swn
Southwestern Energy®

John C. Ale
Senior Vice President, General Counsel and Secretary

Corporate Office
P.O. Box 12359
Spring, Texas 77391-2359
Tel: 832.796.6100
Fax: 832.796.4820
[redacted]

February 3, 2020

VIA EMAIL – *rule-comments@sec.gov*

Securities and Exchange Commission
Attention: Vanessa A. Countryman, Secretary
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: File Number S7-23-19 – Proposed Amendments to Rule 14a-8
Addressing specifically proposed Rule 14a-8(b)(iv)

Ladies and Gentlemen:

The undersigned submits the following comments on behalf of Southwestern Energy Company, whose common stock is listed on the New York Stock Exchange, to the proposed amendments to Rule 14a-8 published on November 5, 2019, in Release No. 34-87458 (the *"Release"*). Shareholder democracy is important and beneficial, and the Commission rightly is looking to enhance its rules so they advance the actual views of real shareholders.

These comments address only new subsection (b)(iv) on proposals through representatives; we have nothing to add to the robust dialogue on other proposed revisions. The suggestions are designed to give clearer guidance to proponents and issuers on how to evidence a representative's authority to submit and deal with proposals, which will not increase the burden on a proponent to any significant extent but will avoid proponents and companies having to grapple with issues that frequently come up in these situations.

The key, interrelated goals of proposed subsection (b)(iv) are to assure that (a) proponents actually know what proposals are being submitted in their names, (b) representatives are acting with authorization, and (c) companies can ascertain whether the shareholder in fact supports the proposal. *See* Release at 29-30. Based on experience with proposals submitted through representatives, Southwestern Energy Company recommends three modest additions to help achieve these goals, with suggested language to effect them attached to this letter:

1. **The proponent must sign and date a page on which the text of the proposal appears.** The text of the proposal could be imbedded in the authorization letter, or the proponent could simply sign and date the page with the proposal's text (though cutting and pasting a signature and date should not be acceptable, as that could be added later). A title or topic alone may not be sufficient, for it often is shorthanded and/or argumentative and so may not convey the substance of the proposal. This requirement would help assure that the substance of the proposal was in fact before the proponent when the authorization was signed rather than

$\frac{R^2}{A} \rightarrow V^+$®

simply attached to a previously signed form letter, as frequently occurs (see below). In response to question 21 in the Release, submission of a broker letter can suggest some principal-agent relationship exists, but it does not evidence its scope, in particular regarding the agent's authority to submit any particular proposal.

2. **The documentation authorizing the proposal must be signed and dated no later than the date the proposal is submitted.** The draft of subsection (b)(iv) appears to assume that a representative may submit a proposal only after the proponent has authorized it, but does not say so explicitly. This timing would reduce the possibility that someone submits a proposal purportedly on behalf of a shareholder, waits to see whether the company objects, and only then obtains the nominal proponent's approval.[1] This requirement would not undermine the 14-day period under Rule 14a-8(b) to allow a proponent to provide evidence of eligibility, for the purpose of that period is not to ***obtain approval***—as appears to occur in practice at times (see below)—but to ***provide evidence approval existed*** at the time the proposal was submitted. (Similarly, a proponent may not meet shareholding eligibility by buying additional shares when notified of a deficiency.) Also, because state agency law—which the Commission has stated applies absent contrary language in applicable statutes or rules, *see* Release at 29—in some circumstances recognizes ratification after after an agent acts, *see, e.g.,* RESTATEMENT (THIRD) OF AGENCY §§ 4.01-4.05 (2006), to avoid confusion and potential abuse, the Commission should clearly require that authorization occur by the time of submission.[2] The proponent and the representative are in the position to create adequate evidence of authority before the proposal is submitted, a minor burden.

3. **The representative may make changes to the proposal and/or the supporting statement only to the extent the authorization documentation says so.** The formulation regularly used by one serial proponent-representative team is "authorized to act on my behalf regarding this Rule 14a-8 proposal, and/or any modification of it." That language is ambiguous when it comes to who may authorize modifications—does it mean the representative may make them unilaterally or only pass along those that the proponent approves? Again, the proponent and the representative should be clear on the extent of authority delegated.

---

[1] Submitting a proposal purporting that it has been authorized before it actually has been may constitute making a false or misleading statement in connection with a proxy solicitation (a violation of Rule 14a-9) and possibly mail fraud or wire fraud, depending on the method of delivery. The Commission should not adopt a rule that effectively tolerates such conduct.

[2] In no event should authorization be valid if occurring after the deadline for submitting, as that would depart dramatically from federal precedent and state agency law. *See, e.g., Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) ("The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.") (emphasis in original; internal quotation marks and citations omitted); RESTATEMENT (THIRD) OF AGENCY § 4.05 (2006) (principal's ratification of agent's prior action invalid if position of third party has changed).

These suggestions are not academic but derive from actual experience with proposals submitted through representatives. A real situation this company has encountered illustrates the point, one that parallels the experience of perhaps dozens of companies each year. The company received an email accompanied by a letter signed by a shareholder purportedly authorizing the email's sender to act on the proponent's behalf, along with a separate page containing a proposal. The letter was a form identical to many appearing in companies' no-action requests in this and prior years, the only difference being the addressee and the date next to the nominal proponent's signature.

The letter did not state the title or subject matter of the proposal; it simply referred to "My attached Rule 14a-8 proposal" and "This Rule 14a-8 proposal." The page that followed with the proposal was dated several weeks after the date of the authorization letter. Obviously, the proposal page was not "attached" to—or even in existence—when the letter was signed authorizing the representative to submit "My attached Rule 14a-8 proposal." Nothing in the letter described the proposal itself or even its general topic or title. The company therefore requested additional evidence of authority under Rule 14a-8(b). The representative responded with a copy of ***the same letter*** but with the title of the proposal—which did not describe its specifics—cut-and-pasted onto the face of the letter above an additional signature and date in the proponent's handwriting. This new date was after the deadline for submission of proposals for the upcoming annual meeting. Hence, the earliest evidence that the proponent ever actually saw the title of the proposal (much less its specifics) was not only after its submission but also past the deadline for submitting proposals.

Was this sufficient evidence of the nominal proponent's authorization, and was it timely given that the proposal deadline had passed? The draft of subsection (b)(iv) does not answer these questions, ones multiple companies face every year. Both proponents and companies should have clearer guidance on these matters.

Based on this oft-repeated real-world experience, Southwestern Energy Company respectfully suggests adding the foregoing requirements to subsection (b)(iv). These three modest additions would help assure that the true shareholder actually approves the specific proposal and reduce the possibility of fraud. They are not burdensome in any individual instance, and they would avoid confusion and countless hours that companies and proponents spend dealing with questions of authorization.

If Commission personnel have any questions, please feel free to contact me at the telephone number or email address above.

Respectfully,

John C. Ale

SUGGESTED MODIFICATION TO PROPOSED SUBSECTION (b)(iv)

(iv) If you use a representative to submit a shareholder proposal and/or otherwise act on your behalf in connection with the shareholder proposal, you must provide the company with written documentation that:

(A) Identifies the company to which the proposal is directed;

(B) Identifies the annual or special meeting for which the proposal is submitted;

(C) Identifies you as the proponent and identifies the person acting on your behalf as your representative;

(D) Includes your statement authorizing the designated representative to submit the proposal **and, if intended, that the representative has the authority to modify the proposal** and/or otherwise act on your behalf;

(E) ~~Identifies~~**Includes the text of** the specific proposal to be submitted;

(F) Includes your statement supporting the proposal; and

(G) Is signed and dated by you **no later than the date the proposal is submitted, including on the same page on which the text of the proposal appears if different from the rest of the documentation**.