CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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February 4, 2015

The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Announcement regarding application of Rule 14a-8(i)(9) during the current proxy season

Dear Chair White:

The U.S. Chamber of Commerce ("Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.[1] To achieve this objective it is an important priority of the CCMC to advance strong corporate governance structures for capital markets to fully function in a 21st century economy.

We are writing to express our significant concern regarding the announcement on January 16, 2015, that the staff in the Division of Corporation Finance will express no views on the application of Rule 14a-8(i)(9) on any shareholder proposal during the 2015 proxy season. This announcement, a contradictory departure from a decision made just weeks earlier, benefits neither issuers nor investors and introduces an additional layer of uncertainty into an already complicated set of rules. The CCMC believes this reversal underscores why corporate governance policies must provide certainty for *all* stakeholders, not just to advance the goals of a small minority of special interest activists.

[1] The Chamber is the world's largest business federation representing the interests of over three million companies of every size, sector, and region.

Though the no-action letter process has room for improvement[2], it provides issuers with a reasonable assurance that exclusion of a shareholder proposal will not lead to an SEC enforcement action. Conversely, denial of no-action relief usually results in inclusion of the proposal in the issuer's proxy statement without the need for judicial review.

The January 16 announcement places many issuers in an untenable position, and presents them with a series of questions for which there may be no good answers. For those issuers wishing to present their own alternative proposal to shareholders for consideration, do they exclude a shareholder proposal in favor of their own and face the heightened risk of litigation with the proponent or the Commission? Do they risk shareholder confusion by including both their own proposal and a competing one from a proponent? Do they incur the added expense and distraction to management of seeking declaratory relief in federal district court? Are shareholders deprived of their right to include a proposal that is omitted because of the absence of SEC action? Far from encouraging private ordering, the recent announcement will only serve to stymie it.

Furthermore, the January 16 announcement adds an additional layer of uncertainty for issuers following a decision last year by the United States District Court for Delaware to reject an SEC staff interpretation of Rule 14a-8(i)(7), commonly known as the "ordinary business exclusion."[3] The Chamber remains very concerned that this decision could ultimately lead to an evisceration of the ordinary business exclusion, and earlier this month we filed an amicus brief in defense of the SEC staff's interpretation of the exclusion.[4]

Although we are aware that you have instructed the staff to review Rule 14a-8(i)(9) and report to the Commission, we respectfully request that the Commission and the staff use this opportunity to undertake a top-to-bottom review of Rule 14a-8 in its entirety. It is well-known that the shareholder proposal process has been

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[2] For example see the 2009 Chamber report *Examining the Effectiveness of the U.S. Securities and Exchange Commission,* which makes six recommendations for improving the no action letter process.
[3] *See* opinion in *Trinity Wall Street v. Wal-Mart Stores, Inc.* November 26, 2014 http://www.ded.uscourts.gov/sites/default/files/opinions/lps/2014/november/14-405_0.pdf
[4]*See* American Petroleum Institute, Business Roundtable, U.S. Chamber of Commerce amicus brief in *Trinity Wall Street v. Wal-Mart Stores* http://www.scribd.com/doc/253534813/American-Petroleum-Institute-Business-Roundtable-and-U-S-Chamber-of-Commerce

dominated by a small group of special interest activists, including groups affiliated with organized labor, certain religious orders, social and public policy advocates, and a handful of serial activists.[5] These special interests use the shareholder proposal process to pursue their own idiosyncratic agendas[6], often far removed from the mainstream, as evidenced by the overall low approval rates of many shareholder proposals that are put to a vote. Indeed, mainstream institutional investors account for only one percent of shareholder proposals at the Fortune 250.[7] Yet all investors, as the court decided in throwing out the 2010 proxy access rules, must bear the cost to the company and disruption that the process annually entails.[8]

Rule 14a-8 is ripe for a number of structural reforms. Last year, for example, the Chamber submitted a petition for rulemaking on behalf of a broad coalition regarding the threshold for resubmission of failed shareholder proposals under Rule 14a-8(i)(12).[9] There, we noted the exclusion as presently written imposes adverse consequences on shareholders, in the form of (i) wasted shareholder resources, (ii) diminished comprehension and attention of shareholders on matters of economic significance, and (iii) diffused management attention better spent on more economically significant matters.

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[5] James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2014: A Report on Corporate Governance and Shareholder Activism*, available at http://proxymonitor.org/Forms/pmr_09.aspx

[6] Research conducted by the Manhattan Institute indicates that union pension funds tend to introduce more shareholder proposals at companies that are the ongoing targets of union-organizing campaigns. In 2012, for example, companies in lightly-unionized and labor-targeted sectors received significantly more shareholder proposals backed by employee pension funds than companies in other industries. James R. Copland, Op-Ed, *Manhattan Moment: Unions Target Corporations Through Shareholder Activism*, Wash. Examiner (July 19, 2012), available at http://www.washingtonexaminer.com/manhattan-moment-unions-target-corporations-through-shareholder-activism/article/2502610

[7] *Supra, note 5*

[8] *See* opinion in *Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission* July 22, 2011 http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf

[9] *See* File No. 4-675, *Petition for Rulemaking Regarding Resubmission of Shareholder Proposals Failing to Elicit Meaningful Shareholder Support* (Apr. 9, 2014).

Another area for reform is the threshold under Rule 14a-8(i)(3) for excluding shareholder proposals that are materially false or misleading. Surely it is reasonable to allow public companies to exclude proposals that include false information or material misstatements. However, through the no-action letter process, the staff has set the bar for exclusion on these grounds so high as to make it virtually impossible to exclude a materially deficient proposal—even when the proposal contains plainly false statements of fact. While it is true that an issuer is not liable for the proponent's misstatements, this fact is of little comfort to issuers that must still include demonstrably false information in their own proxy statements.

We urge the Commission to give its full attention to this important topic, and the CCMC stands ready to assist you in that effort.

Sincerely,

David Hirschmann

Cc: The Honorable Luis A. Aguilar
The Honorable Daniel M. Gallagher
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar