Thomas P. DiNapoli
COMPTROLLER

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

DIVISION OF PENSION INVESTMENT
AND CASH MANAGEMENT
59 Maiden Lane, 30th Floor
New York, NY 10038
Tel: (212) 383-3931
Fax: (212) 383-1331

July 7, 2015

Keith Higgins
Director
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Via email: i9review@sec.gov

Dear Director Higgins:

I am writing on behalf of New York State Comptroller Thomas P. DiNapoli, administrative head of the New York State and Local Employees Retirement System and the New York State and Local Fire and Police Retirement System (collectively, the Systems) and Trustee of the New York State Common Retirement Fund (Fund) in response to the Division of Corporation Finance's (Division) invitation for comment on the proper scope and application of Rule 14a-8(i)(9) (Rule).

The Fund holds the Systems' assets, currently valued at approximately $180 billion, and the Comptroller has a fiduciary duty to invest those assets for the exclusive benefit of the Systems' more than one million members, retirees and beneficiaries. As a long-term investor, the Fund maintains diversified investments across asset classes using both active and passive investment strategies; its largest allocation is to indexed domestic equities. Consequently, the Fund holds stock in most domestic publicly traded companies.

In fulfilling his fiduciary duty, Comptroller DiNapoli routinely engages portfolio companies on a broad range of issues to urge the implementation of sound corporate governance practices as a means of promoting long-term shareholder value. It has been our experience that filing shareholder proposals has proved to be an efficient and effective means to obtain corporate governance reform at our companies.

In many instances, the filing itself initiates discussion with the company and results in an agreement to implement the reform sought, thereby negating the need to include the resolution in the proxy materials. With respect to the 2015 proxy season, our

Office filed 48 shareholder proposals covering diverse issues, 25 of which were withdrawn after we reached agreements with the recipient companies. The reforms achieved through these settlements serve to protect and grow Fund investments and, at the same time, raise the bar for corporate governance "best practices" among companies generally. Thus, the Comptroller views his ability to file shareholder proposals, and his ability to withdraw proposals upon successful engagement, as an important component in fulfilling his fiduciary duty to the Systems' members and fostering the integrity of the financial markets generally. As such, we have followed with interest the recent debate surrounding application of the Rule. In the aftermath of Division staff's December 2014 Whole Foods Market determination, we believe that Chair Mary Jo White acted prudently in instructing the Division to review the scope and applicability of the Rule. We appreciate the opportunity to provide our thoughts and concerns regarding proper interpretation of the Rule.

The Rule provides that a shareholder proposal may be excluded from a company's proxy materials if the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting. The existing debate centers on the interpretation of what constitutes a direct conflict. Division staff in the past has generally taken the position that conflicting proposals need not be identical in scope or focus for the exclusion to be applicable, but the exclusion would apply in situations in which multiple proposals could present alternative and conflicting decisions for shareholders and could provide inconsistent and ambiguous results.

In comments dated June 10, 2015, a group of law firms urged the application of the Rule in situations in which a company proposal sought to address the same issue as the shareholder proposal but through different terms, including where the company proposal sought to do the exact opposite as the shareholder proposal.[1] This sweeping interpretation would vest in corporate management the power to effectively eliminate shareholder proposals from proxy materials. Under this construction, corporate management could have the ability to review shareholder proposals submitted for an annual general meeting, determine which of those it opposed, and simply submit its own proposal – precatory or binding, general or specific – pertaining to the same subject in order to preempt the shareholder proponent's access to the proxy. We do not believe the Rule was promulgated for the purpose of eliminating shareholders' rights in this manner. On the contrary, such an interpretation lends itself only to a continuation of the possibility of gamesmanship criticized by Chair White.

We support an interpretation of the Rule advanced to the Division by CalSTRS and CalPERS (California Funds).[2] For all of the reasons set forth in the California Funds'

---

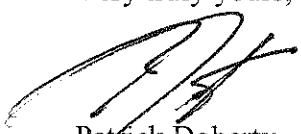
[1] Letter from Gibson Dunn & Crutcher LLP, Sidley Austin LLP, Wilmer Cutler Pickering Hale and Dorr LLP, Morrison & Foerster LLP and Skadden, Arps, Slate, Meagher & Flom LLP (June 10, 2015), available at http://www.sec.gov/comments/i9review/i9review-5.pdf.

[2] Letter from Anne Sheehan, Director of Corporate Governance California State Teachers' Retirement System and Anne Simpson, Senior Portfolio Manager, Investments, Director of Global Governance, California Public Employees' Retirement System (May 21, 2015), available at http://www.sec.gov/comments/i9review/i9review-4.pdf.

comments, and with which we agree, we urge the Division to limit its interpretation of direct conflict to those situations in which neither the shareholder's nor management's proposal is precatory. Precatory proposals serve to inform and persuade corporate management and fellow shareholders. By their nature, they do not conflict with binding proposals that direct particular corporate action, nor need they cause inconsistency or ambiguity. Both the California Funds' comments and those submitted by Michael Garland, Assistant Comptroller Corporate Governance and Responsible Investment for New York City Comptroller Scott M. Stringer,[3] detail actual results of 2015 proxy season meetings to illustrate the viability of shareholders considering and voting on alternative shareholder and management proposals. Indeed, in her comments to the Society of Corporate Secretaries and Governance Professionals on June 25, 2015, Chair White recognized this, stating that based on this year's experience with competing proposals, "…[i]t seems that shareholders were able to sort it all out and express their views."[4]

An interpretation of direct conflict based on whether a shareholder proposal is binding or precatory would permit shareholders to continue submitting their proposals, subject to the thoughtful and balanced approach laid out in Rule 14a-8, while providing Division staff a practical framework to analyze no-action requests submitted under the Rule. Thank you for the opportunity to comment on the Rule.

Very truly yours,



Patrick Doherty
Director of Corporate Governance

---

[3] Letter from Michael Garland. Assistant Comptroller Corporate Governance and Responsible Investment, on behalf of New York City Comptroller Scott M. Stringer (June 17, 2015), available at http://www.sec.gov/comments/i9review/i9review-7.pdf.

[4] Speech by Chair Mary Jo White, "Building Meaningful Communication and Engagement with Shareholders" (June 25, 2015), available at http://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html.