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

DIVISION OF
CORPORATION FINANCE

January 8, 2018

Alan L. Dye
Hogan Lovells US LLP
alan.dye@hoganlovells.com

Re: 3M Company
Incoming letter dated December 8, 2017

Dear Mr. Dye:

This letter is in response to your correspondence dated December 8, 2017 concerning the shareholder proposal (the "Proposal") submitted to 3M Company (the "Company") by Michael Ayers for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Matt S. McNair
Senior Special Counsel

Enclosure

cc: Michael Ayers
***

*** FISMA & OMB Memorandum M-07-16

January 8, 2018

Response of the Office of Chief Counsel
<u>Division of Corporation Finance</u>

Re: 3M Company
Incoming letter dated December 8, 2017

The Proposal directs the compensation committee to ensure that stock and option awards to "Corporate Officers" are subject to a holding period of at least five years after the award date.

There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7), as relating to the Company's ordinary business operations. In this regard, we note that the Proposal relates to compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

Sincerely,

Evan S. Jacobson
Special Counsel

DIVISION OF CORPORATION FINANCE
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the company in support of its intention to exclude the proposal from the company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes and rules administered by the Commission, including arguments as to whether or not activities proposed to be taken would violate the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure.

It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

December 8, 2017

Rule 14a-8(i)(1)
Rule 14a-8(i)(2)
Rule 14a-8(i)(3)
Rule 14a-8(i)(6)
Rule 14a-8(i)(7)

VIA E-MAIL (*shareholderproposals@sec.gov*)

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

Re: 3M Company
Shareholder Proposal of Michael Ayers

Dear Ladies and Gentlemen:

On behalf of 3M Company (the "***Company***"), we are submitting this letter pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934 to notify the Securities and Exchange Commission (the "***Commission***") of the Company's intention to exclude from its proxy materials for its 2018 annual meeting of stockholders (the "***2018 Annual Meeting***") a shareholder proposal (the "***Proposal***") submitted to the Company by Michael Ayers (the "***Proponent***"). We also request confirmation that the staff of the Division of Corporation Finance (the "***Staff***") will not recommend to the Commission that enforcement action be taken if the Company omits the Proposal from its 2018 proxy materials for the reasons discussed below.

A copy of the Proposal, together with other correspondence relating to the Proposal, is attached hereto as Exhibit A.

In accordance with Staff Legal Bulletin No. 14D (November 7, 2008) ("***SLB No. 14D***"), this submission is being delivered by e-mail to shareholderproposals@sec.gov. Pursuant to Rule 14a-8(j), a copy of this submission also is being sent to the Proponent. Rule 14a-8(k) and SLB No. 14D provide that a shareholder proponent is required to send to the Company a copy of any correspondence which the proponent elects to submit to the Commission or the Staff. Accordingly, we hereby inform the Proponent that, if the Proponent elects to submit additional correspondence to the Commission or the Staff relating to the Proposal, the Proponent should concurrently furnish a copy of that correspondence to the undersigned.

Pursuant to the guidance provided in Section F of Staff Legal Bulletin 14F (October 18, 2011), we ask that the Staff provide its response to this request to the undersigned via e-mail at the address noted in the last paragraph of this letter.

The Company intends to file its definitive 2018 Proxy Materials with the Commission more than 80 days after the date of this letter.

THE PROPOSAL

The Proposal requests that the Company's stockholders approve the following:

"Therefore the Compensation Committee is directed to ensure that

1. stock awarded to the Corporate Officers must be held by them and cannot be sold or transferred for at least five years after the award date, and

2. stock options awarded to the Corporate Officers cannot be redeemed for at least five years after the award date.

Under the terms of this proposal,

1. all stock awarded to the Corporate Officers is considered Restricted Stock and has a Restricted Period of five years from the date of award, and

2. all stock options to the Corporate Officers may not be redeemed prior to the fifth anniversary date of the award."

BASES FOR EXCLUDING THE PROPOSAL

We request that the Staff concur that the Company may exclude the Proposal pursuant to:

- Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by stockholders under Delaware law;

- Rule 14a-8(i)(2) because the Proposal would require the Company to violate Delaware law;

- Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal;
- Rule 14a-8(i)(3) because the Proposal is vague and indefinite in violation of Rule 14a-9; and
- Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations.

I. Rule 14a-8(i)(1) – The Proposal is Not a Proper Subject for Action by Stockholders Under Delaware Law

Under Rule 14a-8(i)(1), a shareholder proposal may be excluded from a company's proxy materials if the proposal is "not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." A note to Rule 14a-8(i)(1) states that, "[d]epending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law."

Section G of Staff Legal Bulletin No. 14 (July 13, 2001) provides that, "[w]hen drafting a proposal, shareholders should consider whether the proposal, if approved by shareholders, would be binding on the company. In our experience, we have found that proposals that are binding on the company face a much greater likelihood of being improper under state law and, therefore, excludable under rule 14a-8(i)(1)." Similarly, the Commission has explained that "the board may be considered to have exclusive discretion in corporate matters, absent a specific provision to the contrary in the statute….itself, or the corporation's charter or by-laws. Accordingly, proposals by security holders that mandate or direct the board to take certain action may constitute an unlawful intrusion on the board's discretionary authority under the typical statute." *See* Securities Exchange Act Release No. 34-12999 (November 22, 1976).

The Proposal is not cast as a recommendation or request but as a mandatory directive that would be binding upon the Company if approved. As more fully explained in the legal opinion of Richards, Layton & Finger, P.A. (the "***Delaware Legal Opinion***") attached hereto as Exhibit B, the Proposal, if adopted, would improperly interfere with the managerial authority of the Company's Board of Directors (the "***Board***"), acting through its compensation committee, to determine the compensation of certain officers of the Company and to issue stock and options upon the terms that the Board determines to be advisable and in the best interests of the Company and its stockholders, and therefore would violate Delaware law.

The Company is a Delaware corporation. Section 141(a) of the General Corporation Law of the State of Delaware (the "***DGCL***") provides that the business and affairs of a Delaware corporation are to be managed by the board of directors except as otherwise provided in the DGCL or in the company's certificate of incorporation. As the Delaware Legal Opinion explains, neither the DGCL nor the Company's Certificate of Incorporation (the "***Charter***") provides for any variation to Section 141(a)'s mandate with respect to the matters set forth in the Proposal. The Charter does not reserve to the stockholders any power to manage the business or affairs of the Company or to set the terms of equity awards granted to corporate officers. Additionally, the Company's bylaws provide that "[t]he business and affairs of the [Company] shall be managed by or under the direction of the Board of Directors," and that "[t]he compensation of the officers of the [Company] shall be fixed by or under the direction of the Board of Directors." Likewise, as explained in the Delaware Legal Opinion, Delaware law provides that the Board has the exclusive authority to issue stock and options upon the terms that the Board determines to be advisable and in the best interests of the Company and its stockholders. Accordingly, the Board has the sole discretion to determine the appropriate compensation for its officers and employees in the exercise of its power and authority to manage the business and affairs of the Company.

The Staff has consistently permitted the exclusion of shareholder proposals mandating or directing a company's board of directors to take certain action inconsistent with the discretionary authority provided to a board of directors under state law. For example, in *Celgene Corp.* (March 27, 2013), the Staff concurred that the company could exclude a proposal mandating that the chair of the board be a director who is not concurrently an executive officer of the company. In *IEC Electronics Corp.* (October 31, 2012), the Staff similarly concurred that the company could exclude a proposal mandating that "cash incentive awards for Executive officers and Directors that are not dependent on the price of common shares must be approved by a vote of the common shareholders." See also *Bank of America* (February 16, 2011); *MGM Mirage* (February 6, 2008); *Cisco Systems, Inc.* (July 29, 2005); *Constellation Energy Group, Inc.* (March 2, 2004); and *Ford Motor Co.* (March 19, 2001) (in each case, permitting exclusion of a non-precatory proposal as an improper subject for shareholder action under applicable law).

The Proposal supersedes the discretion of the Board's compensation committee in contravention of the Board's discretionary authority under Delaware law. If approved by stockholders, the Proposal would impose an obligation on the Board, through its compensation committee, to set the terms of equity awards in accordance with the Proposal, regardless of the Board's fiduciary duties and regardless of whether the action is in the stockholders' or the Company's best interests. In addition, the Proposal is stated in mandatory rather than precatory language. Given that the Proposal relates to matters that only the Board has the power to determine, in the exercise of its business judgment, the Proposal is not a proper subject for stockholder action under Delaware law and therefore may be excluded under Rule 14a-8(i)(1).

II. Rule 14a-8(i)(2) – The Proposal Would Require the Company to Violate Delaware Law

Rule 14a-8(i)(2) permits a company to exclude a proposal if its implementation would cause the company to violate state, federal or foreign law applicable to the company. The Company is incorporated under the laws of the State of Delaware. The Proposal, if approved by stockholders, would cause the Company to violate Delaware law. As the Delaware Legal Opinion explains, the Proposal would, if adopted and implemented, (a) impermissibly infringe on the managerial authority of the Board to determine the compensation of certain officers of the Company and to issue stock and options upon the terms that the Board determines to be advisable and in the best interests of the Company and its stockholders, (b) impose a transfer restriction on outstanding shares of the Company's common stock in violation of Delaware law and (c) cause the Company to breach existing contractual obligations or unilaterally modify existing contractual obligations in violation of Delaware law.

The Staff has consistently permitted exclusion under Rule 14a-8(i)(2) of proposals that would cause companies to violate state law for any of the above reasons. First, as discussed in Section I above, the Staff has routinely permitted exclusion of non-precatory proposals as an improper subject for shareholder action under applicable law. Second, in *Mylan Inc.* (March 12, 2010) and *American Express Co.* (February 19, 2010), the Staff agreed that proposals seeking to require officers to retain a significant percentage of their equity compensation until two years after termination of their employment could be excluded under Rule 14a-8(i)(2) where the proposals, if implemented, would have (1) caused the company to "breach existing compensation agreements" and (2) "require[d] [the company] to impose restrictions on transferability of shares already issued." Similarly, the Proposal, if implemented, would cause the Company to violate state law, and should be excluded under Rule 14a-8(i)(2).

A. The Proposal would cause the Company to violate Delaware Law because it impermissibly infringes upon the Board's authority

As discussed in Section I above, DGCL Section 141(a) reserves to the Board the authority to manage the business and affairs of the Company. The Delaware Legal Opinion explains that the DGCL vests in the Board the discretion to set compensation of the Company's officers, by virtue of the Board's power and authority to manage the business and affairs of the corporation. The Board holds the full and exclusive authority to set compensation of the Company's officers and other employees, which include administering the Company's equity compensation plans and establishing the terms of equity awards in accordance with those plans. In addition, as discussed in the Delaware Legal Opinion, the Proposal impermissibly infringes on the Board's powers concerning the grant, issuance, sale or other disposition of the Company's stock and stock options. Accordingly, by limiting the Board's discretion to set the terms of equity awards to corporate officers and other employees, the Proposal would impermissibly infringe on the Board's managerial authority and cause the Company to violate the DGCL.

B. *The Proposal would cause the Company to impose a new transfer restriction on shares of the Company's stock already issued to officers, in violation of Delaware law*

The Company's officers and other employees have acquired shares of the Company's common stock pursuant to the exercise or settlement of equity awards granted to them under the various equity compensation plans of the Company (the "***Plans***"), including the 2016 Long-Term Incentive Plan and its predecessor, the 2008 Long-Term Incentive Plan. Those equity awards include stock options, performance share awards and restricted stock units ("RSUs"). The terms of these equity awards are established by the Compensation Committee in accordance with the terms of the Plans and are set forth in award agreements between the Company and the recipient. The shares of common stock delivered to recipient grantee following the exercise of an option or the settlement of a performance share award or RSU are not governed by the Plans or the individual award agreements, but are issued and outstanding common stock subject to the same conditions as any other shares issued by the Company and available on the open market.

The Proposal dictates that "stock awarded to the Corporate Officers must be held by them and cannot be sold or transferred for at least five years after the award date," and "all stock awarded to the Corporate Officers is considered Restricted Stock and has a Restricted Period of five years from the date of award." These sentences are stated in the present tense and, by their terms, would apply restrictions to fully vested and already delivered shares previously subject to awards made under the Plans. Presently, those shares are not subject to any restriction on transfer of the nature required by the Proposal. To implement the Proposal, therefore, the Company would have to impose a restriction on transfer of any of those shares held by a Corporate Officer until at least five years after the initial grant date of the award.

As explained in the Delaware Legal Opinion, the Company does not have the right under Delaware law to unilaterally impose a transfer restriction on previously issued and outstanding shares of the Company's stock. Section 202(b) of the DGCL provides that a restriction on transfer of a company's securities may be imposed by the company's certificate of incorporation or bylaws, or by an agreement among the holders of the securities. Further, "[n]o restrictions so imposed shall be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are party to an agreement or voted in favor of the restriction." The Proposal attempts to impose a restriction on previously issued securities that is not contained in the Company's certificate of incorporation, bylaws, or any agreement among the holders of the securities.

As discussed above, the Staff has regularly permitted exclusion of proposals seeking to impose a holding period requirement on stock already issued pursuant to previously granted equity awards, because such proposals, if implemented, would violate state law. *See, e.g., Mylan Inc.* (March 12, 2010) (permitting exclusion of a proposal that required senior executives to retain shares acquired through equity compensation programs until two years following the termination of their employment, in part because it would "require Mylan to impose restrictions on transferability of shares already issued," in violation of Pennsylvania law); *American Express Co.* (February 19, 2010) (permitting exclusion of the same proposal under New York law); *JP Morgan Chase & Co.* (March 9, 2009) (permitting exclusion of a similar proposal under Delaware law). As with the proposals addressed in these letters, the Proposal would require the Company to violate state law by imposing a transfer restriction on previously issued shares held by the Company's Corporate Officers, without the agreement or affirmative vote of the Corporate Officers.

C. The Proposal would cause the Company to violate Delaware Law because it would require the Company to breach existing contracts or unilaterally modify them

The Proposal, if implemented, would retroactively impose restrictions on unexercised stock options and unvested restricted stock units and performance shares that have been granted to the Company's Corporate Officers under the Plans and that are subject to equity award agreements. Under Delaware law, an equity incentive plan, as well as the award agreements entered into in connection with awards made thereunder, constitute valid, binding agreements between the corporation and the recipients of awards. As described in the Delaware Legal Opinion, the Proposal, if adopted and implemented, would cause the Company to violate Delaware law by requiring the Company either to breach the terms of the Plans and the equity award agreements entered into thereunder or to unilaterally modify those equity award agreements.

In Staff Legal Bulletin No. 14B (September 15, 2004) ("***SLB No. 14B***"), the Staff stated that "[p]roposals that would result in the company breaching existing contractual obligations may be excludable under rule 14a-8(i)(2), rule 14a-8(i)(6), or both, because implementing the proposal would require the company to violate applicable law or would not be within the power or authority of the company to implement." As discussed above in *Mylan Inc.* (March 12, 2010) and *American Express Co.* (February 19, 2010), the Staff agreed that proposals seeking to require officers to retain a significant percentage of their equity compensation until two years after termination of their employment could be excluded under Rule 14a-8(i)(2), in part because the proposals, if implemented, would have caused the company to "breach existing compensation agreements" and therefore violate state law.

The plain language of the Proposal would cause the Company to violate outstanding award agreements by imposing new restrictions on outstanding awards. For example, unvested RSUs awarded under the 2016 Long-Term Incentive Plan are governed by Restricted Stock Unit Award Agreements between the Company and grantees. Such Restricted Stock Unit Award Agreements do not require that the stock issued upon the vesting of the RSUs be held by the grantee for a period of at least five years after the award date. The Proposal would require the Company to either violate the Restricted Stock Unit Award Agreements (and other award agreements, such as the Performance Share Award Agreements governing performance shares) by imposing such a restriction or retroactively amend the award agreements to impose such a restriction.

In addition, the Proposal provides that "stock options awarded to the Corporate Officers cannot be redeemed for at least five years after the award date." To the extent that the Proposal is seeking to prevent Corporate Officers from exercising stock options granted under the Plans until five years after the grant of such options (as discussed in Section IV below, it is unclear what the Proponent means by "redeemed"), the Proposal would violate the terms of the Stock Option Award Agreements that govern the stock options. Under the Plans, each stock option is evidenced by a Stock Option Award Agreement, which provides for a vesting schedule under which the options will become exercisable. These vesting schedules vary, but by way of example, the stock options granted to the company's Named Executive Officers in 2016 had a ratable three-year vesting schedule. None of them had a five-year cliff vesting provision, which may be what the Proposal is contemplating with its prohibition on "redeeming" stock options for five years. If that's what the Proposal contemplates, the Proposal is incompatible with the existing Stock Option Award Agreements, and would require the Company to breach these agreements or unilaterally amend them. Furthermore, the Stock Option Award Agreements provide that if vested options are not exercised within ninety days of termination of the grantee's service with the Company, the options are forfeited. Under the Proposal, if vested options have not been held for five years at the time of the grantee's termination of service, the options would have to be forfeited, in clear violation of the terms of the Stock Option Award Agreements. The Proposal would be equally inconsistent with the terms of outstanding Stock Option Award Agreements if the proposed ban on "redemption" of stock options were interpreted to mean that Corporate Officers may exercise vested options but may not sell the underlying stock until five years after the option grant date.

A breach of the equity award agreements would violate Delaware law and could subject the Company to a monetary judgment for breach of contract. In addition, the Delaware Legal Opinion references well-established Delaware law that prohibits a party to a contract from unilaterally modifying the terms of the contract. Accordingly, the Company is unable to unilaterally modify the terms of its outstanding equity award agreements to impose additional restrictions on the awards of shares of common stock issued pursuant to those agreements.

For the foregoing reasons, we believe the Proposal, if implemented, would cause the Company to violate Delaware state law and may be excluded from the Company's 2018 Proxy Materials under Rule 14a-8(i)(2).

III. Rule 14a-8(i)(6) – The Company Lacks the Power to Implement the Proposal

Rule 14a-8(i)(6) allows a company to exclude a proposal if the company would lack the power or authority to implement the proposal. As described above, the Proposal would, if implemented, cause the Company to violate Delaware law. The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(6) of proposals that would cause the company to violate the law of the jurisdiction of its incorporation. *See Schering-Plough Corp.* (March 27, 2008) (permitting exclusion of proposal that would violate New Jersey law); *AT&T, Inc.* (February 19, 2008) (permitting exclusion of a proposal that would violate Delaware law) and *Noble Corp*. (January 19, 2007) (permitting exclusion of a proposal that would violate Cayman Islands law).

In addition, the Staff has permitted exclusion of proposals that would retroactively impose restrictions on the transferability of shares already issued, or require breach of existing equity compensation agreements, as being beyond the power of company to implement. See *Mylan Inc.* (March 12, 2010) and *American Express Co.* (February 19, 2010), each discussed in Section II above. For the foregoing reasons, we believe that the Proposal may be excluded from the Company's 2018 Proxy Materials under Rule 14a-8(i)(6).

IV. Rule 14a-8(i)(3) – The Proposal is Vague and Indefinite in Violation of Rule 14a-9

Under Rule 14a-8(i)(3), a shareholder proposal may be excluded 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 the proxy materials." The Staff indicated in SLB No. 14B that a proposal is misleading, and therefore excludable under Rule 14a-8(i)(3), if "the resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires ...." Additionally, the Staff has said that a proposal is impermissibly vague and indefinite, and thus excludable under Rule 14a-8(i)(3), where it is open to multiple interpretations such that "any action ultimately taken by the [c]ompany upon implementation could be significantly different from the actions envisioned by shareholders voting on the proposal." See *Fuqua Industries, Inc.* (March 12, 1991).

The Staff has consistently permitted exclusion of compensation-related proposals where they were vague and indefinite, or susceptible to multiple interpretations, because they failed to define key terms or otherwise failed to provide necessary guidance regarding the scope of the proposal or the manner in which the proposal should be implemented. In *General Electric Co.* (Newby) (February 5, 2003), for example, the Staff permitted exclusion of a proposal requesting that the board "seek shareholder approval of all compensation for Senior Executives and Board members not to exceed 25 times the average wage of hourly working employees," where the proposal failed to define critical terms such as "compensation" and "average wage" and also failed to provide guidance on how the proposal should be implemented. *See also General Dynamics Corp.* (January 10, 2013) (permitting exclusion of a proposal requesting a policy that vesting of equity awards would not accelerate upon a change of control, other than on a pro rata basis, where it was unclear what "pro rata" meant); *Boeing Co.* (March 2, 2011) (permitting exclusion of a proposal requesting that senior executives relinquish preexisting "executive pay rights" where the proposal did not sufficiently explain the meaning of "executive pay rights"); *General Motors Corp.* (March 26, 2009) (permitting exclusion of a proposal to "eliminate all incentives for the CEOs and the Board of Directors" where the proposal did not define "incentives"); *Verizon Communications Inc.* (February 21, 2008) (permitting exclusion of a proposal requesting that the board adopt a new senior executive compensation policy incorporating criteria specified in the proposal where the proposal failed to define critical terms such as "industry peer group" and "relevant time period"); *Prudential Financial, Inc.* (February 16, 2007) (permitting exclusion of a proposal requesting that the board of directors "seek shareholder approval for senior management incentive compensation programs which provide benefits only for earnings increases based only on management controlled programs" where the proposal failed to define critical terms such as "senior management incentive compensation programs"); *General Electric Co.* (January 23, 2003) (permitting exclusion of a proposal seeking "an individual cap on salaries and benefits of one million dollars for G.E. officers and directors" where the proposal failed to define the critical term "benefits" and also failed to provide guidance on how benefits should be measured).

The Proposal, like the proposals addressed in the letters cited above, fails to define certain key terms and fails to provide guidance necessary to explain how the Proposal would be implemented.

First, the Proposal would require that stock options granted to corporate officers not be "redeemed" prior to the fifth anniversary of the date of grant. The Proposal does not define the word "redeemed," and the term does not have a generally accepted meaning in the context of employee stock options. The Merriam-Webster Dictionary defines "redeem" as "to buy back: repurchase."[1] The Company does not repurchase options, however, and deeming "redeem" to mean repurchase does not comport with the apparent purpose of the Proposal, which is to incentivize corporate officers to promote "the long-term health and success of the Company."

---

[1] https://www.merriam-webster.com/dictionary/redeem

Perhaps the Proposal seeks to prevent corporate officers from exercising their options during the five years following grant. Alternatively, the Proposal may seek to prevent corporate officers from selling any stock acquired upon exercise of an option until the fifth anniversary of the date of the option's grant. Either of these interpretations of the word "redeem" would seem consistent with the purpose of the Proposal. These possible interpretations are merely guesses, however. The meaning of the word in the context of the Proposal is indeterminable, and the Proposal does not provide any guidance as to what is meant by the "redemption" of stock options.

Second, the Proposal provides that all stock awarded to corporate officers shall be considered "Restricted Stock" and have a "Restricted Period" of five years from the date of grant of the award. Despite capitalizing both of these terms, the Proposal does not define "Restricted Stock" or "Restricted Period." Generally, restricted stock is an equity compensation award consisting of common stock that is subject to forfeiture and restrictions on transfer until one or more specified vesting dates, which are specified in an award agreement. When the award vests, the vested shares become transferable on the vesting date(s) if the grantee remains employed by the company on that date. The Proposal does not indicate whether it is referring to this type of award when it says that all stock awards shall be considered "Restricted Stock." Nor does the Proposal indicate what is meant by a "Restricted Period." In the context of a typical restricted stock award, a "restricted period" could mean the period between the date of grant and the date of vesting. If that is what the Proposal means, restricted stock awards would have to provide for cliff vesting on the fifth anniversary of the date of grant. Alternatively, the Proposal may mean that, while a restricted stock award may vest and become nonforfeitable at any time, the grantee may not transfer the stock until at least five years after the grant date. Again, however, stockholders in voting on the Proposal, and the Company in implementing the Proposal, are left to guess the Proposal's meaning.

As a result of these ambiguities in the Proposal and the possibility of multiple, conflicting interpretations of key terms used in the Proposal, neither stockholders nor the Company would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires, and any action taken by the Company could be significantly different from what stockholders envision when voting on the Proposal. The Proposal is therefore excludable under Rule 14a-8(i)(3).

V. Rule 14a-8(i)(7) – The Proposal Deals with a Matter Relating to the Company's Ordinary Business Operations

A shareholder proposal may be excluded under Rule 14a-8(i)(7) if "the proposal deals with a matter relating to the company's ordinary business operations." The term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word; instead the term "is rooted in the corporate law concept of providing management with flexibility in directing certain core matters involving the company's business and operations." *See* Securities Exchange Act Release No. 34-40018 (May 21, 1998) (the "***1998 Release***"). In the 1998 Release, the Commission explained that the ordinary business exclusion rests on two central considerations: first, that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight"; and second, the degree to which the proposal attempts to "micromanage" a company by "probing too deeply into matters of a complex nature upon which shareholders as a group, would not be in a position to make an informed judgment."

The Commission stated in the 1998 Release that "proposals relating to [ordinary business] matters but focusing on sufficiently significant policy issues . . . generally would not be considered to be excludable." Since 1992, the staff has taken the position that a proposal relating to the compensation of senior executives raises a significant policy issue. In determining whether a compensation-related proposal may be excluded as relating to ordinary business, the Staff has applied a bright-line test: a proposal may be excluded if it "relate[s] to general employee compensation matters" but not if it "concern[s] only senior executive and director compensation." Staff Legal Bulletin No. 14A (July 12, 2002) (emphasis in original).

The Proposal seeks to revise the terms of equity grants made to the Company's "Corporate Officers." The first paragraph of the Proposal defines the term "Corporate Officers" as: "e.g. Thulin, Banovetz, Bauman, **etc.**, as identified at http://investors.3m.com/governance/corporate-officers/default.aspx" (emphasis added). The hyperlink leads to a Company web page, titled "Corporate Officers," that lists 25 of the Company's officers. Listed on the webpage are the Company's named executive officers and the CEO's direct reports, but also officers at the Company that are a step or more removed from the CEO, such as the Assistant Treasurer and Assistant Secretary, and several Vice Presidents. While they are listed as "Corporate Officers," this latter class of employees would not traditionally be considered "senior executives" of the Company. They are not included in the list of executive officers appearing in the Company's Annual Report on Form 10-K for the year ended December 31, 2016, at pp. 8–9, are not in charge of principal business units and do not perform significant policy-making functions at the Company. Moreover, they are not included in the beneficial ownership table in the Company's proxy statement and they do not file reports under Section 16(a) of the Securities Exchange Act of 1934. Accordingly, the Proposal applies to employees outside the classification commonly identified as "senior executives."

On numerous occasions, the Staff has permitted exclusion under Rule 14a-8(i)(7) of proposals seeking to regulate the compensation of a broader class of employees than the company's senior executives. In *Alliant Energy Corp.* (February 4, 2004), for example, the Staff allowed exclusion of a proposal seeking to regulate the salary of "all levels of vice president, the CEO, CFO and all levels of top management." The company explained that the classes of employees covered by the proposal included persons not commonly identified as "senior executives." The Staff concurred, concluding that the proposal was excludable as relating to "general compensation matters." Similarly, in *Lucent Technologies Inc.* (November 6, 2001), the Staff permitted exclusion of a proposal concerning the compensation of "ALL officers and directors" of the company (emphasis in original). The company noted that the term "officer" encompasses employees who are not commonly identified as "senior executives," and the Staff agreed, noting that the proposal related to the company's "ordinary business operations (i.e. general compensation matters)."

Numerous other Staff letters make clear that a compensation proposal will be excludable as relating to ordinary business if the proposal applies to any person who is not a senior executive officer or a director. *See, e.g., The Goldman Sachs Group* (March 8, 2010) (proposal applied to NEOs and the 100 most highly-compensated employees); *3M Company* (March 6, 2008) (proposal related to compensation of "high-level 3M employees"); *Comshare, Inc.* (September 5, 2001) (proposal requested that the "Board improve disclosure of its strategy for awarding stock options to top executives and directors," but also implicated the stock option plan available to general employees).

By itself, the term "Corporate Officers" clearly covers classes of employees who would not be considered senior executives. Even as defined in the Proposal, the term includes a number of employees who are not executives, senior or otherwise. Accordingly, the Proposal addresses the Company's general compensation matters, which is a matter of the Company's ordinary business operations, and therefore is excludable under Rule 14a-8(i)(7).

CONCLUSION

For the reasons discussed above, the Company believes that it may omit the Proposal from its 2018 proxy materials. We request the Staff's concurrence in our view or, alternatively, confirmation that the Staff will not recommend any enforcement action to the Commission if the Company excludes the Proposal.

If you have any questions or need additional information, please feel free to contact me at (202) 637-5737. When a written response to this letter is available, I would appreciate your sending it to me by e-mail at Alan.Dye@HoganLovells.com.

Sincerely,

Alan L. Dye

Alan L. Dye

Enclosures

cc: Gregg M.Larson, 3M Company
Michael Ayers

Exhibit A

Copy of the Proposal and Related Correspondence

12 October 2017

Gregg Larson
Vice President, Deputy General Counsel and Secretary
3M Company
3M Center 220-14W-06
St Paul MN 55144-1000

Dear Mr. Larson,

As a 3M shareholder, I would like the following proposal to be included in the material sent to the stockholders with the proxy statement for the 2018 stockholder's meeting.

Shareholder Proposal

Inasmuch as the shareholders of 3M reasonably expect the Corporate Officers (e.g., Thulin, Banovetz, Bauman, etc., as identified at http://investors.3m.com/governance/corporate-officers/default.aspx) to make decisions to benefit the long-term health and success of the Company;

Inasmuch as the decisions of the Corporate Officers do effect the long-term health and success of the Company, playing out over the course of several years;

Inasmuch as the compensation due the Corporate Officers ought to provide a strong link between the performance of individuals and the actual performance of the Company as those decisions do play out, even if the individuals have left the Company;

Inasmuch as a significant portion of an Executive's obligation is to groom persons fully qualified to carry on the company's strong performance after the Executive ceases employment at the Company;

Inasmuch as the compensation given the Corporate Officers is partially in the form of ownership of the Company in the form of stock or stock options;

Therefore the Compensation Committee is directed to ensure that

1. stock awarded to the Corporate Officers must be held by them and cannot be sold or transferred for at least five years after the award date, and
2. stock options awarded to the Corporate Officers cannot be redeemed for at least five years after the award date.

Under the terms of this proposal,

1. all stock awarded to the Corporate Officers is considered Restricted Stock and has a Restricted Period of five years from the date of award, and

2. all stock options to the Corporate Officers may not be redeemed prior to the fifth anniversary date of the award.

Sincerely,

Michael Ayers
***

*** FISMA & OMB Memorandum M-07-16

*** FISMA & OMB Memorandum M-07-16

CERTIFIED MAIL®

Mr. Michael B. Avers

***

7016 2710 0001 1522 1158

1024

55144

U.S. POSTAGE
PAID
MINNEAPOLIS, MN
55419
OCT 17, 17
AMOUNT
$6.59
R2304M113751-12

ETURN RECEIPT
REQUESTED

REC'D OCT 19 2017

Gregg Larson
Vice President, Deputy General Counsel and
Secretary
3M Company
3M Center 220-~~14W-06~~ 9E-02
St Paul MN 55144-1000

55144-1000

Exhibit B

Copy of Delaware Legal Opinion

RICHARDS
LAYTON &
FINGER
Attorneys at Law

December 8, 2017

3M Company
3M Center, Building 220-11W-02
St. Paul, MN 55144-1000

Re: Stockholder Proposal Submitted by Michael Ayers

Ladies and Gentlemen:

We have acted as special Delaware counsel to 3M Company, a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by Michael Ayers (the "Proponent") that the Proponent intends to present at the Company's 2018 annual meeting of stockholders (the "Annual Meeting"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware.

For the purpose of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents:

(i) the Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on May 11, 1982, as amended by the Certificate of Ownership and Merger merging Tendcom, Inc. into the Company, as filed with the Secretary of State on December 21, 1983, as amended by the Certificate of Ownership and Merger merging Cod 3 Corporation into the Company, as filed with the Secretary of State on December 29, 1983, as amended by the Certificate of Ownership and Merger merging A.P.C Industries, Inc. into the Company, as filed with the Secretary of State on March 12, 1984, as amended by the Certificate of Amendment of Restated Certificate of Incorporation, as filed with the Secretary of State on May 13, 1986, as amended by the Certificate of Ownership and Merger merging Metropolitan Transmission Center, Inc. into the Company, as filed with the Secretary of State on December 18, 1986, as amended by the Certificate of Ownership and Merger merging Associated Electronics, Inc. into the Company, as filed with the Secretary of State on December 18, 1986, as amended by the Certificate of Amendment of Restated Certificate of Incorporation, as filed with the Secretary of State on May 12, 1987, as amended by the Certificate of Amendment of Restated Certificate of Incorporation, as filed with the Secretary of State on May 22, 1987, as amended by the Certificate of Ownership and Merger merging Dynacolor Corporation into the Company, as filed with the Secretary of State on May 26, 1987, as amended by the Certificate of Ownership and Merger merging International Tapetroncis Corporation into the Company, as filed with the Secretary of State on July 8, 1987, as amended by the Certificate of Ownership and Merger merging C.M.T.L. Corporation into the Company, as filed with the Secretary of State on May 26, 1989, as amended by the Certificate of Ownership and Merger merging Health Systems International, Inc. into the Company, as filed with the Secretary of State on May 11, 1990, as amended by the Certificate of Ownership and Merger merging Minnesco Corporation into the Company, as filed with the Secretary of State on December 13, 1990, as amended by the Certificate of Ownership and Merger merging 3M Fiber Optic Products, Inc. into the Company, as filed with the Secretary of State on December 13, 1990, as amended by the Certificate of Ownership and Merger merging Photodyne, Inc. into the Company, as filed with the Secretary of State on December 19, 1990, as amended by the Certificate of Ownership and Merger merging International Industries, Inc. into the Company, as filed with the Secretary of State on December 27, 1990, as amended by the Certificate of Ownership and Merger merging Apcom Enterprises, Inc. into the Company, as filed with the Secretary of State on December 27, 1990, as amended by the Certificate of Ownership and Merger merging Trim-Line, Inc. into the Company, as filed with the Secretary of State on May 31, 1991, as amended by the Certificate of Ownership and Merger merging Sarns, Inc. into the Company, as filed with the Secretary of State on December 23, 1991, as amended by the Certificate of Ownership and Merger merging Avi, Inc. into the Company, as filed with the Secretary of State on December 23, 1991, as amended by the Certificate of Ownership and Merger merging 3M Diagnostic Systems, Inc. into the Company, as filed with the Secretary of State on July 28, 1992, as amended by the Certificate of Ownership and Merger merging Delta G Corporation into the Company, as filed with the Secretary of State on July 16, 1993, as amended by the Certificate of Ownership and Merger merging 3M Cardiovascular Devices, Inc. into the Company, as filed with the Secretary of State on October 3, 1994, as amended by the Certificate of Ownership and Merger merging Adhesive Technologies Corporation into the Company, as filed with the Secretary of State on January 18, 1995, as amended by the Certificate of Ownership and Merger merging The D. L. Auld Company into the Company, as filed with the Secretary of State on September 3, 1996, as amended by the Certificate of Ownership and Merger merging Design Fabricated Parts, Inc. into the Company, as filed with the Secretary of State on December 30, 1996, as amended by the Certificate of Amendment of the Restated Certificate of Incorporation of the Company, as filed with the Secretary of State on May 23, 1997, as amended by the Certificate of Ownership and Merger merging Zeelan Industries, Inc. into the Company, as filed with the Secretary of State on May 24, 1999, as amended by the Certificate of Correction filed to Correct a Certain Error in the Certificate of Ownership and Merger, as filed with the Secretary of State on July 13, 1999, as amended by the Certificate of Amendment of the Restated Certificate of Incorporation of the Company, as filed with the Secretary of State on May 19, 2000, as amended by the Certificate of Ownership and Merger merging 3M Company into the Company, as filed with the Secretary of State on April 2, 2002, as amended by the Certificate of Amendment of the Certificate of Incorporation of the Company, as filed with the Secretary of State on May 12, 2004, as amended by the Certificate of Amendment of the Certificate of Incorporation of the Company, as filed with the Secretary of State on May 15, 2006, as amended by the Certificate of Amendment of Certificate of Incorporation of the Company, as filed with the Secretary of State on May 11, 2007, and as amended by the

Certificate of Amendment of Certificate of Incorporation of the Company, as filed with the Secretary of State on December 4, 2017 (collectively, the "Certificate of Incorporation");

(ii) the Amended and Restated Bylaws of the Company adopted on November 10, 2015 (the "Bylaws");

(iii) the Compensation Committee Charter, as affirmed on February 7, 2017 (the "Committee Charter");

(iv) the 3M 2008 Long-Term Incentive Plan, as amended through February 2, 2016 (the "2008 Plan");

(v) the 2016 Long-Term Incentive Plan (the "2016 Plan" and, together with the 2008 Plan, the "Plans")

(vi) the agreements listed on Schedule A attached hereto (collectively, the "Award Agreements"); and

(vii) the Proposal.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed, photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above, and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal requests that the Company's stockholders approve the following:

"Therefore the Compensation Committee is directed to ensure that

1. stock awarded to the Corporate Officers must be held by them and cannot be sold or transferred for at least five years after the award date, and

2. stock options awarded to the Corporate Officers cannot be redeemed for at least five years after the award date.

Under the terms of this proposal,

1. all stock awarded to the Corporate Officers is considered Restricted Stock and has a Restricted Period of five years from the date of award, and

2. all stock options to the Corporate Officers may not be redeemed prior to the fifth anniversary date of the award."

Discussion

You have asked our opinion as to (i) whether the Proposal is a proper subject for action by stockholders under Delaware law, (ii) whether the Proposal, if adopted and implemented, would violate Delaware law and (iii) whether the Company has the power and authority to implement the Proposal. For the reasons set forth below, in our opinion, the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law because it would impermissibly infringe on the managerial authority of the Board of Directors of the Company (the "Board")[1] to determine the compensation of certain officers of the Company and to issue stock and options upon the terms that the Board determines to be advisable and in the best interests of the Company and its stockholders. In addition, for the reasons set forth below, in our opinion, the Proposal, if adopted and implemented, would (i) impose limitations on the Board's authority in violation of Sections 141, 122, 152, 153 and 157 of the General Corporation Law of the State of Delaware (the "General Corporation Law"), (ii) impose a transfer restriction on outstanding shares of common stock, par value $0.01 per share, of the Company (the "Common Stock"), in violation of Section 202 of the General Corporation Law and (iii) cause the Company to breach existing contractual obligations or unilaterally

[1] Although the Proposal purports to apply to the Compensation Committee of the Board (the "Compensation Committee") and not the Board itself, the Board has delegated to the Compensation Committee the power and authority to make certain decisions regarding the compensation of its officers. Article SIXTH of the Certificate of Incorporation ("Any . . . committee, to the extent provided in the resolution of the Board of Directors, or in the Bylaws [of the Company], shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of [the Company]"); Section C of the Committee Charter (providing that the responsibilities of the Compensation Committee include the responsibility to "annually review and approve, for the senior executives of the Company (other than the CEO), (i) the annual base salary, (ii) annual incentive compensation, and (iii) awards under the Company's long-term incentive compensation plans."). Because the Compensation Committee is exercising the power and authority of the Board with respect to such decisions, for purposes of this opinion, all references to the Board herein shall also be deemed to refer to the Compensation Committee and vice versa.

modify such contractual obligations in violation of Delaware law. Because the Proposal, if adopted and implemented, would violate Delaware law, the Company lacks the power and authority to implement the Proposal.

For purposes of this opinion, we have assumed (i) that the references to "stock awarded to the Corporate Officers" and "stock options awarded to the Corporate Officers" in the Proposal would include shares and options obtained pursuant to awards made under the Plans and pursuant to Award Agreements, (ii) that the Company has made stock and option awards to its "Corporate Officers" under the Plans and pursuant to Award Agreements, and such officers currently hold shares of Common Stock and/or options that they obtained through such awards, (iii) that shares held by the "Corporate Officers" are currently not subject to the restrictions on transfer contemplated by the Proposal and (iv) that the Proposal is not limited solely to shares of "stock awarded to the Corporate Officers" or "stock options to the Corporate Officers" following the adoption of the Proposal, but would include any such shares or options currently outstanding and held by Corporate Officers.

A. The Proposal Is Not a Proper Subject for Action by Stockholders Under Delaware Law

As a general matter, the directors of a Delaware corporation are vested with substantial discretion and authority to manage the business and affairs of the corporation. Section 141(a) of the General Corporation Law provides in relevant part as follows:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

8 Del. C. § 141(a). Significantly, if there is to be any variation from the mandate of Section 141(a) of the General Corporation Law, it can only be as "otherwise provided in [the General Corporation Law] or in its certificate of incorporation." Id.; see also Lehrman v. Cohen, 222 A.2d 800, 808 (Del. 1966). The Certificate of Incorporation does not grant the stockholders of the Company power to manage the Company with respect to any specific matter or any general class of matters. Further, Section 11 of the Bylaws expressly provides the Board with the authority to manage the business and affairs of the Company and Section 26 of the Bylaws expressly grants the authority to set the compensation of officers in the Board.[2] Thus, under the

[2] Section 11 of the Bylaws provides that "[t]he business and affairs of the [Company] shall be managed by or under the direction of the Board of Directors, except as may be otherwise provided by law or in the Restated Certificate of Incorporation." Section 26 of the Bylaws provides "[t]he compensation of the officers of the [Company] shall be fixed by or under the direction of the Board of Directors."

General Corporation Law, the Board holds the full and exclusive authority to manage the Company.

The distinction set forth in the General Corporation Law between the role of stockholders and the role of the board of directors is well established. As the Delaware Supreme Court has stated, "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). See also CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d. 227, 232 (Del. 2008) ("[I]t is well-established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation."); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.") (footnote omitted); Gorman v. Salamone, 2015 WL 4719681, at *5-6 (Del. Ch. July 31, 2015) (holding that a stockholder-adopted bylaw that would have permitted stockholders to remove and replace officers was invalid because such bylaw took "an important managerial function from the board" and thereby impermissibly infringed on the board's authority to manage the business and affairs of the corporation). The Delaware courts have long recognized this fundamental principle. In Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956), rev'd on other grounds, 130 A.2d 338 (Del. 1957), for example, the Court of Chancery stated that "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy." Similarly, in Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980), rev'd on other grounds sub nom. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), the Court of Chancery stated:

> [T]he board of directors of a corporation, as the repository of the power of corporate governance, is empowered to make the business decisions of the corporation. The directors, not the stockholders, are the managers of the business affairs of the corporation.

Id.; 8 Del. C. § 141(a). See also Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Adams v. Clearance Corp., 121 A.2d 302 (Del. 1956); Mayer v. Adams, 141 A.2d 458 (Del. 1958); Lehrman, 222 A.2d 800.

The rationale for these statements is as follows:

> Stockholders are the equitable owners of the corporation's assets. However, the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation. Instead, they have the right to share in the profits of the company and in the distribution of its assets on liquidation. Consistent with this division of interests, the directors rather than

> the stockholders manage the business and affairs of the corporation and the directors, in carrying out their duties, act as fiduciaries for the company and its stockholders.

Norte & Co. v. Manor Healthcare Corp., 1985 WL 44684, at *3 (Del. Ch. Nov. 21, 1985) (citations omitted). As a result, directors may not delegate to others their decision making authority on matters as to which they are required to exercise their business judgment. See Rosenblatt v. Getty Oil Co., 1983 WL 8936, at *18-19 (Del. Ch. Sept. 19, 1983), aff'd, 493 A.2d 929 (Del. 1985); Field v. Carlisle Corp., 68 A.2d 817, 820-21 (Del. Ch. 1949); Clarke Mem'l College v. Monaghan Land Co., 257 A.2d 234, 241 (Del. Ch. 1969). Nor can the board of directors delegate or abdicate this responsibility in favor of the stockholders themselves. Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

In exercising their discretion concerning the management of the corporation's affairs, directors are not obligated to act in accordance with the desires of the holders of a majority of the corporation's shares. See Paramount Commc'ns Inc. v. Time Inc., 1989 WL 79880, at *30 (Del. Ch. July 14, 1989) ("The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares."), aff'd, 571 A.2d 1140 (Del. 1989). For example, in Abercrombie, 123 A.2d 893, the plaintiffs challenged an agreement among certain stockholders and directors which, among other things, purported to irrevocably bind directors to vote in a predetermined manner even though the vote might be contrary to their own best judgment. The Court of Chancery concluded that the agreement was an unlawful attempt by stockholders to encroach upon directorial authority:

> So long as the corporate form is used as presently provided by our statutes this Court cannot give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters.
>
> Nor is this, as defendants urge, merely an attempt to do what the parties could do in the absence of such an [a]greement. Certainly the stockholders could agree to a course of persuasion but they cannot under the present law commit the directors to a procedure which might force them to vote contrary to their own best judgment.
>
> I am therefore forced to conclude that [the agreement] is invalid as an unlawful attempt by certain stockholders to encroach upon the statutory powers and duties imposed on directors by the Delaware corporation law.

Abercrombie, 123 A.2d at 899-900 (citations omitted).

A facet of the management of the business and affairs of a Delaware corporation is the concept that the board of directors, or persons duly authorized by the board of directors (such as a duly authorized committee of the board of directors) to act on its behalf, directs the decision-making process regarding (among other things) the compensation of officers and employees. See 8 Del. C. § 122(5) (empowering Delaware corporations to "[a]ppoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation"); 8 Del. C. § 122(15) (empowering Delaware corporations to offer stock option, incentive, and other compensation plans for directors, officers, and employees); Seinfeld v. Slager, 2012 WL 2501105, at *6 (Del. Ch. June 29, 2012) ("Employment compensation decisions are core functions of a board of directors, and are protected, appropriately, by the business judgment rule."); Wilderman v. Wilderman, 315 A.2d 610, 614 (Del. Ch. 1974) ("The authority to compensate corporate officers is normally vested in the board of directors" pursuant to Section 122(5).). Delaware courts have consistently upheld the principle that a board of directors has "broad discretion to set executive compensation." White v. Panic, 783 A.2d 543, 553 n.35 (Del. 1991); see also In re Walt Disney Co. Derivative Litig., 731 A.2d 342, 362 (Del. Ch. 1998) ("[I]n the absence of fraud, this Court's deference to directors' business judgment is particularly broad in matters of executive compensation."); In re Goldman Sachs Group, Inc. S'holder Litig., 2011 WL 4826104, at *14 (Del. Ch. Oct. 12, 2011) ("The decision as to how much compensation is appropriate to retain and incentivize employees, both individually and in the aggregate, is a core function of a board of directors exercising its business judgment."); Lewis v. Hirsch, 1994 WL 263551, at *3 (Del. Ch. June 1, 1994) (executive compensation is "ordinarily left to the business judgment of a company's board of directors"). This discretion includes the power to compensate employees appropriately. Pogostin v. Rice, 1983 WL 17985, at *4 (Del. Ch. Aug. 12, 1983), aff'd, 480 A.2d 619 (Del. 1984) (noting that compensation levels are within the discretion of the board of directors); Friedman v. Dolan, 2015 WL 4040806, at *5 (Del. Ch. June 30, 2015) (Delaware courts are hesitant to scrutinize executive compensation decisions, recognizing that "[i]t is the essence of business judgment for a board to determine if a particular individual warrant[s] large amounts of money."); Zucker v. Andreessen, 2012 WL 2366448, at *8 (Del. Ch. June 21, 2012) ("While the discretion of directors in setting executive compensation is not unlimited, it is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money, whether in the form of current salary or severance provisions.") (internal quotation marks and citations omitted); In re Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 138 (Del. Ch. 2009) ("The directors of a Delaware corporation have the authority and broad discretion to make executive compensation decisions."); Haber v. Bell, 465 A.2d 353, 359 (Del. Ch. 1983) ("A corporation, however, may utilize stock options, purchases, and other means … to pay compensation to its employees. And generally directors have the sole authority to determine compensation levels.").

Absent any provision in the Certificate of Incorporation to the contrary, the Board has the sole discretion to determine the appropriate compensation for its officers and employees in the exercise of its power and authority to manage the business and affairs of the Company.[3] As noted above, the Certificate of Incorporation does not provide to the contrary. Indeed, the Bylaws specifically provide that "[t]he compensation of the officers of the [Company] shall be fixed by or under the direction of the Board of Directors." Bylaws, Section 26. Therefore, it is not permissible under Delaware law for the stockholders to restrict the discretion of the Board in exercising its managerial authority to determine the compensation for the Company's officers. Consistent with the foregoing, Lawrence A. Hamermesh, the former Attorney-Fellow for the Office of Chief Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission, has endorsed the view that stockholder proposals which purport to limit the power of a board of directors in matters of executive compensation are impermissible intrusions upon the province of the board. See Lawrence A. Hamermesh, The Shareholder Rights By-law: Doubts from Delaware, 5 Corporate Governance Advisor 9 (Jan./Feb. 1997) ("[A] by-law that purported to preclude the board of directors from adopting certain forms of executive compensation . . . would constitute an impermissible intrusion into the directors' statutory management authority.").[4]

Delaware law also does not permit stockholders to deprive directors of the ability to exercise their full managerial power in circumstances where their fiduciary duties would otherwise require them to exercise their judgment. See CA, Inc., 953 A.2d at 239. Yet, that is exactly what the Proposal attempts to do, in that it would intrude upon the discretion of the Board with respect to officer compensation and prevent the Board from compensating officers through stock or option awards upon terms that, in the Board's good faith business judgment, are in the best interests of the Company and all of its stockholders. Therefore, the Proposal would "have the effect of removing from directors in a very substantial way their duty to use their own best judgment" in determining the compensation paid to the officers and employees referenced therein, Abercrombie, 123 A.2d at 899.

In addition, the Delaware courts have recognized that the "issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly

---

[3] Indeed, Section 141(h) of the General Corporation Law provides that "[u]nless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of *directors*." 8 Del. C. § 141(h) (emphasis added). The use of the phrase "[u]nless otherwise restricted by the certificate of incorporation or bylaws" in Section 141(h) demonstrates that had the drafters of the General Corporation Law intended for stockholders of the Company to have the power to restrict the authority of the Board with respect to fixing the compensation of *employees* and *officer*s (such as through a stockholder adopted bylaw), the drafters were well aware of how to accomplish that.

[4] See also R. Franklin Balotti and Daniel A. Dreisbach, The Permissible Scope of Shareholder Bylaw Amendments in Delaware, 1 Corporate Governance Advisor 22 (Oct./Nov. 1992) ("Any proposal which mandates a certain action by the board or infringes upon the discretion of the board will likely be held unreasonable..."). Mr. Balotti was, and Mr. Dreisbach is, a member of this firm.

requires certainty in such matters." Staar Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991). The function of issuance of shares lies with the board of directors and has been held to be "such a 'vitally important duty' that it cannot be delegated." Cook v. Pumpelly, 1985 WL 11549, at *9 (Del. Ch. May 24, 1985) (citing Field, 68 A.2d at 820). See Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989) (directors are responsible for managing business and affairs of Delaware corporation and, in exercising that responsibility in connection with adoption of employee stock ownership plan, are charged with unyielding fiduciary duty to corporation and its stockholders).

Sections 152, 153 and 157 of the General Corporation Law relating to the issuance of corporate stock and options, together with Section 141(a), underscore the Board's broad (and exclusive) powers and duties in this regard. Section 152 of the General Corporation Law (along with Sections 141 and 153) requires that any issuance of stock by a corporation be duly authorized by its board of directors. Among other things, Section 152 states that the consideration payable for "the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine.... [T]he judgment of the directors as to the value of such consideration shall be conclusive." 8 Del. C. § 152. Indeed, Section 153 sets forth the only instance where stockholders could have authority with respect to stock issuance matters. Importantly, however, Section 153 requires such authority to be in the corporation's certificate of incorporation: "[s]hares of stock with par value may be issued for such consideration, having a value not less than the par value thereof, as determined from time to time by the board of directors, or by the stockholders if the certificate of incorporation so provides." 8 Del. C. § 153(a). In the case of the Company, the Certificate of Incorporation does not confer any such powers on the stockholders.

Similarly, Section 157 permits only the board, not the stockholders, to approve the terms of, and the instruments evidencing, rights and options. 8 Del. C. § 157. The various subsections confirm this result. Subsection 157(a) provides that "rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors." 8 Del. C. § 157(a). Subsection 157(b) provides that the terms of the stock options shall either be as stated in the certificate of incorporation or in a resolution of the board, not the stockholders. See 8 Del. C. § 157(b). Subsection 157(b) further provides that "[i]n the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options ... shall be conclusive." 8 Del. C. § 157(b). Indeed, stockholders are nowhere mentioned in Section 157 of the General Corporation Law. The Delaware Supreme Court has thus interpreted the provisions of Section 157 literally to mean that *only* the board of directors may determine the terms and conditions of rights to buy stock. See Grimes v. Alteon Inc., 804 A.2d 256, 262 (Del. 2002) (invalidating a right to buy stock because, among other reasons, the CEO of the corporation rather than its board approved the right at issue). In fact, with the exception of the delegation to officers (not stockholders) expressly permitted in Section 157(c), "directors have the exclusive right and duty to control and implement all aspects of the creation and issuance of options and rights." 1 David A. Drexler et al., Delaware Corporation Law and Practice § 17.06, at 17-30 (2015) (emphasis added).

Collectively, Sections 152, 153 and 157 of the General Corporation Law "confirm the board's exclusive authority to issue stock and regulate a corporation's capital structure." Grimes, 804 A.2d at 261. Here, by requiring that any stock or options awarded to Corporate Officers not be transferable or redeemable, as applicable, for a period of five years, the Proposal expressly infringes on the Board's exclusive authority to issue stock and options upon the terms that the Board determines to be advisable and in the best interests of the Company and its stockholders.

Because the Proposal would impermissibly infringe on the managerial authority of the Board to determine the compensation of certain officers of the Company and to issue stock and options upon the terms that the Board determines to be advisable and in the best interests of the Company and its stockholders, the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law.[5]

B. The Proposal, If Adopted and Implemented, Would Violate Delaware Law

In addition to not being a proper matter for stockholder action, in our view, the Proposal, if adopted and implemented, would (i) impose limitations on the Board's authority in violation of Sections 141, 122, 152, 153 and 157 of the General Corporation Law, (ii) impose a transfer restriction on outstanding shares of Common Stock in violation of Section 202 of the General Corporation Law and (iii) cause the Company to breach existing contractual obligations or unilaterally modify such contractual obligations in violation of Delaware law.

1. Sections 141, 122, 152, 153 and 157 of the General Corporation Law

[5] The limitations that the Proposal would impose on the Board's ability to compensate officers also raise public policy concerns. As discussed above, under the construct of Delaware corporate law, the Board manages the business and affairs of the Company. In order to carry out its mandate, the Board is granted broad and varied powers. Thus, the Board is granted the power to determine compensation, in the form of cash, stock, options, property and otherwise, so as to be in a position to attract and retain the most qualified employees for the Company. The Board's exercise of these powers, however, is not unfettered. In exercising its managerial authority, the Board is subject to fiduciary duties which require the Board to use its powers in a manner to benefit the Company and its stockholders. Thus, any action of the Board, including the determination of officer compensation, is subject to equitable challenge. To implement the Proposal would allow a stockholder (who owes no fiduciary duties to the Company or the other stockholders) to usurp the Board's authority and dictate the terms of officer compensation. Thus, compensation determinations could be made without the corresponding risk of challenge for breach of fiduciary duty. As a result, the "carefully crafted balance of director power tested against the law of fiduciary duties" would be upset. Frederick H. Alexander and James D. Honaker, Power to the Franchise or the Fiduciaries?: An Analysis of the Limits on Stockholder Activist Bylaws, 33 Del. J. Corp. L. 749, 762 (2008).

As discussed above, under the General Corporation Law, the Board holds the full and exclusive authority to manage the Company. Because the Proposal impermissibly limits the Board's ability to manage the business and affairs of the Company by, among other things, restricting the Board's ability to determine the terms of stock and option-based compensation for certain of the Company's officers, the Proposal would violate Section 141(a) of the General Corporation Law. Indeed, the Delaware Supreme Court's decision in Quickturn supports the conclusion that the Proposal's limitation on the exercise of the Board's discretion to compensate officers would contravene Section 141(a) and, therefore, not be valid under the General Corporation Law. At issue in Quickturn was the validity of a "Delayed Redemption Provision" of a stockholder rights plan, which, under certain circumstances, would prevent a newly elected Quickturn board of directors from redeeming, for a period of six months, the rights issued under Quickturn's rights plan. The Delaware Supreme Court held that the Delayed Redemption Provision was invalid as a matter of law because it impermissibly would deprive a newly elected board of its full statutory authority under Section 141(a) to manage the business and affairs of the corporation:

> One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. Section 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation. The Quickturn certificate of incorporation contains no provision purporting to limit the authority of the board in any way. The Delayed Redemption Provision, however, would prevent a newly elected board of directors from completely discharging its fundamental management duties to the corporation and its stockholders for six months.... Therefore, we hold that the Delayed Redemption Provision is invalid under Section 141(a), which confers upon any newly elected board of directors full power to manage and direct the business and affairs of a Delaware corporation.

Quickturn, 721 A.2d at 1291-92 (emphasis in original; footnotes omitted). See also id., at 1292 ("The Delayed Redemption Provision 'tends to limit in a substantial way the freedom of [newly elected] directors' decisions on matters of management policy.' Therefore, 'it violates the duty of each [newly elected] director to exercise his own best judgment on matters coming before the board.'") (footnotes omitted).

If adopted and implemented, the Proposal would also impose a limitation on the Board's authority with respect to compensation of certain of the Company's officers in violation of Section 122 of the General Corporation Law. Section 122(5) of the General Corporation Law provides that "[e]very corporation created under this chapter shall have power to appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation." 8 Del. C. § 122(5). In addition, Section 122(15) of the General

Corporation Law authorizes a corporation to "[p]ay pensions and establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans, trusts and provisions for any or all of its directors, officers and employees, and for any or all of the directors, officers and employees of its subsidiaries." 8 Del. C. § 122(15). Because the Proposal purports to restrict the Board's ability to compensate certain officers with stock and option awards made upon such terms and conditions that the Board determines are appropriate and in the best interests of the Company and its stockholders, the Proposal would impermissibly encroach upon the Board's powers under Sections 122(5) and 122(15) of the General Corporation Law.

As discussed above, the Proposal, if adopted and implemented, would also impermissibly infringe on the Board's powers concerning the grant, issuance, sale or other disposition of the Company's stock and stock options under Sections 152, 153 and 157 of the General Corporation Law, as it would restrict the Board's ability to issue stock and options on such terms and conditions as the Board determines to be advisable and in the best interests of the Company and its stockholders, both generally and as a component of officer compensation. As discussed above, Sections 152 and 157 only grant the board of directors, not the stockholders, the power to approve the terms of stock and options to be issued by the corporation. While Section 153 allows a corporation to grant its stockholders the right to determine the consideration for the issuance of any shares, such grant of authority must be implemented through a provision in the certificate of incorporation of corporation, which has not been done in the case of the Company. Thus, the Proposal, which imposes limits on the Board's ability to grant stock and options upon the terms and conditions that it may deem advisable and in the best interests of the Company and its stockholders, would, if adopted and implemented, also constitute an invalid restriction on the powers of the Board under Sections 152, 153 and 157 of the General Corporation Law.

2. Section 202 of the General Corporation Law

Restrictions on transfer and ownership on securities of a Delaware corporation are governed by Section 202 of the General Corporation Law. Because the Proposal, if adopted and implemented, would cause the Board to unilaterally impose transfer restrictions on previously issued and currently outstanding shares of Common Stock held by Corporate Officers, the Proposal would violate Section 202 of the General Corporation Law.

The Proposal, if adopted and implemented, would require the Board to "ensure that . . . stock awards to the Corporate Officers must be held by them and cannot be sold or transferred for at least five years after the award date." In addition, if adopted and implemented, the Proposal would provide that "all stock awarded to the Corporate Officers is considered Restricted Stock and has a Restricted Period of five years from the date of award." The foregoing restrictions contemplated by the Proposal would be considered transfer restrictions governed by Section 202 of the General Corporation Law. See Leonard Loventhal Account v. Hilton Hotels Corp., 2000 WL 1528909, at *7 (Del. Ch. Oct. 10, 2000) (citations omitted) ("Statutorily speaking, 8 Del. C. § 202 defines what constitutes a transfer restriction on stock under Delaware law. More generally, one set of commentators has defined transfer restrictions as 'provisions which prevent or establish preconditions for the disposition by stockholders of their stock or other securities.'"); see also Moran v. Household Int'l, Inc., 490 A.2d 1059, 1079 (Del. Ch. 1985); Williams v. Geier, 1987 WL 11285, at *4 (Del. Ch. May 20, 1987).

Section 202 of the General Corporation Law governs the manner in which transfer restrictions may be validly imposed on a corporation's securities,[6] including shares of its capital stock.[7] With respect to the imposition of transfer restrictions on previously issued securities, Section 202(b) provides, in relevant part:

> A restriction on the transfer . . . of securities of a corporation . . . may be imposed by the certificate of incorporation or by the bylaws or by an agreement among any number of security holders or among such holders and the corporation. No restrictions so imposed shall be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are parties to an agreement or voted in favor of the restriction.

8 Del. C. § 202(b) (emphasis added). In Di Loreto v. Tiber Holding Corp., 1999 WL 1261450, at *6 (Del. Ch. June 29, 1999), the Court explained that the purpose of this limitation "is to protect a shareholder's investment from diminishment through post-purchase restrictions placed on the shareholder's shares by the corporation or its other shareholders" and noted that, without such limitation, "others might circumscribe the shareholder's ability to transfer his or her shares, reducing the investment's liquidity and value." Thus, Section 202(b) provides that a board of directors may not impose transfer restrictions on securities issued prior to the adoption of the transfer restriction without the consent of the holders of the securities, either in the form of an agreement or a vote in favor of the restriction. See Joseph E. Seagram & Sons, Inc. v. Conoco, Inc., 519 F. Supp. 506, 513 (D. Del. 1981) (stating that a board of directors may not "unilaterally . . . impose stock transfer restrictions, which might be of significant economic consequence, on existing shares without the consent of the corporation's shareholders"); Geier, 1987 WL 11285, at *4; 1 R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations & Business Organizations, § 6.6 (3d ed., 2013 supp.) (stating that Section 202(b) "provides that the holders

---

[6] See Capital Group Companies, Inc. v. Armour, 2005 WL 678564, at *5 (Del. Ch. Mar. 15, 2005) ("The transfer restrictions [at issue] are governed by 8 Del. C. § 202, which sets forth the requirements for a valid restriction on the transfer of securities.").

[7] The shares of Common Stock acquired by Corporate Officers that are currently outstanding would be considered "securities" within the meaning of Section 202(b). See Joseph E. Seagram & Sons, Inc. v. Conoco, Inc., 519 F. Supp. 506, 512 (D. Del. 1981) (indicating that the term "securities" as used in Section 202(b) includes "capital shares"); RFE Capital Partners, L.P. v. Weskar, Inc., 652 A.2d 1093, 1095 (Del. Super. Ct. 1994) (same); Ernest L. Folk, III, The Delaware General Corporation Law: A Commentary and Analysis, at 197 (1972) (noting that the term "security" includes "stock").

of securities outstanding at the time a restriction is imposed are not bound by the restriction unless they assent to it");[8] II Edward P. Welch, Andrew J. Turezyn & Robert S. Saunders, Folk on the Delaware General Corporation Law, 202.6 (6th ed. 2014-2 supp.) ("A restriction, however imposed, is not retroactive in effect except as to consenting security holders, that is, those who are parties to an agreement or who voted in favor of a restriction (as in the case of a bylaw or certificate amendment).").

As indicated above, the Proposal would require the restrictions contemplated thereby to be imposed, by unilateral action of the Compensation Committee, on previously issued and currently outstanding shares of Common Stock. The imposition of such restrictions, however, may not be validly imposed by the Compensation Committee on previously issued and currently outstanding shares unless the holder of those shares has consented to or voted in favor of the restriction. See 8 Del. C. § 202(b); Conoco, Inc., 519 F. Supp. at 513; Di Loreto, 1999 WL 1261450, at *6; Geier, 1987 WL 11285, at *4. Because the Corporate Officers currently hold outstanding shares of Common Stock—and because such shares are presently not subject to the restrictions on transfer contemplated by the Proposal—the restrictions contemplated by the Proposal cannot now be validly imposed on such shares by unilateral action of the Compensation Committee. Accordingly, the Proposal, if adopted and implemented, would require the Compensation Committee to unilaterally impose a transfer restriction on currently outstanding shares of Common Stock in violation of Section 202 of the General Corporation Law.

3. Breach of Existing Contractual Obligations or Unilateral Modification

The Proposal, if adopted and implemented, would require, among other things, that "all stock awarded to the Corporate Officers is considered Restricted Stock and has a Restricted Period of five years from the date of award," and "all stock options to the Corporate Officers may not be redeemed prior to the fifth anniversary date of the award." We understand that the Company has made awards of options, restricted stock units and performance shares to its Corporate Officers under the Plans and pursuant to Award Agreements, which awards remain unexercised and/or unvested and are currently outstanding (the "Outstanding Awards"). We further understand that neither the Plans nor the Award Agreements entered into in connection with the Outstanding Awards impose the restrictions contemplated by the Proposal and that such restrictions would be in contravention of the terms thereof. Under Delaware law, an equity incentive plan, as well as the award agreements entered into in connection with awards made thereunder, constitute valid, binding agreements between the corporation and the recipient of such awards. See Fox v. CDx Holdings, Inc., 2015 WL 4571398, at *34 (Del. Ch. July 28, 2015) aff'd 141 A.3d 1037 (Del. 2016) (addressing an option holders challenge to the treatment of his options in a merger and stating that the relationship between the corporation and its option holders was governed by contract and that the "operative contract" was the corporation's stock incentive plan, not the merger agreement); Nemec v. Shrader, 2009 WL 1204346, at *5-6 (Del.

[8] Mr. Balotti was, and Mr. Finkelstein is, a member of this firm.

Ch. Apr. 30, 2009) aff'd 991 A.2d 1120 (Del. 2010) (characterizing a stock plan as a "negotiated instrument entered into freely by both parties" and a "valid and enforceable contract").

The Plans and the Award Agreements are governed by Delaware law. Under Delaware law, in the absence of a legal excuse for one party's performance of a contract, that party is "obligated to perform the contract according to its terms, or upon his failure so to do, he is liable to the [other party] for the damages resulting therefrom." Wills v. Shockley, 157 A.2d 252, 253 (Del. 1960). Pursuant to the Plans and the Award Agreements, the Company has agreed to, among other things, issue shares of Common Stock to Corporate Officers upon the exercise or vesting of awards in accordance with the terms of the Plans and the Award Agreements, which terms do not include the restrictions contemplated by the Proposal. Because the Proposal, if adopted and implemented, would require, among other things, that all stock options not be redeemed prior to the fifth anniversary of the date of the award and includes no language providing that such restrictions only apply to future awards of stock options, the Proposal would require the Company to breach its obligations under the Plans and the Award Agreements to redeem such options (or, to the extent redemption is intended to mean exercise, to issue shares of Common Stock upon the valid exercise of such options) at such earlier time as is currently provided for by the Plans and the Award Agreements governing outstanding options. Similarly, to the extent other Outstanding Awards that are not option awards would be exercisable or vest in a manner that is in contravention of the restrictions contemplated by the Proposal, the Proposal, if adopted and implemented, would require the Company to breach its obligations under the Plans and the Award Agreements in respect of such Outstanding Awards. Any such breach could result in the Company being required to pay monetary damages as a result thereof.

Alternatively, modification of the Plans or the Award Agreements by the Company so as to impose the restrictions contemplated by the Proposal also violates the rule of Delaware law that contracts may not be unilaterally modified. See, e.g., First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co., 2005 WL 2173993, at *8 (Del. Ch. Sept. 6, 2005) ("[A]ny amendment to a contract, whether written or oral, relies on the presence of mutual assent and consideration."); Sersun v. Morello, 1999 WL 350476, at *2 (Del. Ch. Mar. 29, 1999) ("When a contract is validly made, it cannot be modified without the consent of all parties and an exchange of consideration."); DeCecchis v. Evers, 174 A.2d 463, 464 (Del. Super. 1961) (same). In either circumstance, the Proposal, if adopted and implemented, would cause the Company to violate Delaware law by either requiring the Company to breach the terms of the Plans and the Award Agreements or to unilaterally modify such agreements.[9]

---

[9] Although Section 9.6 of the 2016 Plan provides that "[t]he Administrator may amend, modify or terminate any outstanding Award, including by . . . changing the exercise or settlement date," any such amendment would require the consent of the Participant (as defined in the 2016 Plan) unless the amendment "does not materially and adversely affect the economic benefits to be delivered under the

C. The Company Does Not have the Power and Authority to Implement the Proposal

As set forth above, the Proposal, if adopted and implemented, would violate Delaware law. Therefore, in our opinion, the Company lacks the power and authority to implement the Proposal.

Conclusion

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that: (i) the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law, (ii) the Proposal, if adopted and implemented, would violate Delaware law and (iii) the Company does not have the power and authority to implement the Proposal.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission in connection with the matters addressed herein and that you may refer to it in your proxy statement for the Annual Meeting, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

WH/SN

Award as of the date of such amendment, modification or termination." It is difficult to see how the imposition of the restrictions contemplated by the Proposal would not materially and adversely affect the economic benefits of the Outstanding Awards. As discussed above, the Delaware courts have recognized that restrictions on the disposition of securities, such as the Outstanding Awards, "might be of significant economic consequence," Joseph E. Seagram & Sons, Inc., 519 F. Supp. at 513, and "reduc[e] the liquidity and value" of such securities, Di Loreto, 1999 WL 1261450, at *6.

Schedule A

1. Form of Agreement for Stock Option Grants to Executive Officers under the 2008 Plan

2. Form of Stock Option Agreement for options granted to Executive Officers under the 2008 Plan commencing February 9, 2010

3. Form of Restricted Stock Unit Agreement for restricted stock units granted to Executive Officers under the 2008 Plan commencing February 9, 2010

4. Form of 3M 2010 Performance Share Award under the 2008 Plan

5. Form of Stock Option Agreement for U.S. Employees under the 2008 Plan

6. Form of Restricted Stock Unit Agreement for U.S. Employees under the 2008 Plan

7. Form of Stock Option Award Agreement under the 2016 Plan

8. Form of Stock Appreciation Right Award Agreement under the 2016 Plan

9. Form of Restricted Stock Unit Award Agreement under the 2016 Plan

10. Form of Performance Share Award Agreement under the 2016 Plan