it reasonably believes may be a Control Holder, supply the Corporation with complete information as to (i) all shares beneficially owned by such person, (ii) any correspondence or discussions between such person (or any person acting on such person's behalf) and the UDFI and/or the FDIC pertaining to such person's ownership of securities of the Corporation, or (iii) any other factual matter relating to the applicability of this Article X, as may be reasonably requested by the Board of Directors within 10 days after making such demand.

(C) "Control Holder" means any Federal Control Holder and/or any Utah Control Holder.

(D) "Federal Control Holder" means, as of any date of determination, any natural person or entity that beneficially owns 10% or more of any class of the Corporation's voting securities outstanding as of such date (determined, with respect to such natural person or entity, without regard to this Article X) outstanding as of such date, provided, that if two or more classes of securities vote together on all matters (except with respect to differences in voting rights that arise by operation of law or by virtue of a default), such classes of securities shall be deemed to be one class of securities for purposes of this paragraph, and a holder's beneficial ownership percentage shall be determined with respect to such aggregate class of securities.

(E) "Record Date" means, with respect to any vote of stockholders of the Corporation, the date fixed for the determination of those stockholders entitled to vote.

(F) "Approval(s)" means (i) in the case of any Utah Control Holder, the approval or consent of the UDFI for the beneficial ownership of the Corporation's voting securities by such Utah Control Holder, in an amount not less than the amount beneficially owned by such Utah Control Holder as of the applicable Record Date, and/or (ii) in the case of any Federal Control Holder, the approval or consent of the FDIC for the beneficial ownership of the

Corporation's voting securities by such Federal Control Holder, in an amount not less than the amount beneficially owned by such Federal Control Holder as of the applicable Record Date.

(G) "Utah Control Holder" means, as of any date of determination, any natural person that beneficially owns 20% or more, or any entity that beneficially owns 10% or more, of any class of the Corporation's voting securities (determined, with respect to such natural person or entity, without regard to this Article X) outstanding as of such date, provided, that if two or more classes of securities vote together on all matters (except with respect to differences in voting rights that arise by operation of law or by virtue of a default), such classes of securities shall be deemed to be one class of securities for purposes of this paragraph, and a holder's beneficial ownership percentage shall be determined with respect to such aggregate class of securities.

(H) For purposes of this Article X, beneficial ownership shall be determined in accordance with Rule 13d-3 promulgated under the Securities Exchange Act of 1934, as amended.

(I) Any percentage set forth in Article X(D) and Article X (G) shall be automatically adjusted if and to the extent that (i) the definition of "Control" set forth in Section 7-1-103(5) of the Utah Financial Institutions Act, and/or (ii) the presumption of control set forth in 12 CFR 303.82(B)(2), is amended after the date hereof to provide for a different percentage.

(J) This Article X shall not affect the validity of any vote of the stockholders that is otherwise valid and the Corporation shall not be deemed to have the authority under this Article X to alter or amend the results of any vote that has otherwise been validly taken and certified by the inspector of elections. Any determination made by a majority of the Board of Directors pursuant to this Article X in good faith and on the basis of such information as was actually known by the Board of Directors at such time shall be conclusive and binding upon the Corporation and the stockholders, including any Control Holder.

(K) If (x) neither the Corporation nor any subsidiary thereof is subject to regulation by either the UDFI or the FDIC, or (y) the Board of Directors so determines by resolution and there is no pending request from the UDFI or the FDIC to deny any stockholder(s) the right to vote at the time such resolution is adopted, the provisions of this Article X shall be of no further force and effect.

ARTICLE XI

In furtherance and not in limitation of the powers conferred upon it by the laws of the State of Delaware, the Board of Directors shall have the power to adopt, amend, alter or repeal the Corporation's By-Laws. The affirmative vote of at least a majority of the entire Board of Directors shall be required to adopt, amend, alter, change or repeal the Corporation's By-Laws. The Corporation's By-Laws also may be adopted, amended, altered, changed or repealed by the affirmative vote of the holders of at least 60% of the voting power of the shares entitled to vote at an election of directors.

ARTICLE XII

The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation in the manner now or hereafter prescribed in this Certificate of Incorporation, the Corporation's By-Laws or the DGCL, and all rights herein conferred upon stockholders are granted subject to such reservation; provided, however, that, notwithstanding any other provision of this Certificate of Incorporation (and in addition to any other vote that may be required by law), the affirmative vote of the holders of at least 60% of the voting power of the shares entitled to vote at an election of directors shall be required to amend, alter, change or repeal, or to
adopt any provision as part of this Certificate of Incorporation inconsistent with the purpose and intent of Articles V, VII, IX and X of this Certificate of Incorporation or this Article XII.

IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation to be executed on its behalf this 9th day of June, 2021.

WEX INC.

By: /s/ Hilary Rapkin

Name: Hilary Rapkin

Title: Chief Legal Officer and Corporate Secretary

EXHIBIT D

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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January 30, 2024

WEX Inc.
One Hancock Street
Portland, Maine 04101

Ladies and Gentlemen:

This letter confirms our advice with respect to a stockholder proposal (the "**Proposal**") submitted by the North Atlantic States Carpenters Pension Fund (the "**Proponent**") to WEX Inc., a Delaware corporation (the "**Company**"), for inclusion in the Company's proxy materials for its next annual meeting of stockholders. For the reasons set forth below, to the extent the Proposal, if implemented, requires the Board of Directors of the Company (the "**Board**") to accept a resignation in circumstances where doing so would violate its fiduciary duties, the Proposal, in our opinion, would violate Delaware law.

The Proposal

The Proponent urges the Board to adopt a new resignation bylaw that requires the Board to make an affirmative determination whether to accept the resignation of a director who has not been reelected by a majority vote of stockholders, yet significantly restricts the Board's discretion in doing so. The Proposal would require the Board to accept a resignation unless it has a "compelling reason" not to do so, and, if the director fails to be elected at the next annual meeting, then the resignation would be automatically effective without any Board action following that second annual meeting:[1]

> **Resolved**: That the shareholders of WEX, Inc. ("Company") hereby request that the board of directors take the necessary action to adopt a director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director's failure to receive the required shareholder majority vote support in an uncontested election. The proposed resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a "holdover" director, the resignation bylaw shall stipulate that should a "holdover" director fail to be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective

[1] For the reasons explained in the final footnote of this letter, we need not address the resignation that is effective in connection with a failed election at the second annual meeting of stockholders.

> 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

We understand that the Company already has majority voting for uncontested director elections. As a condition to being nominated by the Board for reelection, each incumbent director delivers an irrevocable resignation that will become effective if: (i) he or she is not reelected by a majority vote at a future uncontested election and (ii) the Board accepts the resignation. The Board may determine not to accept a resignation for any reason under its current policy.

Delaware Law on Director Resignations for Majority Voting

The Delaware General Corporation Law (the "**DGCL**") permits a director to make a future effective resignation irrevocable in connection with majority voting. Section 141(b) of the DGCL provides, "[a] resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable." This provision was added to the DGCL in 2006 to clarify that a director will not violate the DGCL or public policy by irrevocably committing, today, to resign at a future time where the circumstances surrounding his or her resignation are uncertain. The only requirement is that the resignation result from the failure to be reelected.

The validity of the Proposal does not end with Section 141(b), however. While Section 141(b) permits *an individual director* wide latitude to tender an irrevocable resignation with no conditions other than a failed reelection, Section 141(b) is silent on *the Board's* authority and duties when the directors decide to adopt the majority voting scheme. The Proposal applies to all directors and requires Board action to enact the majority voting scheme. Specifically, the Proposal urges the Board to adopt a bylaw that requires directors to tender an irrevocable resignation, and the Board must solicit irrevocable resignations from each director and affirmatively accept the resignation unless it has a "compelling reason" not to.

Delaware Law Invalidating Intra-Governance Arrangements that Limit Future Directors

The Board's actions are governed by Section 141(a) of the DGCL and the case law interpreting it. Under Section 141(a), "[t]he business and affairs of every [Delaware] corporation . . . shall be managed by or under the direction of a board of directors, except as may be otherwise provided in [the DGCL] or in its certificate of incorporation."[2] The Delaware Supreme Court has held that a board cannot adopt an intra-governance restriction that would prevent a future board from "completely discharging its fundamental management duties to the corporation."[3] Nor can a

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[2] The Proposal does not seek any amendment to the Company's Certificate of Incorporation, so that part of Section 141(a) of the DGCL and related Delaware case law does not apply to the Proposal.

[3] *Quickturn Design Sys. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) (invalidating a "delayed redemption provision" that, under certain circumstances, would have prevented newly elected directors from redeeming a stockholder rights plan for a six-month period).

governing document other than the certificate of incorporation "limit in a substantial way the freedom of . . . directors' decisions on matters of management policy."[4]

Decisions regarding the composition of the board involve "fundamental" management decisions at the heart of management, and the Court has invalidated intra-governance provisions that prevent future directors from making decisions on the future composition of the board. In *Chapin v. Benwood Foundation, Inc.*, the Delaware Court of Chancery invalidated a multi-year agreement among four directors of a corporation, pursuant to which each director named a desired nominee to succeed him as a director and all of the other directors agreed to vote in favor of the successor no matter how circumstances might change in the future.[5] The Court held the agreement "should be controlled by the long-standing rule that directors of a Delaware corporation may not delegate to others those duties which lay at the heart of the management of the corporation."[6] Decisions on the future composition of the board are at the heart of management:

> [Directors owe] a duty to use their best judgment in filling a vacancy on the board of [directors] as of the time the need arises. To commit themselves in advance—perhaps years in advance—to fill a particular board vacancy with a certain named person, regardless of the circumstances that may exist at the time that the vacancy occurs, is not the type of agreement that this Court should enforce . . . .[7]

The Delaware Supreme Court later relied on Section 141(a) of the DGCL to invalidate an attempt by a board of directors to unilaterally restrict a future board's response to an offer to acquire the corporation. In *Quickturn Design Systems, Inc.*, a bidder made a hostile tender offer to acquire the corporation's stock. The target corporation had in place a stockholder rights plan that would effectively prohibit the bidder from acquiring more than 15% of the stock. The board of directors amended the rights plan to add a novel "Delayed Redemption Provision," which prohibited newly elected directors from terminating the rights plan for a six-month period following their election if the purpose of termination was to facilitate a transaction with any bidder who supported the election of those directors to the board. The Court invalidated the Delayed Redemption Provision:

> The Delayed Redemption Provision . . . would prevent a newly elected board of directors from completely discharging its fundamental management duties to the

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4 *Id.* at 1292 (quoting *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956) (invalidating a contract provision that required directors to vote in favor of actions supported by seven of fifteen directors and to abide by the decision of an arbitrator in the event of certain board deadlocks), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957)).

5 402 A.2d 1205 (1979). The corporation at issue was a non-profit membership corporation that referred to its directors as "trustees," but the Court recognized that they were the equivalent of directors for purposes of the DGCL.

6 *Id.* at 1210.

7 *Id.* at 1211.

> corporation and its stockholders for six months. While the Delayed Redemption Provision limits the board of directors' authority in only one respect, . . . it nonetheless restricts the board's power in an area of fundamental importance to the shareholders—negotiating a possible sale of the corporation. Therefore, we hold that the Delayed Redemption Provision is invalid under Section 141(a), which confers upon any newly elected board of directors full power to manage and direct the business and affairs of a Delaware corporation.[8]

The decision whether to accept or reject a director resignation after a failed reelection vote presents the same fundamental governance issues that lay at the heart of management. There are instances where a board may believe it should reject director resignations to avoid harm to the corporation.[9] For example:

- If a majority of the directors are not reelected at a single stockholder meeting, the acceptance of the resignations may have significant change of control and continuity of management implications.

- A director with particular qualifications may need to remain on the Board, notwithstanding a failed reelection vote, to maintain compliance with audit committee or other stock exchange listing requirements.

- More broadly, a director who was not reelected may bring other unique qualifications and experience to the Board that are highly beneficial to the corporation.

In addition, the Board is not necessarily in a position to fully anticipate, today, what harm might befall the corporation in connection with a failed election of one or more directors at a future stockholder meeting where the circumstances facing the corporation and the composition of the Board could have changed significantly.

The Problems with a Compelling Reason Standard

In our view, it would be impermissible for the Board to be required to limit its discretion regarding these matters by requiring future directors to accept a resignation absent a "compelling reason" for rejecting a director's resignation. The Proposal does not define what

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8 721 A.2d at 1291-92.

9 As noted above, a limitation on board discretion might be permissible if it is included in the certificate of incorporation, but the Proponent has not asked the board and stockholders to undertake the process for approving an amendment to the certificate. Nor are the restrictions being proposed in connection with a corporate or commercial transaction. A limitation on board discretion may be permissible if it is imposed in a commercial agreement or arrangement, such as a limitation on board discretion granted in exchange for bargained-for consideration given to the Company or to induce actions that benefit the Company or its stockholders. The restrictions on the Board urged by the Proponent are instead intra-governance measures (much like the succession agreement in *Chapin* and the rights plan in *Quickturn*) that are subject to the provisions of Section 141(a) of the DGCL.

constitutes a "compelling reason," so we believe the Board would likely need to look to the line of cases where the Delaware courts have applied a "compelling justification" standard of review to determine whether directors have complied with their fiduciary duties.[10] The Delaware courts historically have applied this test only in circumstances involving egregious director behavior, such as where directors have acted with the primary purpose of interfering with a contested director election or a contest for control of the corporation.[11]

The compelling justification test is an "onerous" burden for directors to satisfy.[12] It applies in instances where directors are attempting to interfere with stockholder voting rights such that the deference often afforded to good faith, business judgments by directors is not applicable. Under the case law assessing whether a compelling justification exists, "the notion that directors know better than the stockholders who should run the company" is not a compelling justification.[13] The "know better" defense "standing alone, is no justification at all for the board to interfere with a contest for corporate control."[14]

The compelling justification test is so onerous that the Delaware Supreme Court recently retired the concept in the context of a corporate election or a stockholder vote involving corporate control.[15] The Court observed that the compelling justification standard "turned out to be unworkable in practice. Once the court required a compelling justification to justify the board's action, the outcome was, for the most part, preordained."[16] Specifically, as the Court of Chancery observed, "[i]n reality, invocation of the [compelling justification] standard of review usually signals that the court will invalidate the board action under examination."[17] The Delaware Supreme Court replaced the compelling justification test in this context with a more refined application of a reasonableness, or proportionality, test. Under the application of the reasonableness test, "[t]o guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is properly motivated and has

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[10] *See Winston v. Mandor*, 710 A.2d 835, 843 (Del. Ch. 1997) (utilizing case law and a section of the DGCL to interpret a section of a certificate of designation); *see also City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 234 (Del. Ch. 2014) (utilizing case law and relevant DGCL statutes to determine the validity of a bylaw provision); *H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, 1997 WL 305824, at *13-15 (Del. Ch. June 3, 1997) (utilizing case law to assist in the interpretation and construction of a bylaw provision and statute).

[11] *See MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127-29 (Del. 2003); *see also Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659-63 (Del. Ch. 1988).

[12] *See Coster v. UIP Cos.*, 300 A.3d 656, 667-73 (Del. 2023).

[13] *Id.* at 670 (quoting *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 811 (Del. Ch. 2007)).

[14] *Id.*

[15] *See In re Columbia Pipeline Grp.*, 299 A.3d 393, 459 (Del. Ch. 2023) (citing *Coster*, 300 A.3d at 672-73).

[16] *Coster*, 300 A.3d at 696.

[17] *Id.* at 696 n.69 (quoting *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000)).

identified a legitimate threat [to the corporation] must tailor its response to only what is necessary to counter that threat."[18]

We believe a bylaw, combined with a conditional resignation, can include a role for the board to accept or reject a resignation. But in our view, that role, once granted, cannot be confined to an undefined, unqualified reference to a "compelling reason" test that limits the Board's ability to act in the manner that it believes is in the best interests of the corporation and its stockholders in all but the narrowest of circumstances. Applying an undefined compelling justification or reason test to resignations would mean, in most circumstances, it would be a "preordained" conclusion that the Board must accept the resignation. This result is the exact opposite of the Court of Chancery's admonition in *Chapin* that the directors must use their "best judgment" on matters of board composition when and as the need arises in the future.

The compelling justification test has been applied by the Delaware courts when directors have engaged in inequitable conduct with the primary purpose of interfering with stockholder voting rights. For that reason, it is an onerous standard. But no such interference would occur in most majority voting elections. The stockholders will have the chance to freely cast their votes for or against nominees, and the Board must account for the stockholders' views in determining whether to accept the resignation. In our view, choosing a standard that has been associated with wrongful or inequitable conduct by directors to govern future board action would impermissibly restrict the Board's exercise of its fiduciary duties and managerial function.[19]

* * *

[18] *Id.* at 672. Of course, the retirement of the compelling justification test does not mean that the Supreme Court disavowed the outcomes of the cases invalidating director actions, and the concerns expressed by that test are still monitored closely by the Delaware courts under the reasonableness test. *See In re AMC Ent. Holdings, Inc. Stockholder Litig.*, 2023 WL 5165606, at *29 (Del. Ch. Aug. 11, 2023) ("Outside the director election or corporate control setting, I read the weight of authority to call for a reasonableness analysis and to permit the 'fit' between the means and ends to be looser than in the corporate control setting.").

[19] Our analysis would likely be different if the reference to a "compelling reason" were merely in a board policy. A board policy merely references a current statement of intention as to how directors will approach a decision. The Proposal, in contrast, would anchor the "compelling reason" standard in the irrevocable resignation and bylaws themselves, creating a level of binding commitment that is problematic outside a certificate of incorporation under Section 141(a) of the DGCL. Similarly, our analysis may be different if a board of directors developed an understanding of what would constitute a "compelling reason" to reject a resignation or if there is other extrinsic evidence or course of dealing to give that term meaning. But here, the Proponent asks the Board to adopt the "compelling reason" standard without providing, in the Proposal or supporting statement, any context for how the directors should apply such standard in practice. Absent context or interpretive guides, the Proposal could be read to require the Board to apply the compelling justification test as it has been applied under Delaware case law, which is problematic for the reasons described above.

For these reasons, we believe a "compelling reason" standard could, in certain circumstances, require the Board to accept a resignation when their fiduciary duties require otherwise.[20] In our opinion, in those circumstances, the Proposal, if implemented, would violate Delaware law.

Very truly yours,

Morris, Nichols, Arsht & Tunnell LLP

[20] We need not express an opinion on the part of the Proposal that contemplates an automatic resignation if a director suffers a failed election at a second annual meeting of stockholders. This future effective resignation does not contemplate director action. Directors would also have a year from the first failed election to take alternative measures to safeguard the corporation from harm. Finally, this part of the Proposal is not cast in the problematic "compelling reason" rubric.