



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549-4561

June 16, 2009

C. Thomas Keegel
General Secretary-Treasurer
International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001

Re: Southwest Airlines Co.
Incoming letter dated May 14, 2009

Dear Mr. Keegel:

This is in response to your letter dated May 14, 2009. In that letter, you requested that the Commission review the Division of Corporation Finance's March 19, 2009 no-action letter regarding the shareholder proposal submitted to Southwest by the Teamsters General Fund. We also have received a letter on behalf of Southwest dated June 15, 2009.

Under Part 202.1(d) of Title 17 of the Code of Federal Regulations, the Division may present a request for Commission review of a Division no-action response relating to Rule 14a-8 under the Exchange Act if it concludes that the request involves "matters of substantial importance and where the issues are novel or highly complex." We have applied this standard to your request and determined not to present your request to the Commission.

Sincerely,

Thomas J. Kim
Chief Counsel & Associate Director

cc: Gillian A. Hobson
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June 15, 2009

VIA EMAIL (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, D.C. 20549

Re: Response to appeal of no-action letter with respect to a shareholder proposal submitted by the International Brotherhood of Teamsters

Ladies and Gentlemen:

On March 19, 2009, the staff of the Office of Chief Counsel of the Division of Corporation Finance (the “**Staff**”) issued Southwest Airlines (“**Southwest**”) a no-action letter stating that the Staff would not recommend any enforcement action to the Securities and Exchange Commission (the “**Commission**”) if Southwest were to omit a shareholder proposal submitted by the Teamsters General Fund (the “**Fund**”) from its 2009 proxy materials in reliance of Rule 14a-8(i)(7). The Staff indicated in its letter to Southwest that there appeared some basis for Southwest’s view that “Southwest may exclude the proposal under rule 14a-8(i)(7), pertaining to Southwest’s ordinary business operations (i.e., decisions relating to vendor relationships).” *Southwest Airlines Co.* (avail. March 19, 2009).

By letter to you dated May 14, 2009 (the “**Reconsideration Request**”), the Fund has requested the Commission review the determination by the Staff. Southwest does not concede any other arguments addressed in its initial letter; but has limited itself here to those points necessary to fully brief the issues contained in the Reconsideration Request. For the reasons discussed below, we respectfully request that the Fund’s request for appeal to the Commission be denied.

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- I. The Staff was correct in determining that the Proposal may be excluded from Southwest Airlines' Proxy Materials in accordance with Rule 14a-8(i)(7) because the "thrust and focus" of the Proposal deals with Southwest Airlines' ordinary business matters.**

As previously asserted in Southwest's initial request for no action, the Proposal was properly excludable because the "thrust and focus" of the Proposal is on ordinary business matters within the scope of Rule 14a-8(i)(7). The Fund asserts that the "operational and oversight standards that Southwest applies to outsourced aircraft maintenance . . . are a significant social policy issue . . ." However, even applying the standards set forth in Staff Legal Bulletin No. 14C (June 28, 2005) ("SLB No. 14C"), the Proposal is excludable under Rule 14a-8(i)(7) because it would require Southwest to engage in an internal assessment of risks or liabilities that Southwest faces as a result of its operations. Moreover, the Proposal attempts to micromanage management's decisions relating to Southwest's vendors and suppliers.

A. The Proposal Would Require Southwest to Engage in an Internal Assessment of Risk and Liability.

The Proposal may be excluded under Rule 14a-8(i)(7) because the Proposal inherently seeks an internal assessment of the risks or liabilities that Southwest faces as a result of its outsourced aircraft maintenance practices. In SLB No. 14C, the Staff took the position that, "[t]o the extent that a proposal and supporting statement focus on the company engaging in an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health, . . . there is a basis for it to exclude the proposal under rule 14a-8(i)(7) as relating to an evaluation of risk."

The Proposal requests that Southwest disclose the adoption of a policy to "reduce the risks to the flying public generated by Southwest's maintenance outsourcing." The supporting statement specifically states that "in contracting out aircraft maintenance, Southwest compromises the safety and security of the flying public and the long-term sustainability of our Company." Like similar proposals for which the Commission has determined a proposal to be excludable under Rule 14a-8(i)(7), the Proposal and the supporting statement at issue here are not focused on minimizing operations that affect the environment or public health, but instead focus on potential risks and liabilities to Southwest. *See Dow Chemical* (Feb. 23, 2005). In order to adopt the policy referenced in the Proposal, Southwest would be required to engage in an assessment of the operational and oversight standards that apply to the outsourced maintenance of its aircraft. For example, the adoption of such a policy would mandate a wholesale evaluation of Southwest's contract repair facilities for compliance with the Proposal, as well as an assessment of risks and liabilities associated with the renegotiation or termination of existing contracts with third-party maintenance vendors. Accordingly, the Proposal should be excluded under Rule 14a-8(i)(7).



B. The Proposal Attempts to Micromanage Management's Decisions Relating to Southwest's Vendors and Suppliers of Products and Services.

The second prong of the Fund's "ordinary business" exclusion analysis is that "the proposal does not seek to 'micro-manage' the company" because it does not "dictate what specific operational and oversight standards should apply to Southwest's aircraft maintenance or how the Company should implement those standards at contract repair facilities. . . ." The Fund's argument is disingenuous. The Proposal in fact requests that Southwest adopt a policy requiring "all domestic and foreign contract repair facilities . . . to meet *the same operational and oversight standards* as Company-owned repair facilities." [Emphasis added.]

In the supporting statement, the Fund notes in March 2008 that Southwest suspended plans to shift certain maintenance operations to El Salvador. The Fund asserts that "[w]e further believe risks to passenger and crew safety will increase dramatically if Southwest revives its plans to send maintenance work abroad." Safeguarding the safety and security of its customers and employees is fundamental to Southwest's operations, and decisions regarding the standards that apply to maintenance contracts or vendors used to repair Southwest's aircraft relate to these core matters involving Southwest's business. The Fund's statement makes clear that the Proposal seeks to micromanage Southwest's vendor selection process.

As addressed in greater detail both in Southwest's initial request and in this letter, the inclusion of the Proposal would have ceded to shareholders the responsibility for managing matters that are fundamental to Southwest's ordinary business operations, namely, the maintenance of Southwest's aircraft and equipment. While the Fund has attempted to cast these issues as relating to a broader social policy, the intent of the Proposal is to impact Southwest's ordinary business operations by giving shareholders the ability to:

- impact and potentially determine the location of repair facilities;
- impact hiring or firing decisions for maintenance personnel;
- require the renegotiation or termination of existing contracts with third-party maintenance vendors; and
- mandate a wholesale evaluation of Southwest's contract repair facilities for compliance with the Proposal, among other matters.

Each one of these decisions relates to matters that are fundamental to Southwest's business. The business of flying is inextricably linked to the maintenance of aircraft, and decisions regarding how and where to maintain its aircraft are complex decisions for Southwest's management team, unsuited for shareholder oversight. Southwest acknowledges that its customers and employees have an interest in the safety of Southwest's planes; that fact does not make the planes' repair and maintenance an issue for shareholders to manage.



II. The Staff's Determination Regarding the Proposal is Consistent with the Staff's Overall Interpretative Approach to Rule 14a-8(i)(7)

While the Fund has attempted to cast these issues as relating to a broader social policy, the intent of the Proposal, as evidenced by the supporting statement to the Proposal, is to change the manner in which Southwest operates its business by requiring Southwest to change the manner in which it maintains its aircraft. In analogous situations where proponents have requested companies to adopt certain "principles for health care reform," the Staff has recently concurred that proposals could be excluded from the proxy statement because they related to the companies' ordinary business operations (i.e., employee benefits). *See, e.g., Wyeth* (February 25, 2008) (granting no-action relief where a proposal urged the company's board to adopt principles for comprehensive health care reform and sought an annual report on the implementation of those principles); *CVS Caremark Corp.* (January 31, 2008) (granting the same relief with respect to the same proposal). However, Southwest also recognizes that the Staff has determined not to grant no-action relief with respect to other similar health care reform proposals. *See, e.g., The Boeing Company* (February 5, 2008); *United Technologies Corporation* (January 31, 2008). As John W. White, former Director, Division of Corporation Finance of the Commission, noted in his speech to the Committee on Federal Regulation of Securities of the American Bar Association, Section of Business Law, on August 11, 2008, while expressing his views and not those of the Commission or Staff, in relevant part:

During this past season, we were asked to make no-action determinations on . . . a non-binding proposal that urged companies to adopt principles for comprehensive healthcare reform. The staff has taken no-action positions on various healthcare proposals in the past . . . This year's proposal was different — it urged companies to "adopt principles for comprehensive healthcare reform." Unlike prior proposals, it did not ask the companies to change their own healthcare coverage, or ask them to directly lobby anyone in support of healthcare change. No further action was contemplated by the proposal other than the adoption of principles."

Thus, we believe the proper analysis for the Proposal is similar to *Wyeth* and *CVS*, and is distinguishable from *Boeing* and *United Technologies*, in that action by Southwest is implicated, other than the mere adoption of a policy mandating certain operational and oversight standards for outsourced aircraft maintenance work. For these reasons, the Proposal should be excluded under Rule 14a-8(i)(7).

III. Appeal to Full Commission

While the Staff has never articulated the standard for reconsideration, it appears that in practice the Staff will not grant a reconsideration request where the Fund merely reiterates arguments made in its previous submission to the Staff in support of its proposal. The Fund's primary argument appears to be that the "Staff took the narrowest possible view of the Proposal . . . and . . . misconstrued the focus of the Proposal. . . ." As described above and in its initial no

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action letter request, Southwest contends that the “thrust and focus” of the Proposal was on ordinary business matters, which consistent with the Commission’s statements regarding the interpretation of Rule 14a-8(i)(7), are excludable.

The Reconsideration Request further notes that “the burden is on the company to demonstrate that it is entitled to exclude a proposal.” Southwest believes it has met this burden by establishing that the Proposal relates to matters that the Staff has long recognized are ordinary business matters and are not the proper subject of shareholder proposals. Accordingly, Southwest submits that the Staff appropriately evaluated the Proposal, applied the appropriate standard and made the correct determination.

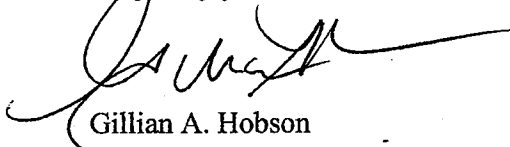
Section 2.2.1(d) of the Informal and Other Procedures permits “[t]he staff upon request or on its own motion, [to] present questions to the Commission with involve matters of substantial importance and where the issues are novel or highly complex.”

Thus, the standard that the Staff applies to requests for Commission review is that the request must raise questions that involve matters of substantial importance and that are novel or highly complex. The Staff is to deny any request for Commission review if the request does not meet this standard.

Southwest believes that the Reconsideration Request does not meet this standard for at least the reason that the Reconsideration Request does not present issues are novel, nor are the issues presented highly complex nor of substantial importance. For the reasons set forth above, Southwest respectfully requests that the Staff deny the request for reconsideration and deny the request that the matter be presented to the Commission for its consideration.

If you have any questions or would like any additional information regarding the foregoing, please do not hesitate to contact the undersigned at (713) 758-3747 or Mark R. Shaw, Southwest’s Associate General Counsel, at (214) 792-6143.

Very truly yours,



Gillian A. Hobson

Enclosures

cc: Mark Shaw, Associate General Counsel, Southwest Airlines Company

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
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C. THOMAS KEEGEL
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May 14, 2009

U.S. Securities and Exchange Commission
Office of the Chief Counsel
Division of Corporation Finance
100 F Street, NE
Washington, D.C. 20549-1090

Re: Appeal of Teamsters General Fund from no-action determination regarding shareholder proposal submitted by the Fund to Southwest Airlines Company

Dear Sir or Madam:

The Teamsters General Fund (the "Fund") hereby requests that the Commission exercise its discretion under 17 C.F.R. § 202.1 (d) and review a determination by the Division of Corporation Finance (the "Staff") that Southwest Airlines Company ("Southwest" or "Company") may exclude from its proxy materials a shareholder proposal (the "Proposal") submitted by the Fund. The Staff's determination involves a "matter[s] of substantial importance," as required by 17 C.F.R. § 202.1 (d) because (a) the Staff's interpretation of the ordinary business exclusion contravenes the Commission's statements regarding the interpretation of Rule 14a-8(i)(7), and, we believe, reflects a broader problem with the Staff's interpretive approach in recent years regarding proposals that raise significant social policy issues; and (b) the focus of the Proposal—aircraft maintenance outsourcing standards—is a significant social policy issue, precluding application of the ordinary business exclusion.

Background

I. The Proposal

The Proposal requests that Southwest "adopt a policy requiring all domestic and foreign contract repair facilities that perform aircraft maintenance for the Company to meet the same operational and oversight standards as Company-owned

repair facilities.” The Proposal further requests that the policy be disclosed to investors prior to the Company’s 2010 annual meeting of shareholders. The supporting statement explains the disparity in operational and oversight standards for outsourced versus in-house aircraft maintenance, exposing the resulting threat to the safety of the flying public and need for Southwest to reduce these public safety risks by adopting the Proposal.

The Staff Determination

By letter dated January 16, 2009 (the “No-Action Request”), Southwest asked the Staff of the Division to advise that it would not recommend enforcement action if Southwest excluded the Proposal from its proxy statement to be sent to shareholders in connection with the Company’s 2009 annual meeting of shareholders. Specifically, Southwest relied on Rule 14a-8(i)(7) (the ordinary business exclusion) and Rule 14a-8(i)(3) as the bases for exclusion.

Relying on Rule 14a-8(i)(7), Southwest contended that the Proposal was excludable because—

(A) the Proposal attempts to interfere with management’s ability to make decisions regarding vendor and supplier relations; (B) the Proposal relates to Southwest’s ordinary business decisions regarding management of the workforce; and, (C) the Proposal relates to the location of Southwest’s repair facilities.

By letter dated February 12, 2009 (the “Fund’s Response”), the Fund disputed Southwest’s characterization of the Proposal as ordinary business, arguing that the Proposal clearly focuses on aircraft maintenance outsourcing standards—a significant social policy issue that transcends ordinary business—and requests Southwest to take actions that would minimize risks to the public’s health, thereby precluding application of the ordinary business exclusion.

In a letter dated March 19, 2009 (“*Southwest Airlines Co.*”), the Staff found “some basis” for Southwest’s view that the Proposal could be excluded “as relating to Southwest’s ordinary business operations (that is, decisions relating to vendor relationships).” The determination was silent as to whether the Proposal raised a significant social policy issue. The Staff noted that in reaching its position, it did not find it necessary to address the alternative basis for omission upon which Southwest relied.

We believe the Staff took the narrowest possible view of the Proposal in *Southwest Airlines Co.*, and, in doing so, misconstrued the focus of the Proposal, which is the operational and oversight standards that Southwest applies to outsourced aircraft maintenance. These standards are not the ordinary business of “decisions relating to vendor relationships”; they are a significant social policy issue that is integral to the safety of the flying public and transcends the realm of ordinary business.

Furthermore, we believe that the Staff’s parochial view of the Proposal conflicts with the Commission’s longstanding guidance regarding the interpretation of Rule 14a-8(i)(7), and is representative of broader problems with the Staff’s overall interpretive approach to the ordinary business exclusion as it applies to shareholder proposals that raise significant social policy issues.

Regardless of whether the Commission is able to review *Southwest Airlines Co.*, prior to the Company’s 2009 annual meeting of shareholders, we believe the Commission should review the determination, because it is a matter of substantial importance and represents a serious interpretive problem. The Fund intends to resubmit similar proposals at airline companies next year.

Analysis

A. *The Staff’s Interpretation of the Ordinary Business Exclusion Regarding Southwest Airlines Co., Contravenes the Commission’s Approach to Rule 14a-8(i)(7) and is Inconsistent with Sound Administration of the Shareholder Proposal Rule*

In declaring that it will not recommend enforcement action to the Commission if Southwest omits the Proposal, the Staff notes that there appears to be “some basis” for Southwest to exclude the Proposal under Rule 14a-8(i)(7) “as relating to Southwest’s ordinary business operations (that is, decisions relating to vendor relationships).” We believe this interpretation of the ordinary business exclusion is at odds with the Commission’s own statements regarding the interpretation of Rule 14a-8(i)(7) and threatens to place off-limits a broad range of proposals dealing with significant social policy issues that have the potential to dramatically affect the safety of the general public and the environment.

The Exchange Act Release No. 40018 (the “1998 Release”) and Staff Legal Bulletin 14C make clear that, for proposals regarding significant social policy issues, the focus of the proposal is critical in determining the applicability of Rule 14a-8(i)(7). More specifically, we believe these authorities make clear that proposals

concerning significant social policy issues are exempt from the ordinary business exclusion so long as they are *focused* on the significant social policy issues and do not seek to “micro-manage” the company.

According to the 1998 Release, there are two considerations used in determining whether a proposal is excludable under the ordinary business exemption:

The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as, the hiring, promotion, and termination of employees, decisions on production quality and quantity, and, the retention of suppliers. However, proposals relating to such matters, but focusing on sufficiently significant social policy issues (for example, significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote. The second consideration relates to the degree to which the proposal seeks to “micro-manage” the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.¹ (Emphasis added)

By stating that a proposal “relating to such [ordinary business] matters *but focusing on* sufficiently significant social policy issues” is not excludable (Emphasis added), the 1998 Release makes clear that a subject's status as a significant social policy issue trumps its characterization as an ordinary business matter, and that the focus of the proposal is a critical consideration.

By stating that the second consideration “relates to the degree to which the proposal seeks to ‘micro-manage’ the company by probing *too deeply* into matters of a complex nature” (Emphasis added), the 1998 Release makes clear that in evaluating proposals under Rule 14a-8(i)(7), a central consideration must be whether the proposal delves too deeply into the day-to-day management of the company—not whether it involves or touches on the day-to-day management of the company at all.

Staff Legal Bulletin 14C further distinguishes that the focus of the proposal is crucial in determining the applicability of Rule 14a-8(i)(7). The Bulletin states:

¹ Exchange Act Release No. 40018 (May 21, 1998)

Each year, we are asked to analyze numerous proposals that make reference to environmental or public health issues. In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole. To the extent that a proposal and supporting statement focus on the company engaging in an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health, we concur with the Company's view that there is a basis for it to exclude the proposal under rule 14a-8(i) (7) as relating to an evaluation of risk. To the extent that a proposal and supporting statement focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health, we do not concur with the Company's view that there is a basis for it to exclude the proposal under rule 14a-8(i)(7).

Together, we believe these authorities underscore that proposals addressing significant social policy issues may involve day-to-day, ordinary business matters so long as (i) the focus remains on the policy issue and the Company's related actions and (ii) the proposal does not seek to "micro-manage" the company.

Consequently, given that "the burden is on the company to demonstrate that it is entitled to exclude a proposal" (Rule 14a-8(g)), the burden of persuasion is on Southwest to demonstrate that the Proposal (i) is not focused on a significant social policy issue and (ii) would effectively have shareholders "micro-manage" the company. Southwest, plainly failed to meet this burden of persuasion in its No-Action Request.

Nowhere in the No-Action Request did Southwest contest the fact that aircraft maintenance outsourcing standards is a significant social policy issue. In fact, Southwest stated: "we do not believe that it is necessary to consider whether the Proposal may also touch upon significant policy issues, since the Proposal here addresses ordinary business issues: management's decisions relating to vendors and suppliers, and job loss and employee relations issues that arise as a result of management of the workforce." On the contrary, it is very necessary to consider whether the Proposal raises significant policy issues. The fundamental standard made explicit by the 1998 Release and Staff Legal Bulletin 14C is that proposals focused on significant social policy issues transcend the realm of ordinary business, even if those proposals also involve ordinary business matters.

Additionally, Southwest failed to meet its burden of persuading the Staff that the Proposal would result in shareholders “micro-managing” the Company. According to the 1998 Release, such micro-management may occur where the proposal “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” However, “timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations.” The Proposal does not dictate what specific operational and oversight standards should apply to Southwest’s aircraft maintenance or how the Company should implement those standards at contract repair facilities—it only asks that Southwest apply the same high operational and oversight standards to contract repair facilities that it applies to in-house facilities. In other words, the Proposal addresses the overarching issue of aircraft maintenance outsourcing standards without involving intricate detail or seeking to impose specific time-frames or methods for implementing complex policies. The Proposal is, in fact, similar to shareholder proposals that have asked companies to adopt supplier codes of corporate conduct based on the United Nation’s International Labor Organization workplace human rights standards, which the Staff has determined to be appropriate for shareholder action. See *Wal-Mart Stores, Inc.*, (avail. April 3, 2002) and *The Stride Rite Corporation* (avail. Jan. 16, 2002).

The only burden of persuasion that Southwest does meet is proving that the Proposal implicates certain day-to-day, ordinary business matters. However, based on the Commission’s interpretation of the ordinary business exclusion as described in the 1998 Release and Staff Legal Bulletin 14C, this showing is not sufficient to permit exclusion of the Proposal. Neither authority supports the notion that a proposal relating to ordinary business operations cannot also focus on a significant social policy issue and the Company’s efforts to minimize or eliminate risks to the public’s health. In fact, Staff Legal Bulletin 14C explicitly states: “The fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials.”

And, yet, the mere fact that a proposal relates to ordinary business matters appears to be the basis on which the Staff made its determination. *Southwest Airlines Co.*, states that there appears to be some basis for Southwest to exclude the Proposal “as relating to Southwest’s ordinary business operations (that is, decisions relating to vendor relationships).” (Emphasis added) We believe the Staff’s narrow approach is clearly inconsistent with the Commission’s guidance regarding the ordinary business exclusion in the 1998 Release and Staff Legal Bulletin 14C.

Notably, *Exxon Mobil Corp.* (avail. March 18, 2005)—which is cited in Staff Legal Bulletin 14C as an example of a proposal that is not excludable—demonstrates

that a proposal involving ordinary business issues but focusing on a significant social policy issue falls outside the ambit of the ordinary business exclusion. The proposal requested a report “on the potential environmental damage that would result from the company drilling for oil and gas in protected areas.” Drilling for oil and gas is certainly part of Exxon Mobil’s ordinary business. Also, the proposal at Exxon Mobil touched on an evaluation of risk, which is also generally considered ordinary business. For example, the supporting statement of the proposal at Exxon Mobil said: “we strongly believe, in addition to recognizing the issue, there is a need to study and disclose the impact on our Company’s value from decisions to do business in protected and sensitive areas. This would allow shareholders to assess the risks created by the Company’s activity in these areas as well as the Company’s strategy for managing these risks.” (Emphasis added) Despite the proposal’s clear relationship to ordinary business issues, it was determined to be exempt from Rule 14a-8(i)(7) because it focused on the significant social policy issue of the Company’s operations in protected areas.

The Proposal—like the proposal at Exxon Mobil—is sufficiently focused on a significant social policy issue and is, therefore, appropriate for a shareholder vote.

B. The Proposal Focuses on Aircraft Maintenance Outsourcing Standards—a Significant Social Policy Issue

Citing the guidance of Staff Legal Bulletin 14C, which states that the presence of widespread public debate is among the factors to be considered in determining whether an issue transcends day-to-day business matters, the Fund’s Response detailed evidence of the widespread public debate around aircraft maintenance outsourcing standards, including: widely discussed Department of Transportation audits of air carriers’ aircraft maintenance outsourcing that revealed alarming oversight failures; the fact that aircraft maintenance outsourcing standards are the subject of Congressional hearings and proposed federal legislation (for example, the Safe Aviation Facilities Ensure Aircraft Integrity and Reliability (SAFE AIR) Act of 2008); the fact that aircraft maintenance outsourcing standards are discussed in major media outlets, such as *BusinessWeek*, CBS News, MSNBC, and CNN, and the subject of a *Consumer Reports* special investigative report; a fatal commuter plane crash that demonstrates the dramatic public safety risks related to inadequate aircraft maintenance outsourcing oversight standards; and, the fact that aviation experts and industry insiders are speaking publicly about their safety and security concerns regarding aircraft maintenance outsourcing operational and oversight standards.²

² Please see pages 5-8 of the Fund’s Response for further information and references.

While the list of evidence provided in the Fund's Response is not exhaustive, and while it would be unwieldy to completely document the public debate on aircraft maintenance outsourcing standards, we believe that the Fund's Response soundly demonstrates that aircraft maintenance outsourcing standards is the subject of widespread public debate and is a significant social policy issue outside the realm of ordinary business.

However, as noted earlier, the mere fact that a proposal implicates a significant social policy issue does not automatically render it appropriate for a shareholder vote. Staff Legal Bulletin 14C makes clear that the focus of the proposal is critical, noting that for a proposal to be exempt from the ordinary business exclusion, the proposal and supporting statement must "focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health."

The Staff determination in *Southwest Airlines Co.*, specifically noted "decisions relating to vendor relationships" as the basis for allowing the Company to exclude the Proposal. However, this view of the Proposal misconstrues the Proposal's focus, which is not on the ordinary business of day-to-day vendor relationships but on the significant social policy issue of aircraft maintenance outsourcing standards. To the extent that the Proposal concerns vendor relationships, it is only because those very relationships give rise to the significant social policy issue upon which the Proposal is focused.

As explained in the Fund's Response, currently there are four tiers to the aircraft maintenance system, each governed by a different regulatory regime that mandates the minimum oversight standards for outsourced airline maintenance, repair, and overhaul. Airline-owned maintenance bases are held to the most stringent standards under Part 121 of the Federal Aviation Regulations (FARs). Domestic repair stations certificated by the Federal Aviation Administration (FAA) fall under the less stringent FAR Part 145. Foreign repair stations certificated by the FAA are also covered by FAR Part 145, but critical exceptions are made in personnel and security standards. Non-certificated repair stations, both domestic and foreign, are not regulated or inspected by the FAA, nor are they limited in the types of maintenance they can perform. The FAA, which is tasked with inspecting nearly 5,000 domestic and foreign repair stations, has historically focused its inspections on airline-owned maintenance facilities and has been slow to change its model, even as maintenance has shifted to domestic and foreign repair stations.³

³ Calvin Scovel III, "Aviation Safety: The FAA's Oversight of Outsourced Maintenance Facilities," Statement of the Inspector General, U.S. Department of Transportation, before the House Transportation and Infrastructure Committee, Subcommittee on Aviation, March 29, 2007.

It is this discrepancy in operational and oversight standards for in-house versus outsourced aircraft maintenance, along with questions regarding the FAA's ability to provide vigilant monitoring of contract repair shops, that has made the safety of aircraft maintenance outsourcing and the adequacy of standards currently applied to contract aircraft repair facilities a significant social policy issue. By seeking to eliminate this discrepancy, the Proposal is focused on "minimizing or eliminating operations that may adversely affect the environment or the public's health." (Staff Legal Bulletin 14C)

We agree that, in general, many "decisions relating to vendor relationships" are indeed mundane, day-to-day business matters that warrant exclusion under Rule 14a-8(i)(7). In fact, some of the precedents cited by Southwest in the No-Action Request well-illustrate this point. For example, the proposal in *International Business Machines Corp.*, (avail. Dec. 29, 2006) asked that the company "update the competitive evaluation process to only accept late quotes from a supplier if the supplier provides documented proof of a situation that only the late supplier experienced and that the situation was unforeseen and not preventable." Similarly, the proposal in *PepsiCo, Inc.*, (avail. Feb. 11, 2004) asked the company to "Stop favoring one bottler over the other, stop permitting unequal or unfair support differentials, and ensure uniform accounting for support payments to avoid regulatory exposure." These proposals were properly excluded because they attempted to micromanage the details of the companies' day-to-day dealings with their suppliers.

The Proposal, by contrast, focuses on a significant social policy issue and is, therefore, precisely the kind of proposal that the Commission has sought to carve out from Rule 14a-8(i)(7). The day-to-day details are not the focus of the Proposal, as they were in the proposals at IBM and PepsiCo.

C. *The Staff's Determination Regarding Southwest Airlines Co., Signals a Broader Problem with the Staff's Overall Interpretive Approach to Rule 14a-8(i)(7) as it Applies to Proposals that Raise Significant Social Policy Issues*

In clarifying that proposals focused on significant social policy issues are exempt from the ordinary business exclusion, the 1998 Release and Exchange Act Release No. 12999 (Nov. 22, 1976) (the "1976 Release") reflect the Commission's recognition that there is a "depth of interest among shareholders in having an opportunity to express their views to company management on . . . proposals that raise sufficiently significant social policy issues." (1998 Release) This guidance serves the purpose of ensuring that any indirect—and, frankly, inevitable—involvement of ordinary business matters would not be the basis for allowing omission of proposals addressing significant social policy issues, as such, an interpretation would undermine

the functioning of the shareholder proposal rule as a vehicle for raising important matters.

Despite this guidance, we believe that in recent years the Staff has often inappropriately focused on the mundane business matters inevitably related to proposals that raise significant social policy issues instead of focusing on the full context of those proposals and the significant social policy issues they address. In other words, we believe *Southwest Airlines Co.*, is indicative of an interpretive approach that takes the narrowest possible view of proposals that focus on significant social policy issues, ignoring the Commission's longstanding, fundamental guidance that proposals focused on significant social policy issues preclude application of Rule 14a-8(i)(7).

The issue of climate change illustrates this point. As a general matter, the Staff has agreed with proponents that climate change is a significant social policy issue. See *American Standard Companies, Inc.*, (avail. March 18, 2002); *Occidental Petroleum Corporation* (avail. March 7, 2002); *Citigroup, Inc.*, (avail. Feb. 27, 2002); and *Exxon Corporation* (avail. Jan. 30, 1990). This conclusion is difficult to dispute, given the widespread and longstanding public debate regarding climate change and the intense public and governmental concerns about global warming caused by carbon dioxide and other greenhouse gases.

Despite the general proposition that climate change is a significant social policy issue, in recent years the Staff has permitted companies to exclude under Rule 14a-8(i)(7) a host of proposals that sought to address corporate strategies regarding climate change. See *Arch Coal Inc.*, (avail. Jan. 17, 2008) (permitting exclusion of a proposal that requested a report on how the company is responding to rising regulatory, competitive, and public pressure to significantly reduce carbon dioxide emissions from the Company's operations and from the use of its primary product: coal); *ACE Limited* (avail. March 19, 2007) (permitting exclusion of a proposal that requested a report describing the Company's strategy and actions related to climate change); *Wachovia Corporation* (avail. Feb. 10, 2006) (permitting exclusion of a proposal that requested a report on the effect on Wachovia's business strategy of the challenges created by global climate change); *Wells Fargo & Company* (avail. Feb. 16, 2006) (permitting exclusion of a proposal requesting a report on the effect on the Company's business strategy of the challenges created by global climate change); *The Chubb Corporation* (avail. Jan. 25, 2004) (permitting exclusion of a proposal that requested a report providing a comprehensive assessment of Chubb's strategies to address the impacts of climate change on its business). The bases for these determinations were that the proposals related to ordinary business operations by involving an evaluation of risk.

Consumer product safety is another significant social policy issue on which shareholders have often been denied the opportunity to act through shareholder proposals. A longtime subject of public debate and concern, a virtual flood of recalls of dangerous products (many made in China) in the Spring and Summer of 2007—including toxic toys, contaminated pet food, counterfeit toothpaste, and defective tires—crystallized consumer product safety as a significant social policy issue and heightened public concerns that companies lack the proper and necessary safeguards to protect consumers.

Yet in the Fall of 2007, the Staff allowed retailer Family Dollar Stores, Inc., to exclude a proposal requesting that the company publish a report evaluating its policies and procedures for minimizing customers' exposure to toxic substances and hazardous components in its marketed products. The requested report would have included options for systematically identifying toxic ingredients and hazardous components in stocked products and encouraged suppliers to reduce or eliminate such materials. According to the Staff, there was "some basis" for the view that the proposal was excludable under Rule 14a-8(i)(7), "as relating to Family Dollar's ordinary business operations (that is, sale of particular products)." See *Family Dollar Stores, Inc.*, (avail. Nov. 6, 2007). See also *Wal-Mart Stores, Inc.*, (avail. March 11, 2008) (permitting exclusion of a proposal requesting a report on the Company's policies on nano-material product safety); *The Home Depot, Inc.*, (avail. Dec. 23, 2008) (permitting exclusion of a proposal requesting a report on policy options to reduce consumer exposure and increase consumer awareness regarding mercury and any other toxins contained in the Company's private label n:vision brand products); *Walgreen Co.*, (avail. Oct. 13, 2006) (permitting exclusion of a proposal requesting a report that would characterize the levels of dangerous chemicals in the Company's products and describe options for new ways to improve the safety of the Company's products); and, *Wal-Mart Stores, Inc.*, (avail. March 24, 2006) (permitting exclusion of a proposal requesting a report evaluating company policies and procedures for systematically minimizing customers' exposure to toxic substances in products). Thus, the Staff prioritized the fact that the proposals necessarily touched on the sale of products by retailers over the proposals' focus on a significant social policy issue.

Rail security is yet another example of a significant social policy issue that has been excluded from the shareholder process. Rail security related to the threat of terrorism is arguably one of the nation's top policy considerations. In the wake of warnings from the Federal Bureau of Investigation that the United States' rail network is a likely target of al Qaeda, securing our country's rail network from terrorist attack has become the subject of widespread public debate, Congressional hearings, and new federal and state laws. However, in 2007 and 2008 the Staff allowed Class 1 rail

carriers to exclude shareholder proposals seeking greater disclosure on the companies' rail security efforts after those companies argued that the proposals involved ordinary business matters. See *Kansas City Southern* (avail. Feb. 21, 2007); *Norfolk Southern Corp.*, (avail. Feb., 20, 2007); *Union Pacific Corporation* (avail. Feb., 21, 2007); and, *Union Pacific Corporation* (avail. Feb. 25, 2008).

These are but some examples of proposals that—at least on the surface—appear to the Fund (and in some cases the Staff itself) to address in a meaningful way significant social policy issues that warrant shareholder action, but have been excluded from the shareholder process under Rule 14a-8(i)(7). To be sure, the Staff has many times determined that companies may not exclude under Rule 14a-8(i)(7) proposals that focus on climate change, consumer product safety, rail security, and other significant social policy issues. The Fund does not accuse the Staff here of consistently misapplying the ordinary business exclusion to shareholder proposals that address significant social policy issues. However, the Fund does want to raise the concern that at times it appears that the Staff takes the narrowest possible view of proposals that raise significant social policy issues, failing to take into account the larger context of the proposals, the proposals' focus, and the depth of shareholder interest in taking action on these important policy issues. This parochial interpretive approach contravenes the Commission's statements regarding the interpretation of Rule 14a-8(i)(7) in the 1998 Release, the 1976 Release, and Staff Legal Bulletin 14C, and limits shareholders' ability to act on matters that are critically important to the public's health and the environment.

We acknowledge that the Staff faces difficult, subjective challenges when determining whether an issue is properly considered to be a significant social policy issue and understand that the Staff seeks to use “the most well-reasoned and consistent standards possible, given the inherent complexity of the task.” (1998 Release) However, when a company seeks to exclude under Rule 14a-8(i)(7) a proposal that raises a significant social policy issue, it is incumbent on that company to soundly demonstrate that the proposal (i) does not focus on a significant social policy issue or (ii) would result in shareholders micro-managing the company. *Southwest Airlines Co.*, along with the precedents cited above, give rise to concerns that the Staff is not consistently holding companies to this high standard, denying shareholders a voice regarding matters on which it is appropriate—even urgent—that they act.

II. Conclusion

For the aforementioned reasons, the Fund respectfully submits that the Commission should grant discretionary review of the no-action determination at issue here and reverse the Staff's determination that the Fund's Proposal may be excluded under Rule 14a-8(i)(7).

Sincerely,

A handwritten signature in black ink that reads "C. Thomas Keegel". The signature is written in a cursive style with a large, prominent initial "C".

C. Thomas Keegel
General Secretary-Treasurer

CTK/jc

cc: Gillian A. Hobson, Esq., Partner, Vinson & Elkins
Ron Ricks, Executive Vice President, Corporate Services and Corporate
Secretary, Southwest Airlines Company