



DIVISION OF
CORPORATION FINANCE

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

September 22, 2021

Elizabeth A. Ising
Gibson, Dunn & Crutcher LLP
shareholderproposals@gibsondunn.com

Re: Brinker International, Inc.
Incoming letter dated July 12, 2021

Dear Ms. Ising:

This letter is in response to your correspondence dated July 12, 2021 concerning the shareholder proposal (the "Proposal") submitted to Brinker International, Inc. (the "Company") by The Humane Society of the United States (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. We also have received correspondence from the Proponent dated July 30, 2021. Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2020-2021-shareholder-proposals-no-action>.

The Proposal asks that the Company develop and adopt a policy, and amend its governing documents as necessary, to ensure that its future annual and special shareholder meetings will be held either in whole or in part through virtual means.

We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(i)(7). In light of technological progress and public health guidance in light of the COVID-19 pandemic, in our view the issue of shareholders' virtual access to annual and special shareholder meetings does not relate to the Company's ordinary business operations.

Accordingly, we do not concur that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Rule 14a-8 Review Team

cc: Matthew Prescott
The Humane Society of the United States
mprescott@humanesociety.org



July 30, 2021

Via Electronic Mail: shareholderproposals@sec.gov

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

Re: Brinker International, Inc. – Shareholder Proposal submitted by the Humane Society of the United States

Ladies and Gentlemen:

I am writing on behalf of the Humane Society of the United States (the “Proponent”), who is the beneficial owner of common stock of Brinker International, Inc. (the “Company”) and who has submitted a shareholder proposal (the “Proposal”) to the Company. I am in receipt of a letter dated July 12, 2021 (“Company Letter”) sent to the Securities and Exchange Commission on behalf of the Company. In that letter, the Company contends that the Proposal may be excluded from the Company’s 2021 proxy statement. A copy of this reply is being emailed concurrently to counsel for the Company.

SUMMARY

The Proponent submitted the Proposal to the Company requesting the following:

“RESOLVED: Shareholders ask that Brinker International develop and adopt a policy, and amend its governing documents as necessary, to ensure that moving forward, its annual and special shareholder meetings will be held either in whole or in part through virtual means (i.e., webcast or other on-line system) and that virtual attendance be allowed. This policy should be formally adopted within six months of the 2021 annual meeting and take effect immediately thereafter.”

The full Proposal is attached as Exhibit 1.

The Company argues for exclusion of the Proposal on the basis of Rule 14a-8(i)(7), claiming both that the Proposal concerns matters of ordinary business, and that it does not involve a significant policy issue. The Company is incorrect.

The Proposal seeks a shareholder vote on a high-level policy that implicates issues of shareholder health and safety, inclusion and accessibility, and on environmental sustainability, such as energy and emissions reduction. These have long been significant social issues and have taken on extraordinary significance in light of the global pandemic, civil rights demonstrations, and a renewed government focus on combatting climate change. Indeed, the Company itself has touted its commitment to each of these issues. In light of this, and innovations in remote work and communications tools, the Proposal simply asks shareholders in broad terms whether the Company should incorporate a policy of adding a virtual attendance component to its annual and special meetings.

The Proposal does not involve ordinary business matters that are “so fundamental to management’s ability to run a company on a day-to-day basis that they would not, as a practical matter, be subject to direct shareholder oversight.” Release No. 34-40018 (May 21, 1998). Moreover, unlike other proposals cited in the Company’s letter, the Proposal here contains no prescriptions as to format, conduct, or content of meetings (e.g., shareholder questions, voting, etc.). In fact, it even leaves to management discretion the type of virtual component to adopt, a virtual-only meeting or a “hybrid,” in which a virtual participation component accompanies an in-person meeting.

Because the Proposal seeks a shareholder vote on a significant policy issue, while still preserving maximum discretion to management in its implementation, the Proposal may not be excluded from the Company’s 2021 proxy materials.

ANALYSIS

The Proposal May Not be Excluded under Rule 14a-8(i)(7).

The Proposal cannot be excluded under Rule 14a-8(i)(7) because it does not relate to “ordinary business practices” and, in any event, it raises a significant policy issue that transcends the Company’s ordinary business. *See* Release No. 34-40018 (May 21, 1998).

A. The Proposal raises a significant policy issue that transcends the Company’s ordinary business.

Although the Company only briefly addresses this issue at the end of its letter, Proponent begins its analysis here because of the dispositive effect of a significant

policy issue that transcends the Company's ordinary business.¹ The Proposal's subject matter involves adopting a shareholder virtual attendance and participation policy at the Company's annual and special meetings. As explained in Proponent's supporting statement, the decision whether to adopt such a policy raises significant issues involving shareholder health and safety, inclusion and equity, and environmental factors. The Company has publicly professed support for all these policy issues, but nonetheless now attempts to deny their significance for purposes of Rule 14a-8(i)(7). But the Company offers no analysis or substantive discussion of these issues and does not—indeed, cannot—carry its burden of proof, under Rule 14a-8(g), that the Proposal should be excluded. The no-action request should be denied.

2020 was a game-changer for virtual shareholder meetings. The public discourse about virtual meetings had been increasing in the years prior to 2020, but the global pandemic and superior technological advancements have propelled public debate to unprecedented levels. The majority of states have laws permitting some form of virtual meetings, including the Company's home state of Texas. *See* Texas Business Organizations Code, Sec. 6.002; *see also* Broadridge Infographic, States that Allow and Prohibit Virtual Shareholder Meetings, current as of April 14, 2021, www.broadridge.com/_assets/pdf/br-vsm-state-policy-infographic_04-14-21.pdf. Broadridge Financial Solutions, which provides a hosting platform for virtual meetings, notes that the number of virtual meetings it hosts have been increasing each of the last five years, with the pandemic leading to a 6-fold increase in 2020 over the previous year. Virtual Shareholder Meetings: 2020 Facts and Figures, www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-april-2021.pdf. A multi-stakeholder working group reported that, prior to the health focus of 2020, companies that held meetings virtually “cited the ‘environmentally friendly’ aspects of online events, greater convenience for an expanded pool of shareholders to participate in corporate governance.” Report of the 2020 Multi-Stakeholder Working Group on Practices for Virtual Shareholder Meetings (Rutgers Center for Corporate Law and Governance, Council of Institutional Investors, Society for Corporate Governance), December 10, 2020, p. 8. The report recognized the potential for virtual shareholder meetings to be an “important part” of company engagement and to “provide more substantive content on a broader set of subjects of importance to its shareholders, including environmental, social and governance (“ESG”), sustainability, and corporate citizenship.” *Id.*, p. 19.

Proxy advisory firms Glass Lewis and ISS issued recent policy statements supporting the use of virtual meeting technology. Glass Lewis “believes that virtual

¹ The Company makes no “micromanagement” argument, which would be a consideration under Rule 14a-8(i)(7) separate from the subject matter of the Proposal. *See* Staff Legal Bulletin No. 14J (October 23, 2018). This is understandable in light of the Proposal's narrow focus on a high-level policy issue, without intricate detail or prescriptive rules for implementation of the policy.

meeting technology can be a useful complement to a traditional, in-person shareholder meeting by expanding participation of shareholders who are unable to attend a shareholder meeting in person (i.e. a “hybrid meeting”).” Guidelines, An Overview of the Glass Lewis Approach to Proxy Advice, United States, 2020. Similarly, ISS will “[g]enerally vote for management proposals allowing for the convening of shareholder meetings by electronic means, so long as they do not preclude in-person meetings.” ISS, Proxy Voting Guidelines, Benchmark Policy Recommendations, November 19, 2020. With respect to virtual-only meetings, the firms would seek disclosures that assure that shareholders will be afforded similar rights and opportunities as they would at in-person meetings (so that virtual technology isn’t used to restrict shareholder participation instead of making it more accessible). *Id.*; see generally, A Virtual Meeting Playbook, Covington & Burling LLP, Oct. 22, 2020, www.cov.com/-/media/files/corporate/publications/2020/10/a-virtual-meeting-playbook.pdf.

Despite having the burden of proof under Rule 14a-8(g), the Company’s nine-page letter includes just two brief paragraphs at the end that claim the Proposal doesn’t raise a policy issue of significance to it. The Company dismisses the supporting statement’s discussions of how the global pandemic has highlighted the issue of public health and safety, generated new perspectives on virtual business practices, and even the express explanation that the Proposal would further “various company social and sustainability policies,” such as inclusiveness, equity, and environmental benefits. The Company argues that these factors do not raise a policy issue, but only state why “providing a means for virtual attendance is desirable or advantageous.” But such an argument does not resolve whether a significant policy exists. Maximizing shareholder value and reducing greenhouse gas emissions are both desirable and advantageous, yet it can hardly be disputed that the former is simply an ordinary business issue, while the latter implicates a significant policy. See *Chevron Corporation* (Mar. 30, 2021)(unable to concur that proposal to reduce greenhouse gas emissions is excludable under 14a-8(i)(7)); *General Motors Company* (Apr. 18, 2018)(same).

Importantly, the Company makes no attempt to dispute that the Proposal does, in fact, involve issues of public health, of shareholder inclusiveness and equity, or that it furthers the Company’s energy and emissions reduction goals. Instead, the Company just summarily states, without a board analysis or substantive discussion, that none of the policy issues in the Proposal—which the Company recognizes relate to health, inclusiveness, and sustainability—are “issues of significance to the Company for purposes of Rule 14a-8(i)(7).” The implausibility of such a statement perhaps explains the Company’s failure to provide a board analysis and substantive, well-reasoned discussion in its letter, despite the last three legal bulletins explaining the staff’s expectation that they be included and detailing the substantive content they should contain. See Staff Legal Bulletin No. 14I (November 1, 2017)(stating that the staff expects “a company’s no-action request to

include a discussion that reflects the board’s analysis of the particular policy issue raised and its significance” and that explains “the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned”); Staff Legal Bulletin No. 14J (October 23, 2018)(reaffirming the expectation of a substantive analysis and offering a non-exclusive list of factors the analysis may include); Staff Legal Bulletin No. 14K (October 16, 2019)(explaining that when proposal raises an apparently significant policy issue, the company’s letter “should focus on the significance of the issue to that company” and if that is not done, “the staff believes the matter may not be excluded under Rule 14a-8(i)(7)”); *see also General Motors Company* (Apr. 18, 2018)(unable to concur in exclusion of a proposal relating to greenhouse gas issues where the no-action request did “not include a discussion of the board’s analysis”); *The TJX Companies, Inc.* (Apr. 9, 2020)(same).

Moreover, the Company’s own public statements on the types of policy issues raised in the proposal demonstrate its views on their significance. For example, in his introductory letter to shareholders in the Company’s 2020 Annual Report, Wyman T. Roberts, President and CEO of Brinker International, proclaimed “the critical issue of equality and respect for all members of our communities is also at the forefront of our focus.” That letter also included a discussion of the Company’s commitment to “diversity and inclusion” among team members and guests that seeks to “cultivate an environment and build programs where individual strengths and stories are celebrated and unique perspectives are valued.” *Id.*; *see also, A Culture of Inclusion*, www.brinkerjobs.com/diversity-and-inclusion (explaining the Company’s commitment to inclusion, to racial justice, and to fighting for both equality and equity). Given these stated Company values, a significant policy issue is surely raised by a Proposal that simply asks whether the Company’s professed commitment to inclusion, equality, and equity should extend to shareholders by incorporating virtual meeting participation that would make more accessible the diverse perspectives of its investors.

The Company also publicly touts its commitment “to tread lightly on the environment.” *Better World*, www.brinker.com/commitment/better-world (listing efforts the Company has taken to save energy and water, and to reduce emissions). The significance of the Company’s environmental claims—as well as any potential disparity in their scope—is of an even greater focus in a year which has seen multiple Executive Orders relating to the climate “crisis.” *See, e.g.,* Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 FR 7037, Jan. 20, 2021. On March 4, the SEC announced the creation of a Climate and ESG Enforcement Task Force, expressly recognizing the “increasing investor focus and reliance on climate and ESG-related disclosure and investment.” SEC Release, 2021-42. Indeed, the Division has not permitted exclusion of proposals that “have focused on a company minimizing or eliminating operations that may adversely affect the environment or the public’s health.” Staff Legal Bulletin No. 14E (October 27, 2009). The instant Proposal

follows this line of precedent in asking shareholders to vote on whether the Company should adopt a policy pursuant to its environmental commitments that incorporates virtual meeting participation, which could minimize or eliminate energy and emissions associated with the transportation and physical hosting requirements of in-person meetings.

B. The Proposal does not involve the type of day-to-day business decisions that cannot practically be submitted to a shareholder vote.

The Commission has explained that “ordinary business matters” for purposes of rule 14a-8(i)(7) are those tasks that 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.” Release No. 34-40018 (May 21, 1998). The purpose of the exception is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” *Id.*, see also, Staff Legal Bulletin 14K (Oct. 16, 2019).

The instant Proposal does not intrude on any such on-the-ground business practices, but instead focuses in broad terms on a policy issue that shareholders may practically consider and vote on at an annual meeting. (Indeed, as the previous section notes, the health and ESG issues relating to adoption of virtual meeting policies are already being widely publicly debated.) Nonetheless, the Company asserts three bases for exclusion, that the Proposal relates to the Company’s determination of whether to hold annual meetings in person, the conduct of shareholder meetings, and the Company’s communications with shareholders. Rather than provide any substantive, well-reasoned analysis of how the Proposal actually infringes on management’s ability to conduct core business matters, the Company relies only on boilerplate generalities, mischaracterizations of the Proposal, and claims of categorical exclusions, none of which are sufficient to carry its burden under Rule 14a-8(g).

1. The Proposal does not intrude on management’s ability to make ordinary business decisions relating to shareholder meetings.

For the first assertion, the Company cites to several Staff decisions granting no-action relief on proposals relating to whether to hold annual meetings in person. Company Letter, p. 4. But these decisions are fundamentally distinguishable from the one now under consideration. While the instant Proposal seeks to adopt a virtual participation policy that would further significant policy issues relating to health, inclusion, and sustainability, the decisions cited by the Company involved the opposite, i.e., proposals that sought to force companies to hold in-person meetings. See, e.g., *Comcast Corp.* (Feb. 28, 2018); *American Outdoor Brands, Corp.* (June 25, 2019). It is a manifestly different proposition to adopt a virtual

accessibility component to meetings than to force a company's directors and executives to gather and stage an in-person shareholder meeting, which necessarily involves substantially greater logistical planning, including scheduling, venue, transportation, and lodging requirements. Such disruption presents a markedly distinct intrusion into day-to-day business matters than the adoption of a virtual participation component to the Company's meetings.

Further, the proposals in these decisions do not involve the transcendent policy issues raised by instant Proposal. Quite the opposite, in that forcing the physical transportation to and staging of an in-person meeting does not advance, and in many ways inhibits, the important policy issues of protecting human health, fostering inclusion and equity, and treading lightly on the environment. Ironically, this very point was made in one of the above decisions cited by the Company. American Outdoor brands revealed that its adoption of virtual meetings "increased accessibility and availability to the Company's stockholders who previously were unable to attend such meetings in-person" and "provide a broad platform for stockholders to engage with the Board and management during the meeting and to vote on proposals and other matters presented to the Company's stockholders at the meeting for their consideration and vote." Letter to SEC, May 10, 2019, *American Outdoor Brands, Corp.* (June 25, 2019). The company's decision to hold meetings virtually "provides an enhanced opportunity for more widespread stockholder attendance and participation at the Company's annual meetings than was previously available to the Company's stockholders" at in-person meetings. *Id.*

The Company next attempts to portray the adoption of a virtual attendance policy as "complex" by offering a highly generalized list of management considerations that could equally apply to nearly any shareholder vote to adopt a new policy. Company Letter, p. 5. But implementation of shareholder-adopted policies routinely results in companies having to make implementation decisions, such as costs, security, staffing, and the like. Such implementation considerations, however, do not speak to the relevant issue of whether the Proposal involves decisions "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." Release No. 34-40018 (May 21, 1998)(emphasis added). The Proposal does not require shareholders to micromanage the Company's implementation discretion, but only to vote on the adoption of a general policy of virtual participation in meetings as part of the Company's commitment to health, diversity, and sustainability. Nowhere in the Company's letter does it explain why shareholders could not, as a practical matter, make an informed vote on that.

2. The Proposal does not regulate the actual conduct of shareholder meetings.

The Company next mischaracterizes the Proposal as one that seeks to "regulate the conduct" of meetings, despite the lack of such prescription anywhere in the text.

Company Letter, pp. 5-6. As its primary example, the Company argues that *Target Corp.* (April 9, 2021), a decision from earlier this year, involved a similar proposal. *Id.* Not so. While the instant Proposal calls only for a high-level vote on the policy of virtual meeting attendance, the proposal in *Target* called for detailed implementation requirements and meeting procedures. Specifically, the proposal would have imposed the following requirements:

- Virtual meetings should be conducted in a specific format “in which all participants can be heard and seen via their internet connected devices”;
- Participation be permitted by “shareholders registered for meeting attendance, and Target associates”;
- “All shareholders who wish to ask questions may speak their questions directly, and not have them read by another”;
- “All participants who choose to be seen may be seen at all times during the meeting”;
- “[A]ll persons who are called upon by meeting director when recognized are to be seen as well as heard.”

The other decisions on which the Company relies are similarly prescriptive, which is plainly apparent even in the parenthetical descriptions of them in the Company’s letter. Company Letter, pp. 5-6 (citing decisions involving proposals that would have prescribed “rules of conduct at all shareholder meetings,” a “question-and-answer period” in conjunction with a company’s annual meeting, that “all shareholders be entitled to attend and speak at all annual meetings,” and that time be provided “at each annual meeting for shareholders to ask questions, and receive replies directly from, the non-employee directors”).

By contrast, the Proposal here contains no prescriptions as to format, conduct, or content of the annual meetings (e.g., shareholder questions, voting, visuals, etc.). It even leaves to management discretion the type of virtual component to adopt, a virtual-only meeting or a “hybrid” component that compliments an in-person meeting. *See generally*, A Virtual Meeting Playbook, *supra* (listing considerations for virtual meeting best practice considerations). The Proposal addresses only a significant policy issue at its highest level and preserves to the Company’s discretion all decisions about meeting content and conduct.

3. The Proposal does not regulate the Company’s communications with shareholders.

The Company’s final assertion suggests a categorical rule that “proposals concerning the manner in which companies communicate with their shareholders, whether at shareholder meetings or otherwise, are excludable under Rule 14a-8(i)(7).” Company Letter, p. 7. But such a sweepingly broad rule cannot be supported under the test framed by the Commission’s 1998 release and the Staff

Legal Bulletins since. Nor do the various decisions cited by the Company support such a categorical rule. The Company argues that in *Con-way, Inc.* (Jan. 22, 2009), exclusion was permitted of a “proposal requesting that the company broadcast future annual meetings over the Internet using webcast technology, *since the proposal involved* ‘shareholder relations and the conduct of annual meetings.’” Company Letter, pp. 6-7 (emphasis added). This isn’t a fair contextual reading of the decision. While the Division did recognize that the proposal at issue involved ordinary business aspects of shareholder relations and the conduct of annual meetings, it did not say that the simple fact of involving those topics itself automatically rendered the proposal excludable. And a closer look at the actual proposal in *Con-Way* reveals that it was far more prescriptive than the Company’s description of it. The proposal mandated “three essential elements”:

- 1) Live video-audio broadcast of Con-way Executives, Directors and Shareholders participating in the Annual Meetings.
- 2) Live video-audio broadcast of Executives and Directors participating from Company headquarters or other locations.
- 3) Post meeting, on-demand distribution via Con-way’s website of entire video-audio recordings of its Annual Meetings.

Con-Way, Letter of Company, Dated December 9, 2008, p. 2. True enough, the proposal involves an issue of shareholder relations and the conduct of meetings, but the actual content of the proposal demonstrates its prescriptive and potentially disruptive nature. In this regard, it is far more akin to the proposals discussed in the previous section, but materially different than the instant proposal. The Company fares no better with its next “shareholder relations and communications” decision, which involved a proposal calling for a shareholder vote to compel the Board of Directors to answer questions alleging misconduct involving the Board. *ARIAD Pharmaceuticals, Inc.* (June 1, 2016), Exhibit A to No-Action Letter, Dated March 21, 2016. The parenthetical descriptions of the remaining decisions cited by the Company demonstrate similar substantive prescriptions that would have disrupted the management’s ability to conduct the company’s fundamental business. Company Letter, p. 7.

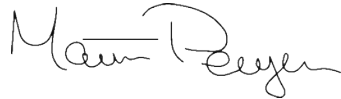
None of the cited decisions supports the Company’s underlying premise that proposals are categorically excludable if they relate in any way to shareholder relations and communications. Indeed, if this were true, it would be difficult to see how any proposals that call for disclosures or reports could ever be included in proxy materials, since all of them concern a company’s communication with shareholders. Yet, the Company nonetheless presses its assertion that the Proposal

is excludable simply by virtue of its relation to the Company's communications with shareholders. Company Letter, p. 7. Such broad categorical arguments—without a substantive analysis of how the Proposal's relation to shareholder communications actually interferes with management's ability to run day-to-day business operations—cannot satisfy the Company's burden to demonstrate it is entitled to exclude the Proposal. *See* 17 C.F.R. § 240.14a-8(g).

CONCLUSION

In conclusion, the Company has failed to carry its burden under Rule 14a-8(g) of establishing that the Proposal is excludable on the basis of Rule 14a-8(i)(7). Accordingly, we request that the Company's petition for no-action be declined.

Respectfully,



Matthew Penzer
Special Counsel
The Humane Society of the United States
1255 23rd Street, NW, Suite 450
Washington, D.C. 20037
mpenzer@humanesociety.org
240.271.6144

cc:
Elizabeth A. Ising

Exhibit 1

Shareholder Proposal Regarding Virtual Meetings

Resolved: Shareholders ask that Brinker International develop and adopt a policy, and amend its governing documents as necessary, to ensure that moving forward, its annual and special shareholder meetings will be held either in whole or in part through virtual means (i.e., webcast or other on-line system) and that virtual attendance be allowed. This policy should be formally adopted within six months of the 2021 annual meeting and take effect immediately thereafter.

Supporting Statement:

In 2020, Brinker held its annual shareholder meeting via virtual webcast. Shareholders support this format and seek to ensure virtual meetings and attendance continue into the future. Please consider the following:

The COVID-19 pandemic has highlighted for many companies the need to ensure continuity of business operations through virtual or remote means. Countless employees have been expected (or even required) to work remotely. Business travel has been dramatically curtailed as the U.S. Centers for Disease Control and Prevention (CDC) has issued health and safety warnings related to air travel. And meetings of all types have been held virtually in greater numbers than ever before.

Yet under its current by-laws, the company may choose to only hold its annual and special shareholder meetings in-person, requiring attendance to be physical, even in circumstances where the CDC recommends against, or when unexpected conditions prevent, travel.

To put it simply, this is unfair and unnecessary: it increases the health risks for any shareholder who may wish to present a proposal, ask a question, or even just attend such a meeting; for company executives and other employees who may be required to attend; for board members; and for support staff at meeting venues.

It also likely deters attendance by forcing shareholders to choose between protecting their health or risking illness in order to exercise their basic shareholder rights.

The advantages of virtual meetings are significant: they add convenience and reduce time and expenses for shareholders, management, and board members; and they promote wider engagement between the company and shareholders.

Further, virtual meetings contribute to various company social and sustainability policies. They further an inclusive company culture by enabling all shareholders an equal opportunity to participate in annual meetings, regardless of financial, physical, or other barriers. And removing the necessity of all shareholders to travel would provide an environmental benefit to the company's ESG practices.

The COVID-19 pandemic has fundamentally changed the way companies think about and hold meetings. In addition to the business advantages virtual meetings provide, it is fundamental that shareholders should be allowed to attend meetings and exercise their rights without putting themselves and others at increased risk. And corporate executives and employees, as well as board members, should be allowed to do the same. For this reason, you are encouraged to vote FOR this proposal.

July 12, 2021

VIA E-MAIL

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

Re: *Brinker International, Inc.*
Shareholder Proposal of The Humane Society of the United States
Securities Exchange Act of 1934 (“Exchange Act”) - Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, Brinker International, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2021 Annual Meeting of Shareholders (collectively, the “2021 Proxy Materials”) a shareholder proposal (the “Proposal”) and statements in support thereof received from The Humane Society of the United States (the “Proponent”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2021 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 2

THE PROPOSAL

The Proposal states:

RESOLVED: Shareholders ask that Brinker International develop and adopt a policy, and amend its governing documents as necessary, to ensure that moving forward, its annual and special shareholder meeting will be held either in whole or in part through virtual means (i.e., webcast or other on-line system) and that virtual attendance be allowed. This policy should be formally adopted within six months of the 2021 annual meeting and take effect immediately thereafter.

A copy of the Proposal and its supporting statements is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may properly be excluded from the 2021 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations, specifically the Company's determination of whether to hold annual meetings in person, the location and conduct of the Company's shareholder meetings and the Company's communications with shareholders.

ANALYSIS

The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because The Proposal Deals With Matters Relating To The Company's Ordinary Business Operations.

A. Background On The Ordinary Business Standard

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting" and identified two central

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 3

considerations that underlie this policy. As relevant here, one consideration is 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.” *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)).

The 1998 Release distinguishes proposals pertaining to ordinary business matters from those involving “significant social policy issues,” the latter of which are not excludable under Rule 14a-8(i)(7) because they “transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” *Id.* Examples of the ordinary business tasks cited by the Commission include “management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers.” *Id.* When assessing proposals under Rule 14a-8(i)(7), the Staff considers the terms of the resolution and its supporting statement as a whole. *See* Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005) (“In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole.”).

As discussed below, the Proposal is excludable because it attempts to regulate the Company’s determination of whether to hold annual meetings in person, the location and conduct of the Company’s shareholder meetings and the Company’s communications with shareholders. These issues are fundamental to management’s ability to run the Company and involve a consideration of multiple and complex factors that are impracticable for shareholders to decide. As such, the Proposal may be omitted under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations.

B. The Proposal May Be Excluded Because It Relates To The Company’s Determination Of Whether To Hold Annual Meetings In Person

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations because it relates to the Company’s determination of whether to hold annual meetings in person.

The Proposal requests a corporate policy requiring that future meetings of the Company’s shareholders “be held either in whole or in part through virtual means.” In other words, the Proposal seeks to require that future shareholder meetings be conducted using either a virtual approach (virtual-only meeting) or a hybrid approach (in-person meeting combined with a virtual meeting). As a result, the Proposal seeks to prohibit the Company from holding

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 4

solely in-person meetings, as the Company has done for many years prior to the 2020 Annual Meeting of Shareholders.¹

The Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of shareholder proposals like the Proposal for similar reasons. For example, in *Comcast Corp.* (avail. Feb. 28, 2018), the Staff concurred that a proposal requesting that the company's board adopt a policy "affirming the continuation of in-person annual meetings in addition to internet access to the meeting" was excludable under Rule 14a-8(i)(7) because it related "to the determination of whether to hold annual meetings in person." *See also American Outdoor Brands, Corp.* (avail. June 25, 2019) (same); *Frontier Communications Corp.* (avail. Feb. 19, 2019) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal seeking "to require . . . a face-to-face meeting to replace the current 'remote' or 'virtual' meeting" of shareholders because it related "to the determination of whether to hold annual meetings in person"); *Alaska Air Group, Inc.* (avail Jan. 25, 2017) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting adoption of a policy "to initiate or restore in-person annual meetings" because it related "to the determination of whether to hold annual meetings in person"); *HP Inc.* (avail. Dec. 28, 2016) (same); and *EMC Corp.* (avail. Mar. 7, 2002) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting adoption of a corporate governance policy "affirming the continuation of in-person annual meetings").

The Proposal's attempt to mandate that the Company hold only hybrid or virtual shareholder meetings—and not in-person meetings—is similar to the attempts by the proposals in *Comcast* and *American Outdoor Brands, Corp.* to mandate hybrid shareholder meetings and in *Frontier Communications, Alaska Air Group, HP* and *EMC* to mandate in-person meetings. The Proposal and its supporting statements also raise similar concerns to those raised in the proposals excluded in the foregoing precedent. For example, in *Comcast*, the proposal asserted that "in-person stockholder meetings play[] an important role in holding management accountable to its investors" and "allow for an unfiltered dialogue between shareholders and management." The *Comcast* proposal also cited various reasons why the requested meeting format was preferable and raised concerns regarding costs, meeting efficiencies, governance, shareholder attendance, and the ability of shareholders to ask questions and interact with management and the board of directors. Similar issues are raised in the Proposal and supporting statements in support of the requested meeting virtual-only or hybrid format. Consistent with the Staff's decision to exclude the proposal in *Comcast*, the Proposal—which raises similar concerns and seeks to mandate a particular shareholders' meeting format—is also excludable.

¹ As noted in its 2020 proxy statement, the Company's 2020 Annual Meeting was held in a virtual meeting format with no physical location in light of the COVID-19 pandemic.

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 5

Moreover, the determination of whether to hold an in-person meeting is exactly the type of matter that the Commission contemplated in the 1998 Release as being in management's purview. In determining whether to hold shareholder meetings in-person, virtually or using a hybrid format, the Company must take into account a myriad of factors, including the associated costs, the availability of the appropriate management and staffing resources, security concerns, the availability and technological capabilities of providers that allow shareholders (including record and beneficial owners) the ability to access and participate in a virtual or hybrid meeting, and shareholder preferences (including that some prefer in-person meetings). These are complex factors, as evidenced by the fact that during the most recent proxy season, some virtual meeting platforms were not fully viewable or functional on every type of electronic device, and there continued to be complex considerations regarding the virtual meeting platforms providing access to street name versus beneficial shareholders. For these reasons, the Company is in the best position to make informed decisions as to the appropriate location (whether in-person, virtual, or hybrid) for the Company's shareholder meetings. Thus, consistent with the precedent discussed above, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business determination of whether to hold shareholder meetings in person.

C. The Proposal May Be Excluded Because It Relates To The Conduct Of Shareholder Meetings

The Proposal seeks to regulate the conduct of the Company's shareholder meetings by seeking to require that "annual and special shareholder meetings . . . be held either in whole or in part through virtual means . . . and that virtual attendance be allowed."

The Staff has routinely permitted the exclusion under Rule 14a-8(i)(7) of proposals concerning the conduct of a company's shareholder meetings. For example, in *Target Corp.* (avail. April 9, 2021), the Staff concurred with the exclusion under Rule 14a-8(i)(7) of a shareholder proposal that sought to require the company to use a "zoom type format in which all participants can be heard and seen" for shareholder meetings when it is not possible to "meet in-person." In arguing for exclusion, the company demonstrated that the proposal sought to "impose . . . detailed requirements as to the format and logistics" of its annual meetings, which the Staff had long held concerned a company's ordinary business operations. *See also USA Technologies, Inc.* (avail. Mar. 11, 2016) (concurring with the exclusion of a proposal that sought a bylaw amendment to include rules of conduct at all meetings of shareholders); *Servotronics, Inc.* (avail. Feb. 19, 2015) (concurring with the exclusion of a proposal "concerning the conduct of shareholder meetings" where the proposal requested that "a question-and-answer period be included in conjunction with [the company's] [a]nnual [s]hareholder [m]eetings"); *Bank of America Corp.* (avail. Dec. 22, 2009) (concurring with the exclusion of a proposal recommending that all shareholders be entitled to attend and speak at all annual meetings because "[p]roposals concerning the

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 6

conduct of shareholder meetings generally are excludable under rule 14a-8(i)(7)"); and *Exxon Mobil Corp.* (avail. Mar. 2, 2005) (concurring in the exclusion of a proposal seeking to set aside time "at each annual meeting for shareholders to ask questions, and receive replies directly from, the non-employee directors").

Just as with the proposals in the precedent cited above, the Proposal seeks to manage how the Company conducts shareholder meetings, including the methods for allowing shareholders to ask questions and otherwise "participate in annual meetings." For example, like the proposal in *Target*, which stressed the importance of shareholder meetings as a place where "ideas, information, [and] opinions are to be exchanged," the Proposal asserts in the supporting statements that virtual meetings "promote wider engagement between the company and shareholders." In *Target*, the proposal also addressed the importance of shareholder meetings as a venue for allowing "shareholders who wish to ask questions [to] speak their questions directly" and the opportunity "to be seen as well as heard," all of which the proposal asserted could be facilitated by the specific Zoom format requested in the proposal. Similarly, the Proposal advocates for a virtual means of accessing future shareholder meetings because "shareholders should be allowed to attend meetings and exercise their rights." This demonstrates that, like the proposal in *Target*, the Proposal's attempt to require a specific type of format for future meetings makes it fundamentally about how the Company conducts its shareholder meetings. Thus, by dictating that the Company adopt a policy to use a "webcast or other on-line system . . . and that virtual attendance be allowed" at all shareholder meetings, the Proposal, consistent with the Staff's recent decision in *Target* and other above-cited precedent, improperly seeks to regulate the conduct of the Company's shareholder meetings and thus is excludable under Rule 14a-8(i)(7).

D. The Proposal Is Excludable Under Rule 14a-8(i)(7) Because It Relates To The Company's Communications With Shareholders

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to ordinary business operations because it relates to the Company's communications with shareholders. A company's methods for communicating with its shareholders—whether at or outside of shareholder meetings—involve complex considerations of effectiveness, investor relations matters, and associated costs—all of which the company is best positioned to consider compared to shareholders.

The Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of proposals relating to how companies use webcasts and electronic media and communications technology to communicate with shareholders in connection with shareholder meetings. *See, e.g., Con-way, Inc.* (avail. Jan. 22, 2009) (concurring with the exclusion of a proposal requesting that the company broadcast future annual meetings over the Internet using webcast technology, since the proposal involved "shareholder relations and the conduct of

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 7

annual meetings”); *Commonwealth Energy Corp.* (avail. Nov. 15, 2002) (concurring with the exclusion of a proposal requesting that, among other things, the company make audio or video recordings of its annual meetings as relating to “shareholder relations and the conduct of annual meetings”); and *Irvine Sensors Corp.* (avail. Jan. 2, 2001) (concurring with the exclusion of a proposal requesting that the company webcast its annual meetings since the proposal related to “procedures for establishing regular communications and updates with shareholders”).

More generally, Staff precedent demonstrates that proposals concerning the manner in which companies communicate with their shareholders, whether at shareholder meetings or otherwise, are excludable under Rule 14a-8(i)(7). *See, e.g., ARIAD Pharmaceuticals, Inc.* (avail. June 1, 2016) (concurring with the exclusion of a proposal requesting that the board respond to questions specified in the proposal, where the company argued it related to “shareholder relations and communications”); *Peregrine Pharmaceuticals, Inc.* (avail. Jul. 16, 2013) (concurring with the exclusion of a proposal requesting that management respond to shareholder questions on public company conference calls because the proposal related to “the ability of shareholders to communicate with management”); *Citigroup Inc.* (avail. Feb. 7, 2013) (concurring with the exclusion of a proposal requesting “a reasonable amount of time before and after the annual meeting for shareholder dialogue” with directors); and *Ford Motor Co.* (avail. Mar. 1, 2010) (concurring with the exclusion of a proposal relating to how the company distributes restated financial statements to shareholders since “[p]roposals concerning the methods used by a company to distribute or present information to its shareholders are generally excludable under rule 14a-8(i)(7)”).

Consistent with the precedent discussed above, the Proposal concerns the methods by which the Company communicates with its shareholders because it seeks to “promote wider engagement between the company and shareholders” by requesting that the Company amend its governing documents to *require* adoption of the Proponent’s preferred communication method: electronic access via a virtual-only or hybrid format. The Proposal’s supporting statements further demonstrate that aspect of the Proposal by asserting that electronic access would “promote wider engagement” and that “[s]hareholders support [the electronic access] format and seek to ensure virtual meetings and [electronic] attendance continue into the future.” By focusing on the Company’s shareholder communications, including the format of such communications, the Proposal is excludable under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations consistent with the precedent discussed above.

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 8

E. The Proposal Does Not Raise A Policy Issue Of Significance To The Company For Purposes Of Rule 14a-8(i)(7)

The Proposal does not raise a policy issue that is significant to the Company for purposes of Rule 14a-8(i)(7), and thus the Proposal does not transcend the Company's ordinary business operations. The Proposal is focused on how the Company conducts its shareholder meetings, specifically requesting that virtual attendance be allowed at all future annual and special shareholder meetings. Additionally, each paragraph of the Proposal's supporting statements is dedicated to rationalizing why, in the Proponent's view, providing a means for virtual attendance is desirable or advantageous. The reasons cited in the Proposal include that virtual attendance would: "add convenience and reduce time and expenses for shareholders, management, and board members;" promote attendance; "further an inclusive company culture;" and "provide an environmental benefit to the [C]ompany's ESG practices." While the supporting statements also mention factors related to the COVID-19 pandemic, the policy change requested by the Proposal is not limited to when a pandemic has been declared, and the health and safety of attendees are one of a myriad of considerations raised in the supporting statements in defense of the requested policy. In fact, the policy requested by the Proposal is intended to apply regardless of whether actual public health and safety risks impacting in-person attendance may exist at the time. Thus, the Proposal is not focused on or limited to policy issues relating to public health or any other issues of significance to the Company for purposes of Rule 14a-8(i)(7).

Instead, as discussed above, the Proposal and the supporting statements relate to a myriad of ordinary business considerations regarding the conduct of the Company's shareholder meetings. While the Company's 2021 Annual Meeting of Shareholders was held through virtual means, and while the Company may determine to hold future shareholder meetings in whole or in part through virtual means, the Company's decision of where and how to conduct such meetings and the manner in which it communicates with its shareholders are fundamentally ordinary business decisions that the Company's Board of Directors and management are best suited to make. Because the Proposal does not transcend the Company's ordinary business operations, consistent with the similar proposals discussed above, it is properly excludable under Rule 14a-8(i)(7).

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2021 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8(i)(7).

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
July 12, 2021
Page 9

should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287, or Daniel Fuller, the Company's Senior Vice President, General Counsel and Secretary, at Dan.Fuller@brinker.com.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Daniel Fuller, Brinker International, Inc.
Matthew Prescott, The Humane Society of the United States

EXHIBIT A



**THE HUMANE SOCIETY
OF THE UNITED STATES**

May 26, 2021

Dan Fuller
SVP, General Counsel & Secretary
Brinker International
3000 Olympus Blvd.
Dallas, TX 75019

And via email: Dan.Fuller@brinker.com

Dear Mr. Fuller,

Enclosed with this letter is a shareholder proposal submitted for inclusion in the proxy statement for the 2021 annual meeting and a letter from The Humane Society of the United States' (HSUS) brokerage firm, BNY Mellon, confirming ownership of Brinker common stock. The HSUS has continuously held at least \$2,000 in market value for the one-year period preceding and including the date of this letter and will hold at least this amount through and including the date of the 2021 shareholder meeting.

Please e-mail me to confirm receipt of this proposal.

And if the company will attempt to exclude any portion of this proposal under Rule 14a-8, please advise me within 14 days. Thank you for your assistance.

Sincerely,

Matthew Prescott
Senior Director of Food and Agriculture
The Humane Society of the United States
240-620-4432
mprescott@humanesociety.org

Shareholder Proposal Regarding Virtual Meetings

Resolved: Shareholders ask that Brinker International develop and adopt a policy, and amend its governing documents as necessary, to ensure that moving forward, its annual and special shareholder meetings will be held either in whole or in part through virtual means (i.e., webcast or other on-line system) and that virtual attendance be allowed. This policy should be formally adopted within six months of the 2021 annual meeting and take effect immediately thereafter.

Supporting Statement:

In 2020, Brinker held its annual shareholder meeting via virtual webcast. Shareholders support this format and seek to ensure virtual meetings and attendance continue into the future. Please consider the following:

The COVID-19 pandemic has highlighted for many companies the need to ensure continuity of business operations through virtual or remote means. Countless employees have been expected (or even required) to work remotely. Business travel has been dramatically curtailed as the U.S. Centers for Disease Control and Prevention (CDC) has issued health and safety warnings related to air travel. And meetings of all types have been held virtually in greater numbers than ever before.

Yet under its current by-laws, the company may choose to only hold its annual and special shareholder meetings in-person, requiring attendance to be physical, even in circumstances where the CDC recommends against, or when unexpected conditions prevent, travel.

To put it simply, this is unfair and unnecessary: it increases the health risks for any shareholder who may wish to present a proposal, ask a question, or even just attend such a meeting; for company executives and other employees who may be required to attend; for board members; and for support staff at meeting venues.

It also likely deters attendance by forcing shareholders to choose between protecting their health or risking illness in order to exercise their basic shareholder rights.

The advantages of virtual meetings are significant: they add convenience and reduce time and expenses for shareholders, management, and board members; and they promote wider engagement between the company and shareholders.

Further, virtual meetings contribute to various company social and sustainability policies. They further an inclusive company culture by enabling all shareholders an equal opportunity to participate in annual meetings, regardless of financial, physical, or other barriers. And removing the necessity of all shareholders to travel would provide an environmental benefit to the company's ESG practices.

The COVID-19 pandemic has fundamentally changed the way companies think about and hold meetings. In addition to the business advantages virtual meetings provide, it is fundamental that shareholders should be allowed to attend meetings and exercise their rights without putting themselves and others at increased risk. And corporate executives and employees, as well as board members, should be allowed to do the same. For this reason, you are encouraged to vote FOR this proposal.



Stacy Stout
Vice President
Client Service Manager

BNY Mellon Wealth Management
Family Office
500 Grant Street, Floor 38
Pittsburgh, PA 15258

T 412.236.1775
stacy.stout@bnymellon.com

May 26, 2021

Dan Fuller
SVP, General Counsel & Secretary
Brinker International
3000 Olympus Blvd.
Dallas, TX 75019

And via email: Dan.Fuller@brinker.com

Dear Mr. Fuller,

BNY Mellon National Association, custodian for The Humane Society of the United States, verifies that The HSUS has continuously held at least \$2,000.00 in market value of Brinker common stock for the one-year period preceding and including the date of this letter. Thank you.

Sincerely,

Stacy L. Stout

Stacy Stout
Vice President, Client Service Manager
BNY Mellon Wealth Management
Family Office Group
500 Grant Street, 38th Floor/Suite 3840/151-3840
Pittsburgh, PA 15258
T (412) 236-1775 | F (866) 230-4247
bnymellonwealth.com