Bulldog Investors, LLC, 250 Pehle Avenue, Suite 708, Saddle Brook, NJ 07663
[redacted] // Fax: [redacted] // [redacted]

March 10, 2020

Ms. Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (File No. S7-23-19)

Dear Ms. Countryman:

While investors and companies duel it out in comment letters about whether or how to tweak Rule 14a-8, there are law firms, most prominently, Skadden Arps, that are quietly promoting a scheme to effectively allow public companies to entirely opt out of any obligation to comply with Rule 14a-8. Thus far, Skadden has been successful in persuading the SEC Staff that a company can adopt a measure that would prohibit a vote on virtually any proposal submitted pursuant to Rule 14a-8. The enclosed letter describes this nefarious scheme.

I urge those that care about retaining Rule 14a-8 as a vehicle to allow shareholders to communicate with their fellow shareholders to urge the Commission to act before this anti-investor virus spreads any further.

Very truly yours,

Phillip Goldstein
Managing Member

Bulldog Investors, LLC, 250 Pehle Avenue, Suite 708, Saddle Brook, NJ 07663
(201) 881-7111 // Fax: (201) 556-0097 // pgoldstein@bulldoginvestors.com

March 9, 2020

Chairman Jay Clayton
Commissioner Hester M. Peirce
Commissioner Elad L. Roisman
Commissioner Allison Herren Lee
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

The Skadden Scheme to Exempt Issuers From Compliance With Rule 14a-8

Dear Chairman Clayton and Commissioners Peirce, Roisman, and Lee:

I am writing to alert you to a novel scheme ("the Skadden Scheme") being advanced by Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") to permit an issuer to evade any obligation it would otherwise have to comply with Rule 14a-8. The Skadden Scheme has passed muster at the Staff level and your intervention is necessary to prevent this viral scheme from spreading further.

I am a managing member of Bulldog Investors, LLC, a registered investment advisor and the father of Alison Pampinella, a beneficial shareholder of Dividend & Income Fund ("DNI" or "the Fund"). Pursuant to Rule 14a-8, Alison submitted the following proposal to DNI for inclusion in its proxy materials for its 2020 annual meeting of stockholders:

> *RESOLVED: The Fund's rigged election bylaw should be replaced with the following one: "The nominees that receive the most votes cast at a meeting at which a quorum is present shall be elected as Trustees."*
>
> *SUPPORTING STATEMENT*
>
> *The Fund's Trustees have adopted a voting requirement that provides that, unless they run unopposed, "the affirmative vote of the holders of at least 75% of the outstanding Shares of the Trust entitled to be voted shall be required to elect a Trustee." On the other hand, if the incumbent Trustees run unopposed, they only need one vote to be elected. To illustrate how that requirement rigs elections in favor of the incumbent Trustees, consider that at the Fund's last annual meeting, fewer than 40% of the outstanding shares (excluding shares voted by brokers on routine matters) were actually voted. Thus, in any election for Trustees in which shareholders have a choice of nominees, it is almost certain than no Trustees will be elected. The result would then be a so-called "failed election" which would leave the incumbent Trustees in their positions as "holdover" (or unelected) Trustees – even if they receive fewer votes than their opponents.*

> *That is patently unfair and makes a mockery of the word "election" which is supposed to be a means to allow voters to choose the persons they want to represent them. Sham elections may occur in dictatorships like Cuba or Venezuela but they are prohibited in the United States of America. In this country, the incumbent office holders may not adopt election requirements that virtually guarantee they can never lose an election. Therefore, the rigged election bylaw should be replaced with the following one: "The nominees that receive the most votes cast at a meeting at which a quorum is present shall be elected as Trustees."*

On behalf of DNI, Skadden has submitted the enclosed letter to the Staff of the Division of Investment Management requesting "no action" assurance if DNI omits Alison's proposal from its proxy materials. Among other things,[1] Skadden argues that (1) Rule 14a-8(b)(1) requires that in order to be eligible to have a proposal included in a company's proxy materials, a securityholder must hold "securities entitled to be voted on the proposal," and since (2) DNI's organizational documents prohibit shareholders from voting on any proposal other than those submitted by its Board of Trustees, then DNI need not include Alison's proposal in its proxy materials because she does not hold securities entitled to be voted on any proposal submitted by shareholders.

In support of its position, Skadden cites several "no action" letters issued by the Staff of the Division of Corporation Finance ("the Staff"). It appears that the first time this argument was presented was in connection with *RAIT Financial Trust* (March 10, 2017) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/edwardfriedman031017-14a8.pdf). In that instance, the Staff of the Division of Corporation Finance, in a brief unexplained response to a "no action" request by the issuer's counsel, stated: "There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(b)" despite the shareholder's vigorous rebuttal argument and a legal opinion supporting his position.

A few months later, Skadden, apparently seeing an opportunity to aid companies that wished to opt out of Rule 14a-8, submitted two letters on behalf of issuers requesting no action relief in connection with Rule 14a-8 proposals: *Government Properties Income Trust* (February 20, 2018) (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/unitehere022018-14a8.pdf) and *Senior Housing Properties Trust* (February 20, 2018) (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/unitehereseniorhousing022018-14a8.pdf). In both instances, Skadden's letters piggybacked on *RAIT Financial Trust* and the Staff concurred with Skadden.

As you know, for almost eighty years Rule 14a-8 has served as a widely used means of communication between securityholders and the companies in which they invest. The rule has been tweaked from time to time but its fundamental objective, i.e., that, subject to certain specified conditions, an issuer of publicly traded securities has an obligation to include in its proxy materials

[1] The other bases Skadden asserts for excluding Alison's proposal are irrelevant to the matter discussed herein.

a proposal submitted by a shareholder, has become an accepted, albeit controversial, part of the federal securities regulatory scheme. Indeed, Exchange Act Release No. 87458, proposing certain modifications to Rule 14a-8, has unsurprisingly generated many comments. Yet, while the Commission and market participants are pre-occupied with the finer points of Rule 14a-8, Skadden is promoting a scheme to permit issuers to effectively opt out of the rule entirely. Here is why that should be of profound concern to the Commission.

Virtually any issuer can, without shareholder approval, adopt a bylaw (or other measure) to prohibit shareholders from voting on any proposal other than those that statutorily require a shareholder vote. Because the Staff has thrice not objected to the Skadden Scheme, Skadden cited all three in its request for "no action" relief in connection with Alison's Rule 14a-8 proposal to DNI. Unless you intervene now, investors will continue to lose the benefits of Rule 14a-8.

To reiterate, Skadden argues that if (1) an issuer's organizing documents prohibit securityholders from voting on proposals other than those submitted by the board, and (2) there is no statute barring such a voting prohibition, then the issuer can omit any securityholder proposal submitted pursuant to Rule 14a-8 from its proxy materials because the rule requires the proposal submitted to be one upon which securityholders are entitled to vote.[2] Thus, the Skadden Scheme would allow issuers, by fiat, to evade entirely any obligation to include in its proxy materials virtually any shareholder proposal submitted pursuant to Rule 14a-8. We shall explain why Skadden is incorrect.

Rule 14a-8(b)(1) states:

> Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible? In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

In that context, the phrase "entitled to be voted on the proposal" defines a <u>shareholder</u> that is eligible to submit a proposal for inclusion in an issuer's proxy materials, i.e., only a <u>shareholder</u> who could cast a vote on the subject proposal is eligible.[3] Conversely, the phrase is not intended to limit the <u>types of proposals</u> that may be voted on by shareholders. Rather, the types of proposal that are excludable by an issuer are enumerated in Rule 14a-8(i). In particular, Rule 14a-(8)(i)(1) ("Improper under state law: If the proposal is not a proper subject for action by shareholders under

[2] Notably, Skadden does not discuss whether the management of such an issuer has a fiduciary duty not to adopt a plenary prohibition on voting on proposals submitted by shareholders. In actuality, management's determination to adopt a bylaw that bars a vote on any precatory proposal is arguably presumptively a breach of fiduciary duty and therefore invalid.

[3] For example, a common stockholder could not submit a proposal under Rule 14a-8 if only preferred stockholders are entitled to vote on the proposal, e.g., the removal of a director who was elected solely by the preferred stockholders.

the laws of the jurisdiction of the company's organization") would be superfluous if Rule 14a-8(b)(1) was intended to serve as a catchall license to an issuer to effectively bar any proposal not otherwise excludable under the former rule. Consequently, it is critical that the Commission promptly reconsider RAIT and its progeny lest other issuers take similar actions to attempt to effectively opt out of their obligation to comply with Rule 14a-8.

If the Commission believes it is powerless to prevent issuers from utilizing the Skadden Scheme to effectively opt out of Rule 14a-8, there are other measures it can consider. At a minimum, it should (1) require any issuer that employs the Skadden Scheme to prominently and fully disclose in its soliciting materials and elsewhere that shareholders may not rely on Rule 14a-8 to submit proposals, and (2) take the position that failure to provide adequate disclosure may constitute a fraudulent omission.[4]

Another alternative for the Commission is to encourage the stock exchanges it oversees to require listed issuers not to prohibit a vote on any shareholder proposal that is not prohibited by statute.

Sincerely yours,

Phillip Goldstein
Managing Member

cc via email: Alison Pampinella
Thomas B. Winmill, President, Dividend and Income Fund
Russel Kamerman, Chief Compliance Officer, Secretary and General Counsel, Dividend and Income Fund
Thomas A. DeCapo, Skadden, Arps, Slate, Meagher & Flom LLP
The Division of Investment Management

[4] DNI's proxy disclosure has been woefully inadequate in this respect. For example, DNI's 2019 proxy statement obtusely states: "If you wish to have your proposal considered for inclusion in the Fund's 2020 Proxy Statement, we must receive it on or before January 22, 2020, pursuant to Rule 14a-8(e)(2) of the Exchange Act. The submission by a shareholder of a proposal for inclusion in the proxy statement or presentation at the Meeting does not guarantee that it will be included or presented. Shareholder proposals are subject to certain requirements under the federal securities laws and Delaware law and must be submitted in accordance with the Fund's Governing Documents, the Nominating Committee Charter and Appendix A thereto, the Policy, and other applicable laws and/or documents." It should have said something like this: "The Fund prohibits shareholders from voting on any proposal submitted by a shareholder unless such a vote is required by statute. If you submit a proposal pursuant to Rule 14a-8 for which no statute requires a vote by shareholders, it will not be included in the Fund's 2020 Proxy Statement."

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
500 BOYLSTON STREET
BOSTON, MASSACHUSETTS 02116-3740
TEL: (617) 573-4800
FAX: (617) 573-4822
www.skadden.com

FIRM/AFFILIATE OFFICES
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WASHINGTON, D.C.
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

DIRECT DIAL
617-573-4814
DIRECT FAX
617-305-4814
EMAIL ADDRESS
THOMAS.DECAPO@SKADDEN.COM

February 21, 2020

VIA ELECTRONIC MAIL (IMshareholderproposals@sec.gov)

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

RE: Dividend and Income Fund
Securities and Exchange Act of 1934
Omission of Shareholder Proposal Pursuant to Rule 14a-8

Ladies and Gentlemen:

I am writing on behalf of the Dividend and Income Fund (the "Fund"), pursuant to Rule 14a-8(j) promulgated under the Securities and Exchange Act of 1934 (the "Exchange Act") to request that the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") concur with the Fund's view that, for the reasons stated below, the shareholder proposal and supporting statement (collectively, the "Proposal") of Alison Pampinella (the "Proponent") may be properly omitted from the proxy materials (the "Proxy Materials") to be distributed by the Fund in connection with its 2020 annual meeting of shareholders ("2020 Annual Meeting"). The Proposal and other materials submitted by the Proponent to the Fund on January 22, 2020 are attached hereto as Exhibit A.

In accordance with Staff Legal Bulletin No. 14D (Nov. 7, 2008), this letter and its attachments are being emailed to imshareholderproposals@sec.gov. In accordance with Rule 14a-8(j)(1), a copy of this letter and its attachments are being sent simultaneously to the Proponent. We take this opportunity to inform the Proponent that if the Proponent elects to

submit correspondence to the Commission or the Staff with respect to the Proposal or this letter, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Fund pursuant to Rule 14a-8(k) and Staff Legal Bulletin No. 14D. We request that such copy be emailed to me at thomas.decapo@skadden.com.

The Fund advises that it currently intends to begin distribution of its definitive Proxy Materials on or after May 11, 2020. Accordingly, pursuant to Rule 14a-8(j), this letter is being submitted not less than 80 days before the Fund currently intends to file its definitive Proxy Materials with the Commission.

BACKGROUND

The Fund is a statutory trust formed under the Delaware Statutory Trust Act (the "DSTA"). The Fund's governing documents are its Amended and Restated Declaration of Trust, dated December 13, 2018, as amended (the "Fund's Declaration of Trust"), a copy of which is attached hereto as Exhibit B, and its Bylaws, dated December 13, 2018, as amended (the "Fund's Bylaws"), a copy of which is attached hereto as Exhibit C.

The Proposal states: "RESOLVED: the Fund's rigged election bylaw should be replaced with the following one: 'The nominees that receive the most votes cast at a meeting at which a quorum is present shall be elected as Trustees.'"

The Fund received the Proposal on January 22, 2020, which was accompanied by a cover letter from the Proponent and a letter from Muriel Siebert & Co., Inc. (collectively, the "Submission"). In accordance with Rule 14a-8(f)(1), on January 30, 2020, the Fund sent a letter to the Proponent, pointing out certain procedural and eligibility deficiencies with the Submission (the "Deficiency Letter"). As suggested in Section G.3 of Staff Legal Bulletin No. 14 (July 13, 2001), the Deficiency Letter included a copy of Rule 14a-8. The Deficiency Letter notified the Proponent that the Proposal failed to comply with Rule 14a-8(b) because the correspondence from Muriel Siebert & Co., Inc. was insufficient to verify the Proponent's eligibility to submit a proposal under Rule 14a-8. The Fund also pointed out that the Proposal may be excluded under Rule 14a-8(i)(3). The Fund requested that the Proponent respond no later than 14 calendar days after the date the Proponent received the Deficiency Letter. A copy of the Deficiency Letter is attached hereto as Exhibit D.

As of the date of this letter, the Proponent has not responded to the Deficiency Letter and has not provided proof of the Proponent's ownership of the Fund's shares as required by Rule 14a-8(b).

BASES FOR EXCLUSION

The Fund believes that the Proposal may properly be excluded from the Proxy Materials for the following reasons:

- The Fund may exclude the Proposal pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent failed to establish the requisite eligibility to submit the Proposal and failed to timely respond to the Deficiency Letter.
- The Fund may exclude the Proposal pursuant to Rule 14a-8(b) because the Proponent does not hold securities entitled to be voted on the Proposal.
- The Fund may exclude the Proposal pursuant to Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by shareholders at the 2020 Annual Meeting under state law.
- The Fund may exclude the Proposal because it contains false and misleading statements in violation of Rule 14a-8(i)(3) and Rule 14a-9.
    - The Proposal is misleading as to the identity of the Proponent.
    - The Proposal contains false and misleading statements that directly and indirectly impugn the character of the Fund and constitute charges concerning improper, illegal or immoral conduct without factual foundation.

ANALYSIS

1. The Fund may exclude the Proposal pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent failed to establish the requisite eligibility to submit the Proposal and failed to timely respond to the Deficiency Letter.

Rule 14a-8(b)(1) provides that "[i]n order to be eligible to submit a proposal, [a shareholder] must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date [the shareholder] submit[s] the proposal. [Such shareholder] must continue to hold those securities through the date of the meeting." Shareholders who are not registered holders of the subject company's shares (and who have not filed an ownership report with the Commission) must prove eligibility under Rule 14a-8(b)(2) by submitting "to the company a written statement from the 'record' holder of [such shareholder's] securities (usually from a broker or a bank) verifying that, at the time [the shareholder] submitted [such shareholder's] proposal, [such

shareholder] continuously held the securities for at least one year." Further, in accordance with the Staff's position as set forth in *Staff Legal Bulletin No. 14F (CF)* (October 18, 2011) ("SLB 14F"), "for Rule 14a-8(b)(2)(i) purposes, *only DTC participants should be viewed as 'record' holders of securities that are deposited at DTC.*" [Emphasis added.]

Rule 14a-8(f)(1) permits a company to exclude a shareholder proposal from the company's proxy materials if a shareholder proponent fails to comply with the eligibility or procedural requirements under Rule 14a-8; *provided* that the company has timely notified the proponent of any eligibility or procedural deficiencies and the proponent has failed to correct such deficiencies within 14 days of receipt of such notice.

According to the Fund's records, the Proponent is not a registered holder of the Fund's outstanding shares. Further, the correspondence from Muriel Siebert & Co., Inc. that the Proponent submitted with the Proposal indicated that the Proponent's ownership in the Fund was based on "historical statements" and did not specifically verify that the Proponent owned the Fund's shares continuously for a period of one year *as of the time of submitting the Proposal*, as required under SLB 14F. Based on the Fund's review of the most recent version of DTC's eligible participant list,[1] Muriel Siebert & Co., Inc. is not a DTC participant, in which case the firm is not the "record" holder of the securities and is not eligible to provide the required verification of the Proponent's share ownership. The Fund timely notified the Proponent of the procedural deficiency under Rule 14a-8(b) by transmitting the Deficiency Letter.

The Staff has consistently granted no-action relief to registrants where proponents have failed, following a timely and proper request by a registrant, to provide any evidence of eligibility to submit a shareholder proposal in response to a deficiency notice from the company. *See, e.g.*, *DigitalGlobe, Inc.* (Feb. 27, 2015) and *E.I. du Pont de Nemours and Company* (Dec. 31, 2014).

Accordingly, the Fund has concluded that the Proposal should be excluded from the Proxy Materials pursuant to Rule 14a-8(b)(2), and respectfully requests the Staff's concurrence with this conclusion.

2. The Fund may exclude the Proposal pursuant to Rule 14a-8(b) because the Proponent does not hold securities entitled to be voted on the Proposal.

As discussed above, to be eligible to submit a shareholder proposal for inclusion in a company's proxy materials under Rule 14a-8(b), a shareholder must have held at least

---

[1] *See* DTC Participant Report, Month Ending – December 31, 2019, http://www.dtcc.com/~/media/Files/Downloads/client-center/DTC/alpha.ashx

$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date such shareholder submits her proposal.

The Fund's Declaration of Trust clearly and unambiguously states that shareholders of the Fund are permitted to vote only on specific matters that are enumerated in the Fund's Declaration of Trust. Under Delaware law, beneficial owners of a statutory trust such as the Fund are only entitled to vote on those matters as specified in the statutory trust's governing instruments. Article IV, Section 2(a) provides as follows:

> The Shareholders ***shall have power to vote only with respect to*** the election or removal of Trustees as provided in Article III hereof, and with respect to the approval of certain transactions as provided in Article V and Article VI, Section 3 hereof, and such additional matters relating to the Trust or the applicable Series as may be required by applicable law, this Declaration, the Bylaws, or any registration of the Trust with the Commission (or any successor agency), or as the Trustees may consider necessary or desirable.[2] [Emphasis added.]

Neither a right to vote to amend the Fund's Bylaws nor a right to vote on a proposal that the Fund's Bylaws should be amended is within the enumerated voting rights. In addition, Article III, Section 5(c) of the Fund's Declaration of Trust expressly and unambiguously states that only the trustees and not shareholders have the power to adopt, alter or repeal a Bylaw provision and to adopt new Bylaws: "Except as otherwise expressly provided in the Bylaws, the [trustees] ***shall have the exclusive power to adopt, alter or repeal any provision of the Bylaws and to make new Bylaws***."[3] [Emphasis added.] The Fund's Bylaws do not otherwise provide that shareholders have any such power.

The Proposal asks that shareholders of the Fund adopt a resolution to change the voting standard in trustee elections. The subject matter of the Proposal, as well as the Proposal itself, are not among those enumerated matters that shareholders of the Fund are permitted to vote on pursuant to Article IV, Section 2(a) of the Fund's Declaration of Trust. Moreover, Article III, Section 5(c) of the Fund's Declaration of Trust specifically provides that only trustees

---

2 This enumerated list is repeated in Article VII, Section 4 of the Fund's Declaration of Trust, which also provides that shareholders have a right to vote on any amendment to Article VII, Section 4 (relating to amendments to the Fund's Declaration of Trust). Article III relates to the election and removal of Trustees; Article V relates to a merger, sale of assets or liquidation of the Fund; and Article VI, Section 3 relates to the conversion of the Fund's shares to "redeemable securities."

3 Article IX of the Fund's Bylaws reinforces the rights of the Trustees to take action on any Bylaw amendment: "Except as otherwise expressly provided in these Bylaws, the [trustees] shall have the exclusive power to adopt, alter or repeal any provision of these Bylaws and to make new Bylaws." The Fund's Bylaws do not otherwise provide that shareholders have any such power.

have the power to alter a Bylaw provision. Further, the Board of Trustees (the "Board," and each member, a "Trustee") does not consider it necessary or desirable that shareholders have the power to vote on the Proposal. Accordingly, the Fund believes that the shares are not entitled to be voted on the Proposal as required under Rule 14a-8(b).

The Staff has concurred with the view that a statutory trust may exclude a shareholder proposal pursuant to Rule 14a-8(b) in circumstances where its declaration of trust does not permit the shareholder proponent to vote on the subject of the proposal. In *Senior Housing Properties Trust* (February 20, 2018), the Staff accepted the position of Senior Housing Properties Trust, a Maryland REIT ("*SNH*"), that its shareholders were entitled to vote only on certain enumerated matters in its declaration of trust, which did not include the proposal in question, and that, therefore, the shareholder proponent did not hold securities entitled to be voted on the proposal as required by Rule 14a-8(b). Notably, the *Senior Housing Properties Trust* no action letter, like the present case, involved a proposal that a trustee election standard in the company's bylaws should be changed.[4] The pertinent language of SNH's declaration of trust, Article VIII, Section 8.2, provides as follows:

> Voting Rights. Subject to the provisions of any class or series of Shares then outstanding, ***the shareholders shall be entitled to vote only on the following matters***: (a) election of Trustees as provided in Section 5.2 and the removal of Trustees as provided in Section 5.3; (b) amendment of the Declaration of Trust as provided in Article X; (c) termination of the Trust as provided in Section 12.2; (d) merger or consolidation of the Trust to the extent required by Title 8, or the sale or disposition of substantially all of the Trust Property, as provided in Article XI; and (e) such other matters with respect to which the Board of Trustees has adopted a resolution declaring that a proposed action is advisable and directing that the matter be submitted to the shareholders for approval or ratification. Except with respect to the foregoing matters, no action taken by the shareholders at any meeting shall in any way bind the Board of Trustees. [Emphasis added.]

See Government Properties Income Trust (Feb. 20, 2018) (concurring with the exclusion of a proposal to eliminate the classification of the board of trustees of the company); *RAIT Financial*

---

[4] The proposal submitted to SNH reads as follows: "RESOLVED, that the shareholders of Senior Housing Properties Trust ("SNH," or the "Company") recommend that the Board of Trustees ("the Board") take all steps necessary to require Trustee nominees to be elected by an affirmative vote of the majority of votes cast for uncontested Trustee elections, that is, when the number of Trustee nominees is the same as the number of board seats (with a plurality vote standard retained for contested Trustee elections, that is, when the number of Trustee nominees exceeds the number of board seats)."

Trust (March 10, 2017) (concurring with the exclusion of a proposal to externalize the management of the company by entering into an advisory agreement with an external adviser).

For the reasons discussed above, the Fund has concluded that the Proposal should be excluded from the Proxy Materials pursuant to Rule 14a-8(b)(2), and respectfully requests the Staff's concurrence with this conclusion.

The Fund did not provide the Proponent with the 14-day notice described in Rule 14a-8(f)(l) on this eligibility requirement because such notice is not required if a proposal's deficiency cannot be remedied. The lack of entitlement of the shares held by the Proponent to vote on the Proposal under Delaware law cannot be remedied. Accordingly, the Fund was not required to send a 14-day notice to cure the eligibility deficiency in order for the Proposal to be excluded under Rule 14a-8(b).

An opinion of special Delaware counsel to the Fund with respect to certain matters of Delaware state law pertinent to the exclusion of the Proposal under Rule 14a-8(b)(1) will be supplementally filed with the Staff shortly following the submission of this letter.

3. The Fund may exclude the Proposal pursuant to Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by shareholders under state law.

A company is permitted to omit a proposal from its proxy materials under Rule 14a-8(i)(1) if the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of organization of the company. The Fund believes that it may exclude the Proposal from the Proxy Materials under Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by shareholders of the Fund under the laws of the State of Delaware.

The DSTA provides maximum flexibility to those forming a statutory trust to select and construct their own governance structure and provides broad power and discretion to trustees to determine the best way to manage the business and affairs of the statutory trust.[5] Consistent with these principles of Delaware law, Article II, Section 2(b) of the Fund's Declaration of Trust expressly states that "[e]very [s]hareholder, by virtue of having become a [s]hareholder, shall be held to have expressly assented and agreed to be bound by the terms of

---

[5] *See* 12 Del. C. § 3825(b) ("It is the policy of this subchapter to give the maximum effect to the principle of freedom of contract and to the enforceability of governing instruments"); *PHL Variable Ins. Co. v. Price Dawe Ins. Tr.*, 28 A.3d 1059, 1077 (Del. 2011) ("The policy of the Delaware Statutory Trust Act is to give maximum effect to freedom of contract and the enforceability of governing instruments, and its provisions are to be construed broadly even if in derogation of the common law.").

this Declaration and the Bylaws."[6] In addition, the Fund's Declaration of Trust confers no general powers or rights on to shareholders and confers broad power on the Fund's Board. Article III, Section 5 of the Fund's Declaration of Trust states:

> Subject to the provisions of this Declaration, the business of the Trust shall be managed by the Trustees, and the Trustees shall have all powers necessary or convenient to carry out that responsibility . . . The Trustees may perform such acts as, in their sole discretion, are proper for conducting the business of the Trust.
>
> The Trustees shall have exclusive and absolute control over the Trust Property and over the business of the Trust to the same extent as if the Trustees were the sole owners of the Trust Property and business in their own right, but with such powers of delegation as may be permitted by this Declaration.

Moreover, the Fund's Declaration of Trust provides that "[a]ny determination as to what is in the interests of the Trust made by the Trustees in good faith shall be conclusive. In construing the provisions of this Declaration, ***the presumption shall be in favor of a grant of power to the Trustees***." [Emphasis added.] Article III, Section I of the Fund's Bylaws reinforces the broad authority of the Trustees, stating that "[e]xcept as otherwise provided by law, by the Declaration or by these Bylaws, the business and affairs of the Trust shall be managed under the direction of, and all the powers of the Trust shall be exercised by or under authority of, its Board of Trustees."

As noted above, the Fund's Declaration of Trust expressly sets forth the voting rights of shareholders of the Fund, and under Delaware law, beneficial owners of a statutory trust such as the Fund are only entitled to vote on those matters as specified in the statutory trust's governing instruments. Article IV, Section 2(a) of the Fund's Declaration of Trust specifically enumerates the matters that the Fund's shareholders may vote on, and the subject matter of the Proposal and the Proposal itself are not within those enumerated matters. Article III, Section 5(c) of the Fund's Declaration of Trust, moreover, specifically states that only trustees have the power to alter a Bylaw provision. Article IX of the Fund's Bylaws reinforces that the trustees have the exclusive power to adopt, alter or repeal any provision of the Fund's Bylaws and to make new bylaws.

The Fund's Declaration of Trust is clear that the Board has authority over the business and affairs of the Fund, including the decision of whether shareholders should vote on the Proposal. Nothing in the Fund's Bylaws or under the DSTA creates a right for shareholders

---

[6] Each of the Fund's Declaration of Trust and Bylaws are documents filed publicly with the Commission and available for inspection before a person decides to buy shares in the Fund.

to vote on the Proposal. Therefore, the Fund believes it may exclude the Proposal pursuant to Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by shareholders under the laws of the State of Delaware.

4. The Fund may exclude the Proposal because it contains false and misleading statements in violation of Rule 14a-8(i)(3) and Rule 14a-9.

a. *The Proposal is misleading as to the identity of the Proponent.*

The Proposal purports to be made by Alison Pampinella as an individual proponent. However, the facts indicate that this assertion is false and misleading, in violation of Rule 14a-9, including Note (c) thereto. Note (c) to Rule 14a-9 specifies that a statement may be misleading if it fails "to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter."

On January 21, 2020, a Schedule 13D (the "Schedule 13D") relating to the Fund was filed on behalf of Bulldog Investors, LLC, Phillip Goldstein and Andrew Dakos (collectively, the "Bulldog Group"). "Item 4. Purpose of the Transaction" of the Schedule 13D contained the following statement: "See exhibit B - Letter to the Secretary from a Fund shareholder." Exhibit B to the Schedule 13D is a copy of the Proposal, including the accompanying cover letter. Further, the envelope received by the Fund containing the Proposal had the following return address: Andrew Dakos, Bulldog Investors, Park 80 West – 250 Pehle Ave, Suite 708, Saddle Brook, NJ 07663, indicating a material relationship between the Proponent and the Bulldog Group. Moreover, on information and belief, it is the Fund's understanding that the Proponent is a family member of Mr. Goldstein, a member of the Bulldog Group.

Pursuant to Rule 13d-5(b) under the Exchange Act, a "group" is defined as "two or more persons [that] agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer." It is not necessary under the rule that such an agreement to act together be in writing; such an agreement can be inferred by the Commission or a court from the concerted actions or common objective of the group members. Under the circumstances described above, the Fund believes that the Proponent's Proposal is, in fact, a proposal on behalf of the Bulldog Group as a whole, rather than a proposal on behalf of the Proponent as an individual.

The Fund believes that the facts reveal that the Proponent is a part of the Bulldog Group, and that they have acted together such that the Proponent and the Bulldog Group are one and the same "group." Yet, the Proponent has not disclosed in her Proposal her membership in

the Bulldog Group.[7] This failure is all the more egregious in view of the Bulldog Group's Schedule 13D/A filing on February 3, 2020, pursuant to which the Bulldog Group disclosed its intention to nominate a candidate for election as a Trustee of the Fund and present a proposal for the 2020 Annual Meeting.

The Fund believes that there is a substantial likelihood that a reasonable shareholder would consider the information described above to be important in deciding how to vote. Therefore, the Fund views the omission of this information from the Proposal to be materially misleading, in violation of Rule 14a-9, including Note (c) thereto. The Fund also believes that the omission of this information was designed to obfuscate and, potentially, manipulate the market, particularly in view of the Bulldog Group's self-identification as an "activist" market participant (as described on its website).[8]

b. ***The Proposal contains false and misleading statements that directly and indirectly impugn the character of the Fund and constitute charges concerning improper, illegal or immoral conduct without factual foundation.***

Rule 14a-8(i)(3) permits a company to omit a shareholder proposal and related supporting statement from its proxy materials if "the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials." Note (b) to Rule 14a-9 specifies that a statement may be misleading if it "directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation." The Staff has concurred that a company may properly exclude entire shareholder proposals and supporting statements where they contain false and misleading statements or omit material facts necessary to make such statements not false and misleading. *See Entergy Corp.* (Feb. 14, 2007) (permitting the exclusion of the entire proposal which contained false and misleading statements relating to management and the

---

[7] The Schedule 13D to which the Proponent's Proposal was attached also did not disclose anything about the Proponent's relationship with the named filers of the Schedule 13D or the circumstances under which her Proposal ended up in the hands of the Bulldog Group. For example, "Item 5. Interest In Securities Of The Issuer" of the Schedule 13D made no reference to the Proponent as a part of the Bulldog Group, nor is the Proponent included as a signatory to the joint filing agreement attached as Exhibit A to the Schedule 13D. We further note that the Proponent has not filed a separate Schedule 13D disclosing (1) her share ownership in the Fund or her relationship with Bulldog Investors, LLC, Phillip Goldstein, Andrew Dakos or the Bulldog Group, of whose shares the Proponent may be deemed to be a beneficial owner due to her status as part of the same "group," or (2) any of the other information required under Schedule 13D. In addition, neither the Schedule 13D nor the Proposal explains how or why the Proposal was mailed to the Fund by Mr. Dakos, a member of the Bulldog Group, or what familial and other relationships, arrangements or agreements the Proponent may have with Mr. Goldstein, another member of the Bulldog Group.

[8] *See, e.g.*, https://bulldoginvestors.com/services/. e

board); *The Swiss Helvetia Fund, Inc.* (April 3, 2001) (permitting exclusion of entire proposal due to unsupported statements insinuating that directors may have violated, or may choose to violate, their fiduciary duties); and *General Magic, Inc.* (May 1, 2000) (permitting exclusion of proposal relating to change of name of company which contained false and misleading statements). Additionally, Section B.4 of Staff Legal Bulletin No. 14B (CF) (Sept. 15, 2004) provides that the Staff "may find it appropriate for companies to exclude the entire proposal, supporting statement, or both as materially false or misleading if a proposal or supporting statement would require detailed and extensive editing in order to bring it into compliance with the proxy rules."

From the first sentence to the very end, the Proposal is riddled with statements and assertions that are clearly intended to mislead readers into believing that the Fund has and is continuing to engage in behavior that is improper, illegal or immoral. Among such false and misleading statements are the following:

- "*The Fund's rigged election bylaw should be replaced with the following one . . .*"
- "*To illustrate how that requirement rigs elections in favor of incumbent Trustees . . .*"
- "*Sham elections may occur in dictatorships like Cuba or Venezuela, but they are prohibited in the United States of America . . .*"
- "*Therefore, the rigged election bylaw should be replaced with the following one . . .*"

[Emphasis added.] Perhaps the most important assets of any firm, and particularly of investment companies such as the Fund, are its reputation and the confidence of its investors, potential investors and the investment community at large. Therefore, any false and misleading statements intended to directly or indirectly impugn the character of a firm in a direct communication to investors are inherently material in that there is a substantial likelihood that a reasonable shareholder would consider them important in deciding how to vote. The Fund's Declaration of Trust and the Fund's Bylaws, including the Fund's election bylaw provision, were adopted in compliance with the DSTA. The Proponent's statements that the Fund's election process or governing documents are "rigged," or that the Fund improperly "rigs" elections in favor of its preferred candidates, or comparing the Fund or its processes to those of "dictatorships like Cuba or Venezuela" – all made without any semblance of legal or factual foundation (as opposed to the Proponent's own subjective, inflammatory beliefs) – clearly constitute charges that the Fund's processes, governing documents and behavior are improper, illegal and immoral. The Fund emphatically denies the Proponent's implication of any such improper, illegal or immoral

conduct, which is even more egregious in light of being part of a group with Bulldog who intends to wage a hostile proxy contest against the Fund for the purpose of electing its own trustee.

Based on the foregoing, the Fund believes that the entire Proposal should be excluded from the Proxy Materials pursuant to Rule 14a-(8)(i)(3) as materially false and misleading in violation of Rule 14a-9 and respectfully requests the Staff's concurrence with this conclusion.

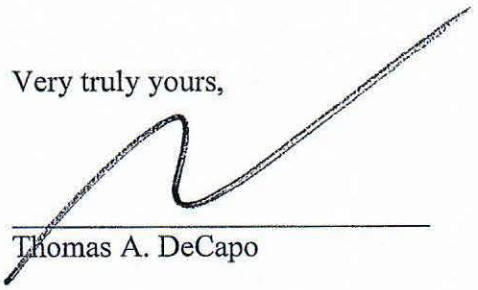
Accordingly, the Fund believes the Proposal violates Rule 14a-9, including Note (c) thereto. As a result, the Fund has concluded that the Proposal should be excluded from the Proxy Materials pursuant to Rule 14a-(8)(i)(3), and respectfully requests the Staff's concurrence with this conclusion.

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Fund excludes the Proposal from its Proxy Materials. Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of the Fund's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response.

If the Staff has any questions or comments regarding the foregoing, please contact the undersigned at [redacted].

Very truly yours,



Thomas A. DeCapo

cc: Alison Pampinella
Thomas B. Winmill, President, Dividend and Income Fund
Russell Kamerman, Chief Compliance Officer, Secretary and General Counsel, Dividend and Income Fund