UNIVERSITY *of* DENVER

STURM COLLEGE OF LAW

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Keith F. Higgins
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Securities and Exchange Commission
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Re: Comment on Rule 14a-8(i)(10)

Dear Keith:

I am writing to express concern with two recent no action letters issued under subsection (i)(10) of Rule 14a-8. I am submitting a copy of this letter to the subsection (i)(9) review file[1] in the belief that these concerns are relevant to the ongoing analysis in that area.[2] I would be happy to discuss this matter further if it would be helpful to the Division.

In *AGL Resources*[3] and *Windstream Holdings*,[4] the staff found that proposals seeking to lower the percentage of shares needed to call a special meeting were "substantially" implemented under subsection (i)(10) despite the addition of a one year holding period on the shares eligible to call a meeting.[5]

A holding period affecting share eligibility can, in some cases, make it actually or practically impossible for shareholders to call a special meeting.[6] Whether this was the case in these two instances is unknown. Despite the burden resting with the company, the no action

[1] http://www.sec.gov/corpfin/Article/corp-fin-staff-review-of-conflicting-shareholder-proposals.html

[2] The two exemptions have a close relationship. When one company was told that no action relief would not be issued under subsection (i)(9), see http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/johncheveddenagl012315-14a8.pdf, it filed a second no action request under (i)(10). *See* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/johncheveddenaglrecon030515-14a8.pdf

[3] http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/johncheveddenaglrecon030515-14a8.pdf

[4] http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kennethsteinerwindstream030515-14a8.pdf

[5] 17 CFR 240.14a-8(i)(10) ("Substantially implemented: If the company has already substantially implemented the proposal").

[6] Actual impossibility would occur where the number of eligible shares was less than the percentage of outstanding shares needed to call a special meeting. Practical impossibility would occur where the number of eligible shares is so reduced that shareholders have little meaningful opportunity to obtain the requisite percentage. The concern over this type of result was raised in *Whole Food.* One of the objections was that the competing proposal by the company actually denied rather than provided access. *See* Letter from James McRitchie to the Office of the Chief Counsel, Division of Corporation Finance, SEC, Dec. 30, 2014 ("A review of the company's proxy statements shows that under the original 9%/5 year threshold, no shareholder met the requirement. Thus, under the Company bylaw, shareholders would have received no right to access. The effect of the proposal would have been to prohibit all existing shareholders from a right to access.").

process was devoid of any significant analysis of the impact of the holding periods on the number of eligible shares.[7] The staff therefore allowed the exclusion of proposals as "substantially implemented" even though the company alternatives could have rendered illusory the very rights sought by shareholders.

In addition, the availability of subsection (i)(10) is conditioned upon the "implementation" of the company's proposal. In *AGL*, the element was deemed to have been met despite the need for shareholder approval *and* the adoption of implementing bylaws. The bylaws appear to be substantive and material, although this is speculative since no text or description of their content was provided as part of the no action process.[8] The staff did not explain how a proposal subject to a double set of contingencies fulfilled the requirement of "implementation."

I. Facts

In both no action letters, the companies received precatory proposals asking the board to change the bylaws to facilitate the ability of shareholders to call a special meeting. In *Windstream*, the shareholder asked that owners of 20% of the company's outstanding common stock be given the right. In *AGL*, the requested percentage was 25% of the outstanding shares.

The two companies agreed to amend the articles to implement the proposals and to submit the changes to shareholders. The amendments contained the same percentages as those requested by shareholders. Both amendments, however, also added a restriction not found in either shareholder proposal.

With respect to the shares eligible to call a meeting, the companies chose not to extend that right to all outstanding voting shares, the presumptive standard under state law, but to limit the right to shares held continuously in a net long position for at least one year.[9] Moreover, one of the companies provided in the implementing bylaws that shares held for a year could be ineligible to the extent subject to certain hedging transactions.[10]

There was no meaningful discussion of the impact of the holding period on the number of eligible shares.[11] One letter indicated that the information was not available, at least from public sources. As an official at the company stated:

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[7] 17 CFR 240.14a-8(g) ("Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal").

[8] In *Windstream*, the company provided the text of the relevant bylaws and they appear substantive and complex. *See infra* note 37. A brief description of the bylaws was included in the AGL proxy statement. *See infra* note 38.

[9] *See* MBCA § 7.02 Special Meeting (percentage needed to call a special meeting determined on the basis of holders of "the votes entitled to be cast on any issue").

[10] In *Windstream*, the bylaw provided that the net long position was to "be reduced by the number of shares of capital stock as to which such holder . . . has, at any time during the One-Year Period, entered into any derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares." *See infra* note 37 for the text of the full bylaw.

[11] In *Windstream*, the company did make an argument for the provision on the merits. *See Windstream* ("Taking into account the extent to which stockholders requesting a special meeting hedge their shares (or otherwise reduce or

> Unfortunately, we do not have an estimated number for any point in time during the past year or any specific time period. We would only have this data if it is provided to us directly from the shareholder. Institutional investment managers are required to file a Form 13F on a quarterly basis and those positions are already dated by the time they are filed with the SEC. I don't believe the information is otherwise available publicly, and we do not solicit such information from our shareholders.[12]

Nor was there any significant discussion of the logistical burdens imposed on shareholders as a result of the requirement.[13]

Both companies submitted the promised article amendment to shareholders for approval.[14] Windstream also submitted for approval the implementing bylaws.[15] AGL did not but did state that "[f]ollowing the effectiveness of the articles of amendment, the board will adopt amendments to . . . the Company's bylaws including provisions dealing with the information required to be furnished with any special meeting request, the determination of the requesting shareholders' net long position, the scope of business to be considered at any special meeting, and the date by which a special meeting must be held pursuant to any qualifying request."[16]

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offset their economic exposure in their shares) and how long they have held those shares ensures that on balance, stockholders seeking to call a special meeting share the same economic interest in the Company as the majority of stockholders. Requiring that stockholders have held their shares for at least one year helps to ensure that their economic interest in the Company's affairs is more than transitory.").

[12] *See* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/johncheveddenaglrecon030515-14a8.pdf The company also noted that, "[u]nfortunately, there isn't a way for us to know in advance which of our shareholders hold a long or short position in our stock." The answer was provided the information in a response to a question from the shareholder proposal. Id. ("Do you have a rough estimate of the percentage of shareholders who hold company common stock in a net long position continuously for one year or more.").

[13] In *Windstream*, the company did make an argument for the provision on the merits. *See Windstream* ("Taking into account the extent to which stockholders requesting a special meeting hedge their shares (or otherwise reduce or offset their economic exposure in their shares) and how long they have held those shares ensures that on balance, stockholders seeking to call a special meeting share the same economic interest in the Company as the majority of stockholders. Requiring that stockholders have held their shares for at least one year helps to ensure that their economic interest in the Company's affairs is more than transitory.").

[14] Both companies have submitted the proposed amendment to the articles to shareholders. *See* AGL Proxy Statement, March 17, 2015, *available at* http://www.sec.gov/Archives/edgar/data/1004155/000119312515095340/d799002ddef14a.htm#toc799002_13; Windstream Proxy Statement, March 31, 2015, *available at* http://www.sec.gov/Archives/edgar/data/1282266/000120677415001083/windstream_def14a.htm

[15] *See* Windstream Proxy Statement, supra note 14, at 53.

[16] *See* AGL Proxy Statement, supra note 14, at 80.

II. Analysis

A. Overview

In permitting the exclusion of proposals, Rule 14a-8 imposes the burden of proof on companies. *See* Rule 14a-8(g), 17 CFR 240.14a-8(g). Companies seeking to establish the availability of subsection (i)(10), therefore, have the burden of showing both the insubstantiality of any revisions made to the shareholder proposal and the actual implementation of the company alternative.[17]

B. "Substantial" Implementation and Special Meetings

As *AGL* and *Windstream* illustrate, proposals seeking to facilitate the right of shareholders to call a special meeting typically focus on the percentage of outstanding shares needed to do so, with shareholders commonly seeking a reduction in any required percentage.[18] As a result, the staff has been asked on many occasions to determine whether the percentage set by the company "substantially" implements the percentage sought by shareholders. The staff's interpretation in this area has for the most part been clear and objective.

Where the shareholder specifies a range of percentages (10% to 25%), the staff has agreed that the company "substantially" implements the proposal when it selects a percentage within the range, even if at the upper end.[19] Likewise the staff has found substantial implementation when the shareholder proposal includes no percentage[20] or merely "favors" a particular percentage.[21]

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[17] The exclusion originally applied to proposals deemed moot. *See* Exchange Act Release No. 12999 (Nov. 22, 1976) (noting that mootness "has not been formally stated in Rule 14a–8 in the past but which has informally been deemed to exist."). In 1983, the Commission determined that a proposal would be "moot" if substantially implemented. Exchange Act Release No. 20091 (August 16, 1983) ("The Commission proposed an interpretative change to permit the omission of proposals that have been 'substantially implemented by the issuer'. While the new interpretative position will add more subjectivity to the application of the provision, the Commission has determined that the previous formalistic application of this provision defeated its purpose."). The rule was changed to reflect this administrative interpretation in 1997. *See* Exchange Act Release No. 39093 (Sept. 18, 1997) (proposing to alter standard of mootness to "substantially implemented").

[18] In some cases, companies set the percentage at 100%. *See SED International Holdings, Inc.* (Oct. 25, 2007).

[19] In cases where the staff allowed for the exclusion of a proposal, the shareholder proposal provided a range of applicable percentages and the company selected a percentage within the range. *See Citigroup Inc.* (Feb. 12, 2008) (range of 10% to 25%; company selected 25%); *Hewlett-Packard Co.* (Dec. 11, 2007) (range of 25% or less; company selected 25%). In *General Dynamics*, the proposal sought a bylaw that would permit shareholders owning 10% of the voting shares to call a special meeting. The management bylaw provided that special meetings could be called by a single 10% shareholder or a group of shareholders holding 25%. As a result, the provision implemented the proposal for a single shareholder but "differ[ed] regarding the minimum ownership required for a group of stockholders". *General Dynamics Corp.* (Feb. 6, 2009).

[20] *Borders Group, Inc.* (Mar. 11, 2008) (no specific percentage contained in proposal; company selected 25%); *Allegheny Energy, Inc.* (Feb. 19, 2008) (no percentage stated in proposal; company selected 25%).

[21] *Johnson & Johnson* (Feb. 19, 2009) (allowing for exclusion where company adopted bylaw setting percentage at 25% and where proposal called for a "reasonable percentage" to call a special meeting and stating that proposal "favors 10%"); *3M Co.* (Feb. 27, 2008) (same).

Where, however, the company sets the percentage of eligible shares higher than the one specified in the shareholder proposal, the staff has consistently declined to find "substantial" implementation.[22] The logic is compelling. In these cases, the primary, if not exclusive, purpose of shareholders is to seek a lower percentage threshold. Setting the percentage higher than what the shareholder requested cannot be said to "substantially" implement that purpose. The staff has taken the same approach in other areas where shareholders have specified a percentage of shares necessary to take action and companies have implemented a higher threshold.[23]

By adding a holding period, *Windstream* and *ALG* have done precisely what the staff has previously rejected. Rather than changing the percentage sought by shareholders, or the numerator of the equation, the holding period altered the denominator by decreasing the number of eligible shares.[24] Thus, to the extent that the proposed holding periods rendered half of the shares ineligible, shareholders would have to obtain an all but prohibitive percentage of the remaining eligible shares to call a meeting (50% of the eligible shares in one case; 40% in the other).

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[22] *See General Dynamics Corp.* (Jan. 24, 2011) ("We note that the proposal specifically seeks to allow shareholders to call a special meeting if they own, in the aggregate, 10% of the company's outstanding common stock, whereas General Dynamics' bylaw requires a special meeting to be called at the request of a group of shareholders only if the group owns, in the aggregate, at least 25% of General Dynamics' outstanding voting stock. We are therefore unable to conclude that the bylaw adopted by General Dynamics substantially implements the proposal."); *Halliburton Co.* (Feb. 12, 2010) ("We are unable to concur in your view that Halliburton may exclude the proposal under rule 14a-8(i)(10). We note that the proposal specifically seeks to allow shareholders to call a special meeting if they own, in the aggregate, 10% of the company's outstanding common stock, whereas Halliburton's bylaw requires a special meeting to be called at the request of a group of shareholders only if the group owns, in the aggregate, at least 25% of Halliburton's issued and outstanding voting stock."); *AT& T Inc.* (Feb. 12, 2010) (unable to concur on use of (i)(10) to exclude proposal to lower threshold for calling special meeting from 25% to 10%); AT&T, Inc. (Jan. 28, 2009 (staff declined to permit exclusion of proposal seeking to allow 10% of shares to call special meeting where company had in place bylaw that set the percentage at 25% even though company asserted that "it does not appear that the 10% level is a central concern of the 2009 Proposal."); *Verizon Communications Inc.* (Jan. 28, 2010) ("We are unable to concur in your view that Verizon may exclude the proposal under rule 14a-8(i)(10). We note that the proposal specifically seeks to allow shareholders to call a special meeting if they own, in the aggregate, 10% of the company's outstanding common stock, whereas Verizon's bylaw directs the board to call a special meeting at the request of a group of shareholders only if the group owns, in the aggregate, not less than 25% of Verizon's outstanding voting stock."); *The Interpublic Group of Companies, Inc.* (March 12, 2009) (not allowing for exclusion under (i)(10) where proposal set special meeting percentage at 10% while bylaws set the percentage at 25% despite company's argument that "the essential objective of the Proposal and By-law Amendment -- giving the stockholders of the Company a meaningful opportunity to call a special meeting -- is identical" and therefore "substantially implemented"); 3M Company (Feb. 17, 2009) (declining to grant no action relief where bylaw set percentage at 25% and shareholder proposal sought 10%); *Marathon Oil Corp.* (Feb. 6, 2009) (not allowing for exclusion under (i)(10) where "[t]he By-law amendment sets a different percentage (25% of Marathon's outstanding common stock) rather than the 10% favored by the Proponent."); *Borders Group, Inc.* (Feb. 16, 2009) (not allowing for exclusion under (i)(10) where proposal set special meeting percentage at 10% while bylaws set the percentage at 25% despite company's argument that it had "implemented the essential objective of the 2009 Proposal, which is to provide an opportunity for shareholders of the Company to call a special meeting."); *AMN Healthcare Services, Inc.* (Dec. 30, 2008) (declining to grant no action request under (i)(10) where the board "simply implemented the proposal with a different stock threshold than that requested" (25% rather than the requested 10%).

[23] *KSW, Inc.* (March 7, 2012) (declining to find that access bylaw proposed by company with 5% threshold for a single shareholder had "substantially implemented" a shareholder proposal with a 2% threshold by shareholders in the aggregate).

[24] Moreover, the reduction in eligible shares does not necessarily depend only on a holding period but may be further reduced by the existence of certain hedging transactions. *See supra* note 10.

Moreover, the holding period is likely to have a greater effect at companies that have highly liquid trading markets, something typical of exchange traded companies. Data from the NYSE suggests that turnover rate for these companies annually exceeds 50%[25] and in some years 100%.[26] In at least some cases, therefore, the imposition of a holding period can make the calling of a special meeting by shareholders actually or practically impossible.[27]

The effect of the holding periods adopted by Windstream and AGL is, of course, speculative. This is because the record contains no meaningful analysis of their impact on the number of eligible shares.[28] Indeed, one company suggested that the information was not publicly available.[29] As a result, the staff had no empirical basis for determining the effect of the holding period on the ability to call a special meeting, much less the substantial or insubstantial nature of the imposition.

Likewise, the no action process lacked meaningful consideration of the logistical burdens imposed on shareholders as a result of the holding periods.[30] Given the non-public nature of the relevant information, shareholders presumably needed to verify holding periods and review all relevant hedging transactions.[31] In the absence of any analysis on the logistical burdens, there was no basis for determining whether the holding period was a substantial or insubstantial change in the shareholder proposal.

C. Substantial "Implementation"

Subsection (i)(10) also has a temporal component. In addition to the need for a substantially identical alternative to the shareholder proposal, the company must have "implemented" its approach at the time of the no action request.

In construing the need for implementation, the staff has provided companies with modest flexibility. Companies can sometimes meet the requirement even though implementation is

[25] http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=table&key=3149&category=3

[26] http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=table&key=2992&category=3

[27] For monthly statistics at NASDAQ that include the consolidated volume of shares traded for listed companies, go here: http://www.nasdaqtrader.com/trader.aspx?ID=marketsharedaily

[28] Thus, for example, the company in *Windstream* did not argue that the holding period was immaterial or insignificant but instead that it was meritorious. *See Windstream, Inc.* (March 5, 2015) (noting that a holding period "is intended to ensure those stockholders requesting a special meeting, rather than merely benefitting their own transitory interest, share the same long-term positive economic interest in the Company's affairs as the majority of stockholders" and that such mechanisms "were intended to avoid the substantial cost and disruption that would result from holding multiple special stockholder meetings over a short period of time, or holding such meetings so close to the Company's annual meeting of stockholders as to make a separate meeting cost prohibitive, duplicative and unnecessary.").

[29] *See supra* note 12 and accompanying text.

[30] A company does not "substantially implement" a proposal where it imposes additional burdens on exercise of the right not otherwise in the shareholder proposal. *See CSX Corp.* (March 14, 2008) (declining to allow for exclusion under (i)(10) where company sought to require that shareholders retained "beneficial ownership by the proponent of shares representing at least 15% of the Company's outstanding voting stock at the time of the special meeting").

[31] *See supra* note 12 and accompanying text.

conditioned upon future action. This most commonly occurs where the board has not yet adopted the requisite provision[32] but commits to do so and agrees to file a supplemental letter with the staff once the promised action has taken place.[33]

The staff has also treated a proposal as "implemented" where the future contingency is shareholder approval. Approval by shareholders is generally the final step in the implementation process and requires no significant additional steps by the board. In some cases, amendments to the articles are followed by conforming changes to the bylaws. The changes are typically pro forma[34] or are simultaneously submitted to shareholders for approval.[35]

In the *AGL* letter, implementation was subject to a pair of contingencies. The company made its alternative conditional upon shareholder approval of an amendment to the articles and the adoption of bylaws designed to set out the necessary procedures and methodologies for

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[32] *See Chevron Corp.* (Feb. 19, 2009) ("We expect that Chevron's Board of Directors will consider, at its next scheduled meeting, an amendment to Chevron's By-Laws to permit stockholders owning at least 25 percent of Chevron's common stock to call for a special meeting of stockholders. The Board of Directors is not scheduled to meet, however, until after Chevron's deadline for submitting a no-action letter request to exclude the 2008 Proposal from its definitive proxy materials.").

[33] The company in *Windstream* filed the requisite supplemental letter. *Windstream* ("We write to confirm that, at a February 11, 2015 meeting, the Windstream Board of Directors approved the inclusion of the Windstream-Sponsored Proposal in the 2015 Proxy Materials."). *See also Hewlett Packard* (Dec. 11, 2007) (company noting that the "Staff consistently has granted no-action relief under Rule14a-8(i)(10) where a company intends to omit a stockholder proposal on the grounds that the board of directors is expected to take certain action that will substantially implement the proposal, and then supplements its request for no-action relief by notifying the Staff after that action has been taken by the board of directors."). *See also Johnson & Johnson* (Feb. 19, 2009) ("We will supplementally notify the Staff after the Board's consideration of the Proposed By-Law Amendment."); *General Dynamics Corp.* (Feb. 6, 2009) ("The Company has authorized us to represent to the staff that the Company undertakes to notify the staff supplementally of the board's action on the proposed amendment to the Company's bylaws."); *3M Co.* (Feb. 27, 2008) (noting that board will "in the near future consider adoption" of a bylaw that would substantially implement shareholder proposal and committing that "We will supplementally notify the Staff after Board consideration of the Proposed Bylaw Amendment").

[34] The have come up in the context of the implementation of a declassified board, see *UCBH Holdings, Inc.* (Feb. 11, 2008) ("Subject to stockholder approval of the Company's proposal, the Board has approved and authorized conforming amendments to the Company's certificate of incorporation and bylaws, and the taking of those steps necessary to effect declassification of the Board."); *Piper Jaffray Companies* (Feb. 7, 2007) ("Specifically, the Company Proposal would recommend the amendment of the Company's certificate of incorporation to eliminate the classification of its directors and instead provide for the annual election of all directors. The Board of Directors would also adopt conforming changes to the Company's bylaws."), and the implementation of majority vote provisions. *See NCR Corp.* (Feb. 9, 2015) (company committed to "adopting resolutions to approve a conforming amendment to the Bylaws that will eliminate the supermajority voting provision discussed above and replace it with a voting standard of a majority of the votes entitled to be cast, effective upon approval by the Company's stockholders of the Charter Amendments at the 2015 Annual Meeting").

[35] *NETGEAR, Inc.* (March 31, 2015) ("There appears to be some basis for your view that NETGEAR may exclude the proposal under rule 14a-8(i)(10). In this regard, we note your representation that NETGEAR will provide shareholders at NETGEAR's 2015 annual meeting with an opportunity to approve amendments to NETGEAR's certificate of incorporation, approval of which will result in the replacement of each provision in NETGEAR's certificate of incorporation and bylaws that calls for a supermajority vote with a majority vote requirement."). *See also PPG Industries* (Jan. 21, 2015) ("The PPG Proposal also will contemplate a related amendment to the Bylaws to eliminate the supermajority voting thresholds therein. If the PPG Proposal receives the requisite shareholder approval at the 2015 Annual Meeting, the supermajority voting thresholds currently in the Articles of Incorporation and the Bylaws will be removed promptly thereafter and be replaced with voting thresholds which are wholly consistent with the thresholds requested in the Proponent's Proposal.").

implementing the special meeting provision, including the holding period.[36] If the example in *Windstream* is any guide,[37] these bylaws will not be pro forma but will be extremely complex.[38]

[36] As the amendment provided: "The procedure to be followed by shareholders seeking to call a special meeting of shareholders and the methodology for determining the percentage of votes entitled to be cast by the shareholders seeking to call a special meeting of shareholders (including without limitation the calculation of the amount of a net long position or other limitations or conditions) shall be as set forth in the Corporation's Bylaws."

[37] Thus, in *Windstream,* the company did include bylaws that specified the relevant definitions and procedures. *See* Proposed Article II, Section 2 of the Windstream Bylaws. As the provision provided: "(b) Subject to this Section 2(b) and other applicable provisions of these Bylaws, a special meeting of stockholders shall be called by the secretary of the Corporation upon the written request (each such request, a 'Special Meeting Request' and such meeting, a 'Stockholder Requested Special Meeting') of one or more stockholders of record of the Corporation that together have continuously held, for their own account or on behalf of others, beneficial ownership of at least a twenty percent (20%) aggregate 'net long position' of the capital stock issued and outstanding (the 'Requisite Percentage') for at least one year prior to the date such request is delivered to the Corporation (such period, the 'One-Year Period'). For purposes of determining the Requisite Percentage, 'net long position' shall be determined with respect to each requesting holder in accordance with the definition thereof set forth in Rule 14e-4 under the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder (as so amended and inclusive of such rules and regulations, the 'Exchange Act'); provided that (x) for purposes of such definition, (A) 'the date that a tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired' shall be the date of the relevant Special Meeting Request, (B) the 'highest tender offer price or stated amount of the consideration offered for the subject security' shall refer to the closing sales price of capital stock on the NASDAQ Stock Market (or any successor thereto) on such date (or, if such date is not a trading day, the next succeeding trading day), (C) the 'person whose securities are the subject of the offer' shall refer to the Corporation, and (D) a 'subject security' shall refer to the outstanding capital stock; and (y) the net long position of such holder shall be reduced by the number of shares of capital stock as to which such holder does not, or will not, have the right to vote or direct the vote at the Stockholder Requested Special Meeting or as to which such holder has, at any time during the One-Year Period, entered into any derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. Whether the requesting holders have complied with the requirements of this Section 2(b) and related provisions of these Bylaws shall be determined in good faith by the Board of Directors or its designees, which determination shall be conclusive and binding on the Corporation and the stockholders. (c) In order for a Stockholder Requested Special Meeting to be called, one or more Special Meeting Requests must be signed by the Requisite Percentage of stockholders submitting such request and by each of the beneficial owners, if any, on whose behalf the Special Meeting Request is being made and must be delivered to the secretary of the Corporation. The Special Meeting Request(s) shall be delivered to the secretary at the principal executive offices of the Corporation by nationally recognized private overnight courier service, return receipt requested. Each Special Meeting Request shall (i) set forth a statement of the specific purpose(s) of the Stockholder Requested Special Meeting and the matters proposed to be acted on at it, (ii) bear the date of signature of each such stockholder signing the Special Meeting Request, (iii) set forth (A) the name and address, as they appear in the Corporation's books, of each stockholder signing such request and the beneficial owners, if any, on whose behalf such request is made and (B) the class or series and number of shares of capital stock of the Corporation that are, directly or indirectly, owned of record or beneficially (within the meaning of Rule 13d-3 under the Exchange Act) by each such stockholder and the beneficial owners, if any, on whose behalf such request is made, (iv) set forth any material interest of each stockholder signing the Special Meeting Request in the business desired to be brought before the Stockholder Requested Special Meeting, (v) include documentary evidence that the stockholders requesting the special meeting own the Requisite Percentage as of the date on which the Special Meeting Request is delivered to the secretary of the Corporation; provided, however, that if the stockholders are not the beneficial owners of the shares constituting all or part of the Requisite Percentage, then to be valid, the Special Meeting Request must also include documentary evidence (or, if not simultaneously provided with the Special Meeting Request, such documentary evidence must be delivered to the secretary of the Corporation within ten (10) days after the date on which the Special Meeting Request is delivered to the secretary of the Corporation) that the beneficial owners on whose behalf the Special Meeting Request is made beneficially own such shares as of the date on which such Special Meeting Request is delivered to the secretary, (vi) an agreement by each of the stockholders requesting the special meeting and each beneficial owner, if any, on whose behalf the Special Meeting Request is being made to notify the Corporation

Moreover, there is nothing to suggest that the company lacked the authority to adopt the bylaws at the time of shareholder approval[39] or at least describe their content.[40]

Subsection (i)(10) is designed to allow for the exclusion of proposals that have already been implemented. To the extent that implementation is conditioned upon future actions that are material in content and uncertain in timing, this element is not present.

III. Conclusion

The rational underlying the two letters is troubling. Left unaddressed, they will encourage the use of holding periods even where such holding periods have the potential to eliminate the very rights sought by shareholders.

The staff should, in its review of Rule 14a-8, correct any misconception suggested by these letters. The staff should reiterate that the burden of establishing the availability of (i)(10) is on the company and that no action relief will be conditioned upon a sufficient showing *from the company* as to the effect of any change to a shareholder proposal. Specifically with respect to holding periods, the staff should emphasize that a finding of substantial implementation cannot occur absent some kind of assessment of the impact on share eligibility. The staff should also

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promptly in the event of any decrease in the net long position held by such stockholder or beneficial owner following the delivery of such Special Meeting Request and prior to the Stockholder Requested Special Meeting and an acknowledgement that any such decrease shall be deemed to be a revocation of such Special Meeting Request by such stockholder or beneficial owner to the extent of such reduction, (vii) contain any other information that would be required to be provided by a stockholder seeking to bring an item of business before an annual meeting of stockholders pursuant to Article II, Section 11 of these Bylaws, and, (viii) if the purpose of the Stockholder Requested Special Meeting includes the election of one or more Directors, contain any other information that would be required to be set forth with respect to a proposed nominee pursuant to Article III, Section 4 of these Bylaws. Each stockholder making a Special Meeting Request and each beneficial owner, if any, on whose behalf the Special Meeting Request is being made is required to update such Special Meeting Request delivered pursuant to this Section 2 in accordance with the requirements of Article II, Section 11 and Article III, Section 4 of these Bylaws. Any requesting stockholder may revoke his, her or its Special Meeting Request at any time prior to the Stockholder Requested Special Meeting by written revocation delivered to the secretary of the Corporation at the principal executive offices of the Corporation. If at any time after sixty (60) days following the earliest dated Special Meeting Request, the unrevoked (whether by specific written revocation or by a reduction in the net long position held by such stockholder, as described above) valid Special Meeting Requests represent in the aggregate less than the Requisite Percentage, there shall be no requirement to hold a Stockholder Requested Special Meeting.").

[38] The proxy statement did note that "[a] shareholder's 'net long position' is the amount of shares in which the shareholder holds a positive (i.e., "long") economic interest, reduced by the amount of shares in which the shareholder holds a negative (i.e., "short") economic interest" but did not otherwise provide any specific language or more precise guidance. *See* AGL Resources Proxy Statement, at 79.

[39] *See* Section 7.4, Bylaws, AGL Resources, Inc. (as amended, April 28, 2015), http://media.corporate-ir.net/media_files/IROL/79/79511/AGLR_CorporateByLaws.pdf *See also* http://www.sec.gov/Archives/edgar/data/1004155/000100415514000040/exhibit_3-1.htm

[40] The proxy statement submitted by the company to shareholders did not set out the text of the bylaws or otherwise define the requisite terms. The proxy statement, but not the no action request, did note that "[a] shareholder's 'net long position' is the amount of shares in which the shareholder holds a positive (i.e., "long") economic interest, reduced by the amount of shares in which the shareholder holds a negative (i.e., "short") economic interest" but did not otherwise provide any specific language or more precise guidance. *See* AGL Resources Proxy Statement, at 79.

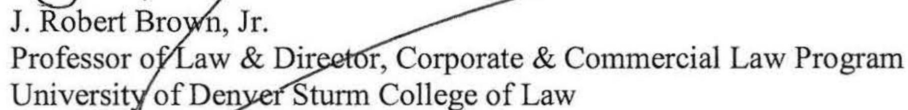
clarify that the imposition of a significant logistical burden can, standing alone, result in a failure to substantially implement a shareholder proposal.

Finally, the staff should reiterate that a proposal will not be deemed to be substantially implemented where implementation depends upon material contingencies within the control of the board such as the future adoption of substantive bylaws, particularly in the absence of any specific time frame for implementation or any detailed description of the content of the bylaws.

*   *   *

Thank you again for considering these concerns. I'm happy to discuss this with you or the staff of the Division.

With regards.



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