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



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Received SEC June 26, 2012

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Edward Durkin  
United Brotherhood of Carpenters and Joiners of America  
edurkin@carpenters.org  
Washington, DC 20549

Act: 1934  
Section: \_\_\_\_\_  
Rule: 14a-8  
Public \_\_\_\_\_  
Availability: 6/26/12

Re: NetApp, Inc.  
Incoming letter dated May 16, 2012

Dear Mr. Durkin:

This is in response to your letter dated May 16, 2012 concerning the shareholder proposal that the United Brotherhood of Carpenters Pension Fund submitted to NetApp. We also have received a letter from NetApp dated May 18, 2012. On May 10, 2012, we issued our response expressing our informal view that NetApp could exclude the proposal from its proxy materials for its upcoming annual meeting. You have asked us to reconsider our position. After reviewing the information contained in your letter, we find no basis to reconsider our position.

Under Part 202.1(d) of Section 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.

Copies of all of the correspondence on which this response is based will be made available on our website at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml>. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Thomas J. Kim  
Chief Counsel &  
Associate Director

Enclosure

cc: Nathaniel P. Gallon  
Wilson Sonsini Goodrich & Rosati  
ngallon@wsgr.com



UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

*Douglas J. McCarron*

General President

[Sent electronically to [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov) ]

May 16, 2012

Thomas Kim  
Chief Counsel and Associate Director  
Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: Request for Staff Reconsideration by Division of Corporation Finance of the Staff No-Action Letter to NetApp, Inc. Company (May 10, 2012) and Submission of the NetApp, Inc. No-Action Letter to the Full Commission for Review

Dear Mr. Kim:

On May 10, 2012, the Division of Corporation Finance staff ("Staff") issued a no-action letter ("No-Action Letter") to NetApp, Inc. ("NetApp" or "Company") advising that the Staff would not recommend enforcement action to the United States Securities and Exchange Commission ("Commission") if the Company omits from its proxy statement for its 2012 annual meeting a shareholder proposal titled "Audit Firm Independence Report Proposal" ("Proposal") submitted by the United Brotherhood of Carpenters Pension Fund ("Carpenter Fund" or "Fund") pursuant to Rule 14a-8 under the Securities and Exchange Act of 1934, as amended. We respectfully request that the Staff reconsider its decision in the NetApp No-Action Letter or alternatively submit its decision to the full Commission for review pursuant to Part 202.1(d) of Section 17 of the Code of Federal Regulations. These requests to the Division of Corporation Finance are being joined in the interests of expediting reconsideration and review of the No-Action Letter. A copy of this Request for Staff Reconsideration and Commission Review is simultaneously being sent to NetApp and its outside counsel.

### **The Audit Firm Independence Report Proposal**

The Audit Firm Independence Report Proposal, a copy of which is attached as Exhibit A, requests that the Company's audit committee prepare a report for shareholders that contains several items of disclosure related to processes and practices undertaken by the audit committee to preserve and protect the independence of the Company's external audit firm. The Proposal's supporting statement identifies the importance of auditor independence to the effective functioning of our nation's capital markets .

### **Staff Reconsideration of its NetApp No-Action Letter Decision**

We urge the Staff to reconsider its No-Action Letter decision, specifically its characterization of the issue addressed by the Proposal. The No-Action Letter identifies the subject matter of the Proposal to be "auditor independence," but then after listing information items requested in the Independence Report states that the Proposal concerns "the selection of the independent auditors or, more generally, management of the independent auditor's engagement." We believe that the No-Action Letter's initial description of the Proposal's subject matter as auditor independence correctly defines the Proposal's subject matter and should be the basis for rejection of the Company's Rule 14a-8(i)(7) "ordinary business" exclusion request.

The Proposal's request for a report with information about the Company and audit firm relationship, such as the tenure of the relationship and associated fees, as well as information regarding those processes and practices undertaken by the audit committee to preserve auditor independence squarely addresses the issue of auditor independence. The Proposal's requested information on the processes and practices undertaken by a company's audit committee to protect auditor independence should not be seen to transform the topic of the Proposal into the selection and management of a company's external audit firm. While boards and audit committees have clearly defined responsibilities with regards to protecting auditor independence, shareholders have important voting responsibilities that are dependent on their access to information such as that requested concerning audit committee actions to protect auditor independence. These information needs are particularly acute when, as is the case at NetApp, shareholders are asked to ratify the retention of the external audit firm selected by the audit committee.

We believe that the Staff's rationale for its decisions in the auditor rotation proposal no-action letters cited by the Company to argue for an "ordinary business" exclusion is pertinent to the present Proposal. Company arguments for no-action relief against the auditor rotation proposal focused on the direct imposition upon audit committee auditor retention and relationship management responsibilities associated with a mandated audit firm rotation requirement. In this instance, the

Proposal simply requests basic information about the Company and audit firm relationship, and practices to protect auditor independence. Full compliance with the Proposal's information requests would in no manner effect, limit, or dictate any aspects of the audit committee's responsibilities to select the Company's external audit firm or manage the audit firm relationship.

It is well established in our system of corporate governance that shareholders have rights and duties to protect their investment interests through the informed exercise of their voting rights. The audit firm retention and management responsibilities of an audit committee should not be a basis for precluding shareholder initiatives, including the submission of shareholder proposals, designed to procure information that will allow for the informed exercise of shareholder voting rights on matters related to auditor independence. The Staff's No-Action Letter decision does exactly that.

There are two shareholder voting contexts in which the information requested in the Proposal's Independence Report is critically important: the election of directors and the ratification of the selection of the external audit firm. A corporation's board members are shareholder representatives with fiduciary obligations to act in the corporation's and shareholders' best interests. In director elections, shareholders are presented with certain prescribed disclosure on a range of topics including individual nominee qualifications, corporate governance provisions, and executive compensation, but they also have important rights to seek additional information that will enable them to exercise their voting rights on a more informed basis. Further, many corporations, including NetApp, include an auditor ratification vote in their annual proxy statement, with little information provided for shareholder consideration.<sup>1</sup> Given the paucity of information typically provided shareholders in auditor ratification proposals, the requested information outlined in the Proposal is vitally important to providing shareholders a meaningful voting right in this context.

In considering our request for Staff reconsideration, the Staff should consider its no-action decision in *The Walt Disney Company* (Dec. 18, 2001) in which the Staff addressed a proposal relating to the same subject matter, auditor independence, as that presented by the Proposal. In *Disney*, the proposal sought to enhance auditor independence by requesting that the board of directors adopt a policy that the

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<sup>1</sup> It is common for companies to include a nonbinding auditor ratification vote in their annual proxy and note that while the vote is not required, it is included as "a matter of good corporate governance." It should be noted that the auditor ratification vote is generally the only "routine" voting issue presented on a company's proxy and thus broker voting discretion can be exercised allowing "broker non-votes" to be recognized at the meeting and counted in establishing a meeting quorum.

company's independent auditors only be allowed to provide audit services to the company and not any other type of non-audit services. Disney sought to omit the proposal pursuant to Rule 14a-8(i)(7) on the ground that it related to its ordinary business operations; specifically, that it encroached upon the Board and Audit Committee's discretion to engage its independent auditors. It argued:

[W]e believe the Commission has recognized the appropriateness of leaving basic responsibility for the maintenance of auditor independence, within the limits adopted in the Commission's rules, to each registrant's board of directors and audit committee.

The proponent in *Disney* rebutted the company's argument in words that we believe apply equally to the instant case:

The Fund respectfully submits that the Company has confused the ordinary business of "selecting" auditors (see the numerous rulings cited by the Company on pages 3-4 of its letter) with the broad policy sought in the proposal to ensure that whoever the Company selects to be its independent accountant is truly "independent" by removing the potential for conflicts of interest that is created if the accountant renders "other" services to the Company in addition to its audit service.

This same logic supports inclusion of the Proposal. The proposal in *Disney* sought to enhance auditor independence by limiting the provision of non-audit services; the Proposal in the instant case seeks to enhance auditor independence by providing shareholders information regarding the retention and management of the external auditor relationship. With this information in hand, shareholders will be better equipped to make informed decisions in the exercise of their voting rights in director elections and company-sponsored auditor ratification votes.

A further basis for Staff reconsideration of its Rule 14a-8(i)(7) positions in the NetApp No-Action Letter is that the subject matter of the Proposal, auditor independence, raises a significant policy issue that transcends the scope of the "ordinary business" basis for exclusion. In determining whether to allow the exclusion of a shareholder proposal as a matter of "ordinary business," the Staff must consider whether the subject matter of the proposal "has emerged as a consistent topic of widespread public debate such that it would be a significant policy issue." *AT&T Inc.* (Feb. 2, 2011). We believe that the Proposal directly relates to a significant policy issue, auditor independence, that is the subject of widespread public debate and therefore should not be excludable under the ordinary business rule. While longstanding, the public and professional debate on the means of enhancing auditor independence is clearly intensifying. In the wake of a severe credit market collapse that saw the unrestrained use of complex, high risk, and poor

quality financial products, enhancing auditor independence and investor confidence in the quality of financial reporting is of paramount importance

In the US and international markets, methods to enhance and protect auditor independence are being considered with increasing urgency. In its recent Concept Release entitled "Auditor Independence and Audit Firm Rotation," the Public Company Accounting Oversight Board ("PCAOB") solicited public comment on ways that auditor independence, objectivity and professional skepticism can be enhanced. The Concept Release prompted unprecedented levels of response from a wide range of corporations, audit firms, professional associations, investors and academic representatives.<sup>2</sup> Internationally, the issue of auditor independence is receiving heightened attention by the European Commission and other regulatory bodies.

#### **Request for Commission Review**

We combine our request for staff reconsideration of its No-Action Letter decision with a request that the Staff, should it confirm its No-Action Letter decision, bring its No-Action Letter decision to the full Commission for review. Pursuant to Section 202.1(d) of the SEC Rules of Practice, "[t]he staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex." The Fund's Audit Firm Independence Report proposal involves a matter of substantial importance -- auditor independence -- addressed in a novel manner -- the presentation of a range of auditor independence-related information designed to enhance shareholder voting rights - that meets the standard for Commission review.

The public debate on the issue of auditor independence and the best means of enhancing auditor independence that has been stimulated by the PCAOB's Concept Release and related public hearing, along with international actions is broadening and intensifying. Very powerful participants, particularly corporate interests, are fully engaged. The Fund's Proposal represents an important private-ordering approach to the important issue of auditor independence. The Proposal is a mechanism for shareholders to access information on an audit committee's handling of its various responsibilities related to protecting auditor independence, so as to inform their voting and heighten board accountability on the issue of auditor independence.

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<sup>2</sup> As of the close of the comment period on the Concept Release on "Auditor Independence and Audit Firm Rotation," the PCAOB received 659 comment letters from corporations, audit firms, professional associations, investors and academics. Additionally, the PCAOB held a public hearing on March 21-22 on "Firm Independence and Rotation" to gather additional information and ideas on protecting and enhancing audit firm independence.

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**Conclusion**

We respectfully submit that the Proposal's subject matter of "auditor independence" can no longer be considered a matter of "ordinary business" on which shareholders have no right to be heard. Auditor independence is a matter of substantial importance and shareholders have the right to present and vote on shareholder proposals designed simply to provide investors information on the retention of a company's external audit firm by its audit committee and aspects of the management of that relationship. We respectfully request that the Division of Corporation Finance submit the Staff decision to the full Commission for review.

The Carpenter Fund would welcome the opportunity to provide any additional information concerning this Request for Staff Reconsideration and full Commission Review. Please direct correspondence regarding this letter to the undersigned at [edurkin@carpenters.org](mailto:edurkin@carpenters.org).

Sincerely,



Edward Durkin  
Director, Corporate Affairs Department  
United Brotherhood of Carpenters

cc. Deanna M. Butler, Senior Director, Legal, NetApp, Inc.  
Nathaniel P. Gallon, Wilson Sonsini Goodrich & Rosati

## EXHIBIT A

### **Audit Firm Independence Report Proposal**

Auditor independence is the foundation for investor confidence in financial reporting. The Public Company Accounting Oversight Board (PCAOB) describes auditor independence as "both a description of the relationship between auditor and client and the mindset with which the auditor must approach his or her duty to serve the public." One measure of an independent mindset is the auditor's ability to exercise "professional skepticism," an attitude that includes a questioning mind and a critical assessment of audit evidence. An auditor must conduct an audit engagement "with a mindset that recognizes the possibility that a material misstatement due to fraud could be present, regardless of any past experience with the entity and regardless of the auditor's belief about management's honesty and integrity."

In a system in which corporate audit clients pay for-profit accounting firms to audit their financial statements, every effort must be made to protect auditor independence. Long-term auditor-client relationships are common, with the average auditor tenure at the largest 100 U.S. companies averaging 28 years, and 21 years at the 500 largest companies. Proxy data indicates that NetApp, Inc. ("Company") has retained Deloitte & Touche LLP as its outside auditor, and paid \$32,861,223 in total fees to Deloitte & Touche over the last 10 years alone.

We believe the Board's Audit Committee, whose members have a principal responsibility to protect auditor independence, should provide shareholders an annual Audit Firm Independence Report to give shareholders insight into the auditor-client relationship and efforts undertaken to protect auditor independence.

**Therefore, Be it Resolved:** That the shareholders of NetApp, Inc. request that the Board Audit Committee prepare and disclose to Company shareholders an annual Audit Firm Independence Report that provides the following:

1. Information concerning the tenure of the Company's audit firm if such information is not already provided, as well as the aggregate fees paid by the Company to the audit firm over the period of its engagement;
2. Information as to whether the Board's Audit Committee has a policy or practice of periodically considering audit firm rotation or seeking competitive bids from other public accounting firms for the audit engagement, and if not, why;
3. Information regarding the mandated practice of lead audit partner rotation that addresses the specifics of the process used to select the new lead partner, including the respective roles of the audit firm, the Board's Audit Committee, and Company management;



- 4. Information as to whether the Board's Audit Committee has a policy or practice of assessing the risk that may be posed to the Company by the long-tenured relationship of the audit firm with the Company;**
- 5. Information regarding any training programs for audit committee members relating to auditor independence, objectivity, and professional skepticism, and**
- 6. Information regarding additional policies or practices, other than those mandated by law and previously disclosed, that have been adopted by the Board's Audit Committee to protect the independence of the Company's audit firm.**

NATHANIEL P. GALLON  
Internet: ngallon@wsgri.com  
Direct Dial: (650) 565-3591

May 18, 2012

**BY EMAIL** (shareholderproposals@sec.gov)

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

**Re: Response to the Request for Reconsideration of the No-Action Letter  
Related to the Shareholder Proposal of the United Brotherhood of  
Carpenters Pension Fund Submitted to NetApp, Inc.**

Ladies and Gentlemen:

By letter dated May 10, 2012 (the "No-Action Letter"), the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") stated that it would not recommend enforcement action to the Commission if our client, NetApp, Inc., a Delaware corporation (the "Company"), were to omit the shareholder proposal and supporting statement (the "Proposal") submitted by the United Brotherhood of Carpenters and Joiners of America, on behalf of the United Brotherhood of Carpenters Pension Fund (the "Proponent"), from the proxy materials to be distributed by the Company in connection with its 2012 Annual Meeting of Shareholders (the "2012 Proxy Materials"). This letter is submitted in response to the letter to the Staff, dated May 16, 2012 (the "Reconsideration Request"), submitted on behalf of the Proponent. In the Reconsideration Request, the Proponent requests that the Staff reconsider its grant of the No-Action Letter and, if reconsideration is denied, that, pursuant to 17 C.F.R. 202.1(d) (2011), the matter be presented to the Commission for its consideration.

In the Reconsideration Request, the Proponent concedes that the adoption of the Proposal would require the preparation of a report concerning a number of matters related to the Company's retention of its independent auditors, including "the processes and practices undertaken by the [Company's] audit committee to preserve auditor independence." It is telling that at no point in the Reconsideration Request does the Proponent offer any justification as to why such a report does not fall squarely within nearly a decade of settled precedent related to the

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preparation of reports about the management of the engagement of a company's independent auditors, much less challenge, refute or distinguish the extensive authority and precedents cited in the letter furnished to the Staff on behalf of the Company on April 26, 2012 (the "April 26 Letter"). See, e.g., *General Electric Co.* (publicly available January 28, 2003) (concurring with the exclusion pursuant to Rule 14a-8(i)(7) of a shareholder proposal requesting that management prepare a report regarding (i) the number of consecutive years of service by the company's independent auditor and (ii) if in excess of five consecutive years, a clear justification for the retention of the same audit firm for such an extended period and noting that "disclosure of the method of selecting independent auditors" related to the company's ordinary business operations); *Loews Corp.* (publicly available January 28, 2003) (same). For purposes of the Staff's analysis of the Proposal, it is completely irrelevant that the Proponent does not agree with the Staff's "characterization" of the Proposal's subject matter.

The No-Action Letter is entirely consistent with a number of other granted no-action requests related to shareholder proposals concerning the preparation of reports regarding auditor independence. Indeed, no less than five other companies obtained no-action relief permitting the exclusion of shareholder proposals that are identical to the Proposal. See *CA, Inc.* (publicly available May 3, 2012); *Computer Sciences Corporation* (publicly available May 3, 2012); *Dell Inc.* (publicly available May 3, 2012); *McKesson Corporation* (publicly available May 3, 2012); *Xilinx, Inc.* (publicly available May 3, 2012). In the Reconsideration Request, the Proponent offers no legal basis for the Staff to reconsider (i) the No Action Letter, (ii) any of the similar no-action letters issued in respect of shareholder proposals that are identical to the Proposal or (iii) any of the multitude of other no-action letters concerning auditor rotation, auditor independence or the preparation of reports about the management of the engagement of a company's independent auditors. The sole precedent cited by the Proponent in the Reconsideration Request in support of its position is puzzling, as the shareholder proposal at issue in that instance concerned the *adoption of a policy* prohibiting a company's independent accountants from providing non-audit services to the company and not, as is the case with the Proposal, the *preparation of a report* concerning aspects of the Company's selection of independent auditors or, more generally, management of the independent auditor's engagement. See *Walt Disney Co.* (publicly available December 18, 2001). In this regard, it has been the Commission's position since 1983 that when determining whether a shareholder proposal requesting the *preparation of a report* is excludable pursuant to Rule 14a-8(i)(7), the Staff "will consider whether the subject matter of the special report involves a matter of ordinary business [and] where it does, the proposal will be excludable." Exchange Act Release No. 20091 (August 16, 1983).

In truth, the Reconsideration Request consists of little more than the Proponent's opinion, offered without legal basis, that the Company's shareholders require additional information in

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order to cast an “informed” vote with respect to the non-binding ratification of the Company’s selection of its independent auditors.<sup>1</sup> As the Staff is aware, shareholder proposals that seek additional or enhanced disclosure are excludable pursuant to Rule 14a-8(i)(7) if the subject matter of such disclosure relates to ordinary business. *See Refac* (publicly available March 27, 2002) (concurring with the exclusion pursuant to Rule 14a-8(i)(7) of a shareholder proposal requesting that the board of directors take the necessary steps to change the company’s accounting firm and “amend and improve corporate disclosure practices” as relating to “disclosure of ordinary business matters”).

The Reconsideration Request also argues that auditor independence raises a significant policy issue that should override the ordinary business aspects of the Proposal. In making this argument, the Proponent both concedes that the Proposal concerns a matter of ordinary business and conveniently ignores the fact that the Proposal is entirely concerned with the preparation of a report regarding numerous aspects of the Company’s selection of its independent auditors. That is, the subject matter of the Proposal is not, as the Proponent asserts, auditor independence; rather, it is the preparation of a report about, among other things, the Company’s policies and practices of periodically considering audit firm rotation and seeking competitive bids from other public accounting firms for audit engagement. The preparation of such a report is not associated with “sustained public debate ... and the increasing recognition that the issue raises significant policy considerations.” *AT&T Inc.* (publicly available February 10, 2012). It has also not “emerged as a consistent topic of widespread public debate such that it would be a significant policy issue for purposes of [R]ule 14a-8(i)(7).” *AT&T Inc.* (publicly available February 2, 2011).

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. 17 C.F.R. 202.1(d) (2011). The Staff is to deny any request for Commission review if the request does not meet this standard. The No-Action Letter is consistent with the Staff’s position in numerous other no-action letters. Quite simply, shareholder proposals concerning the selection of independent auditors or, more generally, management of the independent auditor’s engagement—or the preparation of reports regarding such matters—do not present an issue that is novel, highly complex or of substantial importance.

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<sup>1</sup> It appears that the Proponent fails to recognize that auditor ratification proposals, and more generally the method of selecting a company’s auditors, are matters relating a company’s ordinary business operations. *See Rite Aid Corp.* (publicly available March 31, 2006) (concurring with the exclusion pursuant to Rule 14a-8(i)(7) of a shareholder proposal seeking shareholder ratification of the appointment of auditors because it related to “the method of selecting independent auditors”).

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For the reasons set forth above, the Company respectfully requests that the Staff deny the Proponent's request that the Staff (i) reconsider its grant of the No-Action Letter and (ii) present the matter to the Commission for its consideration.

The Company continues to believe that the Proposal may properly be excluded from the 2012 Proxy Materials pursuant to Rule 14a-8(i)(7), Rule 14a-8(i)(10), Rule 14a-8(i)(3) and Rule 14a-8(c) for the reasons set forth in the April 26 Letter.

\* \* \*

Should the Staff require any additional information in support of the Company's position, please do not hesitate to contact me at the telephone number or email address appearing on the first page of this letter, or my partner, Steven E. Bochner, at (650) 354-4110 or [sbochner@wsgr.com](mailto:sbochner@wsgr.com).

Very truly yours,

**WILSON SONSINI GOODRICH & ROSATI**  
Professional Corporation



Nathaniel P. Gallon

cc: Matthew Fawcett, Esq., NetApp, Inc.  
Edward J. Durkin, United Brotherhood of Carpenters and Joiners of America  
(by email: [edurkin@carpenters.org](mailto:edurkin@carpenters.org))  
Douglas J. McCarron, United Brotherhood of Carpenters and Joiners of America  
(by fax: (202) 547-8979)