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

Re: *Shareholder Proposal Submitted by Lucian Bebchuk*

Ladies and Gentlemen:

We submit this letter on behalf of our client Electronic Arts Inc., a Delaware corporation ("***EA***" or the "***Company***") requesting confirmation that the staff (the "***Staff***") of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the "***Commission***") will not recommend enforcement action to the Commission if, in reliance on rule 14a-8 under the Securities Exchange Act of 1934, the Company omits the enclosed shareholder proposal (the "***Proposal***") and supporting statement (the "***Supporting Statement***") submitted by Lucian Bebchuk (the "***Proponent***") from the Company's proxy materials for its 2008 Annual Meeting of Stockholders (the "***2008 Annual Meeting***"). The Proponent's letter setting forth the Proposal and Supporting Statement is attached hereto as Exhibit A.

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

- enclosed six copies of this letter and the related exhibit;
- filed this letter with the Commission no later than eighty (80) calendar days before EA intends to file its definitive 2008 proxy materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

I. Summary of the Proposal

The Proposal recommends that EA's Board of Directors submit to a stockholder vote an amendment to the Company's Certificate of Incorporation or Bylaws, to the extent consistent with its fiduciary duties, that states the Company shall, to the extent permitted by law, submit to a vote of stockholders at any annual meeting, include in the Company's notice of any such annual meeting, and allow stockholders to vote on the Company's proxy card for any "qualified proposal" to amend the Company's bylaws. For purposes of the Proposal, a "qualified proposal" would be a proposal that:

- was submitted by one or more stockholders to the Company no later than 120 days following the Company's preceding annual meeting;
- was submitted by a proponent (or proponents) that individually or together beneficially own (at the time of submission) no less than 5% of the Company's outstanding common stock, represented in writing an intention to hold such stock through the date of the Company's annual meeting date, and each proponent had been the continuous beneficial owner of $2,000 of the Company's common stock for at least one year prior to the date of submission;
- would effect only an amendment to the Company's bylaws that would be valid under state law;
- was proper action for stockholders under state law;
- would not deal with a matter relating to the Company's "ordinary business operations";
- did not "exceed 500 words"; and
- the proponent(s) of the proposal furnished the Company within 21 days of the Company's request, any information that was reasonably requested by the Company for determining the eligibility of the proponent(s) to submit a "qualified proposal" or to enable the Company "to comply with applicable law."

II. Bases for Excluding the Proposal

The Proposal may be properly omitted from the Company's proxy materials for the 2008 Annual Meeting for the following reasons:

- the Proposal may be excluded in reliance on rule 14a-8(i)(3) because it is contrary to the proxy rules, particularly rule 14a-8;

- because the Proposal would create a process by which the Company would be required to include future proposals that may be omitted in reliance on paragraph (i) of rule 14a-8, it would merely do indirectly what a proposal could not do directly -- require a shareholder proposal to be included in the Company's proxy materials even if it could be omitted in reliance on one of the subparagraphs of paragraph (i) -- and, as such, the Proposal may be excluded in reliance on rules 14a-8(i)(3), (i)(4), (i)(5), (i)(6), (i)(8), (i)(9), (i)(10), (i)(11), (i)(12), and (i)(13);

- the Proposal may be excluded in reliance on rule 14a-8(i)(7) because it relates to the Company's ordinary business matters (*i.e.*, would require disclosure of ordinary business matters in Company filings with the Commission beyond that which is required by Commission rules and regulations); and

- the Proposal may be excluded in reliance on rule 14a-8(i)(3) because it is so vague and indefinite that neither shareholders in voting on it, nor the Company in implementing it, would be able to determine with any reasonable certainty what actions are required.

Each of the bases upon which the Company may properly omit the Proposal from its proxy materials for the 2008 Annual Meeting is discussed below.

A. The Proposal may be excluded in reliance on rule 14a-8(i)(3) because it is contrary to the proxy rules, particularly rule 14a-8.

Section 14(a) of the Exchange Act provides the Commission with broad rulemaking authority regarding the regulation of proxy solicitations, stating that "[i]t shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title." The Commission exercised its authority under Section 14(a) to adopt rule 14a-8. In adopting rule 14a-8 (and modifying that rule numerous times since its original adoption), the Commission used notice and comment rulemaking to balance the federally-imposed obligations on companies that are soliciting proxy authority with the costs that result from those obligations.[1] In connection with the adoption of the federal proxy rules, the

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1 In 1942, the Commission first addressed the issue of shareholder proposals in a formal rulemaking. Specifically, the Commission adopted rule X-14A-7 regarding the duty of management to set forth shareholder proposals in the company's proxy. *See* Release No. 34-3347 (Dec. 18, 1942). This rule allowed that "[i]n the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can make a specification as provided in Rule X-14A-2" (*i.e.,* on the proxy card). Since the adoption of this initial rule, the Commission has

Commission has recognized the interplay between state and federal law in the proxy solicitation context and has adopted a balance between state and federal law that it believes to be appropriate.

Rule 14a-8(i)(3) was adopted in 1976 to codify the formerly assumed ability of companies to exclude shareholder proposals that are contrary to any of the proxy rules. In this regard, when the Commission sought comments on its proposal of what is now rule 14a-8(i)(3), it stated:

> "The Commission is aware that on many occasions in the past proponents have submitted proposals and/or supporting statements that contravene one or more of its proxy rules and regulations. Most often, this situation has occurred when proponents have submitted items that contain false or misleading statements. Statements of that nature are prohibited from inclusion in proxy soliciting materials by Rule 14a-9 of the proxy rules. Other rules that occasionally have been violated are Rule 14a-4 concerning the form of an issuer's proxy card, and Rule 14a-11 relating to contests for the election of directors.
>
> In light of the foregoing, the Commission proposes to add a new subparagraph [(i)(3)] to Rule 14a-8 expressly providing that a proposal or supporting statement may not be contrary to any of the Commission's proxy rules and regulations, including Rule 14a-9. This provision, if adopted, would simply formalize a ground for omission that the Commission believes is inherent in the existing rule."[2]

In 1982, the Commission proposed amendments to rule 14a-8 that would have permitted companies and their shareholders to establish a company-specific shareholder proposal process that would have been substantially similar to that set forth in the Proposal. In these proposed amendments, the Commission proposed a supplemental rule ("rule 14a-8A") that would have permitted a company and its shareholders to adopt a company-specific alternative procedure to govern the shareholder proposal process.[3]

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addressed the proper requirements and balance of shareholder access to management's proxy and the burden on issuers a number of times, including the adoption of amendments to the rule in Release 34-4037 (Dec. 17, 1947), Release No. 34-4185 (Nov. 5, 1948), Release No. 34-4979 (Jan. 6, 1954), Release No. 34-12999 (Nov. 22, 1976), Release No. 34-20091 (Aug. 16, 1983), Release No. 34-40018 (May 21, 1998), and Release No. 34-56914 (Dec. 6, 2007).

2 *See* Exchange Act Release No. 12598 (July 7, 1976).

3 *See* Proposal II in "Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders," Exchange Act Release 34-19135 (October 14, 1982) (the "1982 Proposing Release").

In the 1982 Proposing Release, the Commission proposed an additional alternative approach to the rule 14a-8 process whereby all proposals that were proper under state law and not relating to the election of directors would be included in a company's proxy materials, subject to a numerical limitation.[4] This proposed alternative arose, in part, from the recognition that the shareholder proposal process is an important element of shareholder democracy, and a desire to create a simpler and more predictable regulatory process.[5]

In the 1983 release adopting changes to rule 14a-8 based on proposals in the 1982 Proposing Release,[6] the Commission elected to retain the framework of rule 14a-8, incorporating certain revisions designed principally to remove procedural provisions that were not required to further the purpose of the rule and to clarify and simplify the application of the rule. In taking its action in 1983, the Commission stated:

> "After review of the constructive and detailed views of the commentators and after consideration of the issues presented in the [1982] Proposing Release, the Commission has determined that shareholder access to issuers' proxy materials is appropriate and that federal provision of that access is in the best interests of shareholders and issuers alike. Moreover, based on the overwhelming support of the commentators and the Commission's own experience, the Commission has determined that the basic framework of current Rule 14a-8 provides a fair and efficient mechanism for the security holder proposal process, and ... should serve the interests of shareholders and issuers well."[7]

The Commission's actions in 1983, as well as its statements explaining the bases for those actions, clearly evidence the Commission's determination that the Commission adopted rule 14a-8 (and subsequently modified it to include the provisions of paragraph (i)) because the Commission believed that the "basic framework" of the rule "provides a fair and efficient mechanism for the security holder proposal process" and that the "federal provision of the [shareholder] access is in the best interests of shareholders and issuers alike."[8]

In addressing and reacting to the 2006 Second Circuit decision in AFSCME v. AIG (discussed in greater detail in Section II.B below),[9] the Commission recently reconsidered the

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4 *See* Proposal III in the 1982 Proposing Release.

5 *Id.*

6 *See* Exchange Act Release No. 34-20091 (August 16, 1983).

7 *Id.* at pages 6-7.

8 *Id.*

9 American Federation of State County and Municipal Employees, Employees Pension Plan ("AFSCME") v. American International Group, Inc. ("AIG"), 462 F.3d 121 (2d Cir. 2006).

proper role of the Commission and rule 14a-8 in the proxy process.[10] In determining the appropriate response to the Second Circuit's decision, the Commission again emphasized the importance of the federally established procedures for shareholder access.[11] Indeed, the 2007 release proposing certain amendments to rule 14a-8 began by noting that Congress intended to give the Commission power to control the conditions under which proxies may be solicited, and that this authority encompassed "both disclosure and mechanics."[12] The amendments to rule 14a-8(i)(8) proposed in the 2007 Proposing Release and later adopted by the Commission were intended to prevent shareholders from usurping that authority by establishing the excludability of shareholder proposals creating procedures that would require a company to include certain shareholder nominees in its proxy materials.[13] Making clear that rule 14a-8(i)(8) would bar such proposals, these amendments changed the language of the rule to include not just proposals "relat[ing] to an election for membership on the company's board...," but also proposals relating to "procedures" for nomination or election to the board.[14] In disallowing such proposals, the Commission discussed the "numerous protections of the federal proxy rules," and also noted the "critical importance" of the anti-fraud protection afforded by rule 14a-9.[15] As it did in 1983, the Commission found that circumvention of the federal proxy rules -- even by a shareholder's own proposal -- was not in the best interests of shareholders.

As noted above, the Commission adopted rule 14a-8 pursuant to its authority under Section 14(a) of the Exchange Act and has modified that rule many times. Rule 14a-8 specifies "when a company *must include* a shareholder's proposal in its proxy statement and...[the] few specific circumstances [under which] the company is *permitted to exclude* [a] proposal, but only after submitting its reasons to the Commission" (emphasis added).[16] Under the current version of rule 14a-8, companies are *required* to include a shareholder proposal in their proxy materials *only if*: (1) the proposal is submitted in accordance with the procedural requirements of rule 14a-8; and (2) rule 14a-8(i) does not *permit* the company to exclude the proposal. Contrary to this intended

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10 *See* http://www.sec.gov/divisions/corpfin/cfroundtables.shtml for transcripts of the May 2007 Roundtable Discussions Regarding the Proxy Process and http://www.sec.gov/news/testimony/2007/ts111407cc.htm for a transcript of Chairman Christopher Cox's testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs on Nov. 14, 2007.

11 *See* Exchange Act Release No. 34-56914 (Dec. 6, 2007) (the "2007 Final Release").

12 Exchange Act Release No. 34-56161 (July 27, 2007) (the "2007 Proposing Release") at page 3 (internal quotation omitted).

13 *See* the 2007 Final Release at pages 16-19.

14 *Id.* at pages 16-17.

15 *Id.* at pages 2-3, 5, 22.

16 *See* rule 14a-8.

operation of rule 14a-8, the Proposal attempts to use the rule 14a-8 process, under which companies are required to include proposals unless they are permitted to exclude them pursuant to the terms of the rule, to require the inclusion of *all* "qualified proposals" *permitted by* federal or state law, subject only to certain limitations set forth in the Proposal, namely:

1. certain procedural requirements that are similar to, but not the same as, those currently set forth paragraphs (b)-(e) of rule 14a-8; and

2. three substantive requirements that:

    a. the "qualified proposal" for a bylaw amendment would be "valid under applicable law";

    b. the "qualified proposal" for a bylaw amendment is a proper action for stockholders under state law; and

    c. the "qualified proposal" for a bylaw amendment does not deal with a matter relating to the Company's "ordinary business operations."

The Supporting Statement confirms the Proponent's intent that a bylaw amendment adopted under the Proposal would require the Company to include shareholder proposals in its proxy materials beyond those that currently are required under rule 14a-8. Specifically, the Supporting Statement states that "[c]urrent and future SEC rules may in some cases allow companies -- but do not currently require them -- not to place proposals for Bylaw amendments initiated by stockholders in the [Company's] notice of an annual meeting and proxy card for the meeting." Consistent with this language, the Proposal seeks to require the Company to include "qualified proposals" on substantive matters that far exceed the boundaries of rule 14a-8(i). For example, the bylaw amendments that would be permitted under the Proposal would *require* the Company to include any future shareholder "qualified proposal," which would include (but not be limited to) proposed bylaw amendments relating to:

- the redress of a personal grievance against the Company (which otherwise would be excludable in reliance on rule 14a-8(i)(4));

- *de minimus* operations of the Company not otherwise significantly related to the Company's business (which otherwise would be excludable in reliance on rule 14a-8(i)(5));

- a nomination or an election for membership on the Company's board of directors or analogous governing body or a procedure for such nomination or election (which otherwise would be excludable in reliance on rule 14a-8(i)(8)); and

- a matter addressed in a proposal that directly conflicts with one of the Company's own proposals to be submitted to shareholders at the same meeting (which otherwise would be excludable in reliance on rule 14a-8(i)(9)).

Because the Proposal would *require* the Company to include bylaw amendment proposals in its proxy materials even where the Company would be permitted to exclude those bylaw amendment proposals in reliance on rule 14a-8, the Proposal is contrary to the federal proxy rules. As such, the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(3) because the Proposal is contrary to the Commission's proxy rules, particularly rule 14a-8.

Consistent with our view that the Company may omit the Proposal in reliance on rule 14a-8(i)(3), the Staff expressed its view in its 2004 no-action letter to State Street Corporation that the company was permitted to exclude, pursuant to rule 14a-8(i)(3), a proposal seeking an amendment to a company's bylaws that would require any future bylaw amendment proposed by stockholders to be included in the company's proxy statement and every future change to the bylaws to be required to be included in the company's proxy statement for stockholder ratification or rejection.[17] In reaching this position, the Staff concluded that such a proposal, which was substantially similar to the Proposal and had the same effect and intent as the Proposal, was contrary to the Commission's proxy rules, including rule 14a-8.

In the State Street no-action request, the company expressed its view that "[t]he authority to regulate what is required or permitted in a proxy statement or on a form of proxy, however, is vested exclusively in the Commission under Section 14 of the 1934 Act and is expressed in related Rules and in Regulation 14A… [and the proposal's] attempt to clothe stockholders with rights of access to the Company's proxy statement and form of proxy absent compliance with Rule 14a-8 is flatly inconsistent with the scheme for access to the corporate electoral machinery that the Commission has carefully crafted, including under Rule 14a-8."[18] Further, citing to Exchange Act Release No. 34-20091 (Aug. 16, 1983) and Exchange Act Release No. 34-40018 (May 21, 1998), the company expressed its view that the Commission's refusal to adopt rules that reduce its oversight role in favor of more autonomous shareholders would "make no sense" if shareholders could eliminate the Commission's oversight role through submissions such as this proposal. The Staff concurred with the company's belief that the proposal could be omitted from its proxy materials in reliance on rule 14a-8(i)(3), as contrary to the Commission's proxy rules.

In the current Proposal, the Proponent is seeking to create an end run around rule 14a-8 that is nearly identical to the proposal in State Street. The supporting statement to the proposal in State Street stated that the power to amend the bylaws is "a time-honored tool by which

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17 *See* State Street Corporation (Feb. 3, 2004) ("State Street").

18 *Id.*

shareholders can protect their investment," and that State Street's decisions not to include bylaw amendment proposals on its proxy card imposed on shareholders' exercise of these rights.[19] Similarly, the Proponent in his Supporting Statement opines that stockholders "should consider voting for my proposal to express support for facilitating stockholders' ability to decide for themselves whether to adopt Bylaw amendments initiated by stockholders."

As noted above, the Commission has spoken clearly regarding the role of the federal proxy rules -- including rule 14a-8 -- in the proxy solicitation process, as well as the role of the Staff in the administration of those proxy rules. In 2007, the Commission reassessed the interaction of state and federal law in connection with the solicitation of proxies and reaffirmed its view that it was appropriate to have a nationwide standard -- as expressed in rule 14a-8 -- for the determination of those shareholder proposals that are required to be included in a company's proxy materials. Further, in its letter to State Street, the Staff addressed the operation of rule 14a-8 with regard to a shareholder proposal that, like the Proposal, was intended to establish a process outside of the federal proxy rules that would ease or more readily allow for the exercise of shareholders' rights under state law. In its letter to State Street, consistent with Commission's statements regarding rule 14a-8, the Staff concurred with the view of the company that it could exclude the shareholder proposal in reliance on rule 14a-8(i)(3) as contrary to the federal proxy rules, including rule 14a-8.

Based on the Commission's longstanding position regarding the intended operation of rule 14a-8 and its role as a uniform standard for the inclusion of shareholder proposals in a company's proxy materials, including the Commission's reaffirmation of that position in 2007, as well as the previously expressed position of the Staff regarding the application of rule 14a-8 to a substantially similar shareholder proposal, it is appropriate to exclude the Proposal and Supporting Statement from the Company's proxy materials in reliance on rule 14a-8(i)(3) as contrary to the federal proxy rules, particularly rule 14a-8.

B. Because the Proposal would create a process by which the Company would be required to include proposals that may be omitted in reliance on paragraph (i) of rule 14a-8, it would merely do indirectly what a proposal could not do directly -- require a shareholder proposal to be included in the Company's proxy materials even if it could be omitted in reliance on a subparagraph of paragraph (i) -- and, as such, the Proposal may be excluded in reliance on each such subparagraph of paragraph (i).

In seeking to establish a process by which EA would be required to include all future "qualified proposals" in its proxy materials, the Proposal would require the Company to include shareholder proposals that could be omitted in reliance on most, if not all, of the subparagraphs of rule 14a-8(i). We provide a summary of these subparagraphs below. Due to the similarities

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19 *Id.*

among the interaction of the Proposal and the subparagraphs of rule 14a-8(i), we have grouped those subparagraphs for ease of discussion.

The Proposal would create a process under which a future "qualified proposal" could establish a procedure for the nomination or election of members on EA's Board of Directors and, as such, may be excluded in reliance on rule 14a-8(i)(8).

The Commission recently amended rule 14a-8(i)(8)[20] in response to the 2006 decision in AFSCME v. AIG -- in which the Second Circuit agreed with the Staff's view that companies were not required to include in their proxy materials any shareholder proposals that would result in an immediate election contest, but disagreed with the Staff's view that companies were not required to include in their proxy materials any shareholder proposals that would establish a process for shareholders to wage a future election contest.

In the 2007 Final Release, the Commission stated that the phrase "relates to an election" in rule 14a-8(i)(8) cannot be read so narrowly as to refer only to a proposal that relates to the current election, or a particular election, but rather must be read to refer to a proposal that "relates to an election" in subsequent years as well.[21] The Commission noted, in this regard, that if one looked only to what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily.

A similar analysis should be applied to this Proposal. Specifically, although the inclusion of this Proposal in the Company's proxy materials for the 2008 Annual Meeting would not result in a contested election for the current election, if the Proposal were included in the Company's proxy materials and the proposed bylaw amendment were implemented upon approval by the Company's shareholders, a shareholder would be permitted to submit for inclusion in the Company's materials for subsequent meetings a proposal to amend the Company's bylaws to provide for the inclusion of shareholder nominees in the Company's proxy materials. The Proposal seeks to establish this result, even though a shareholder proposal specifically seeking to implement a process that would provide for the inclusion of shareholder nominees in the Company's proxy materials clearly would be excludable under rule 14a-8(i)(8). Therefore, based upon the interpretation and amendments to rule 14a-8(i)(8) recently established by the Commission, the Proposal is excludable pursuant to rule 14a-8(i)(8) because it seeks to indirectly establish a process for shareholders to wage a future election contest.[22]

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20 *See* the 2007 Final Release.

21 Moreover, the Commission stated that the purpose of rule 14a-8(i)(8), and its interpretation of that rule, is to ensure that contests for election of directors are not conducted without compliance with the Commission's disclosure rules applicable to contested elections. *See* the 2007 Final Release at pages 2-6.

22 *See* JPMorgan Chase & Co. (Feb. 11, 2008); The Bear Stearns Companies Inc. (Feb. 11, 2008); and E*TRADE Financial Corporation (Feb. 11, 2008).

Rules 14a-8(i)(3), (i)(4), (i)(5), (i)(6), (i)(9), (i)(10), (i)(11), (i)(12), and (i)(13) -- The Proposal seeks to establish a procedure to evade the purpose of the substantive exclusions in rule 14a-8(i).

The Proposal, if adopted, would require any future shareholder bylaw amendment proposal that would be "valid under state law," "proper action for stockholders under state law," and "does not deal with a matter relating to the [Company's] ordinary business operations" to be included in the Company's proxy materials. Following the interpretation of rule 14a-8(i)(8) set forth by the Commission in the 2007 Final Release, the determination of whether the Proposal seeks to evade the purpose of the substantive provisions of rule 14a-8(i) requires the consideration of the Proposal's effect in both the current year and "in any subsequent year" to determine whether it is seeking to evade the purpose of the substantive exclusions under rule 14a-8(i). The effect and intent of the Proposal are to establish a process under which, in future years, the Company would be required to include "qualified proposals" in its proxy materials, even though rule 14a-8(i) would permit the exclusion of those future proposals from the Company's proxy materials. As such, the Proposal would establish a procedure that would evade most of the substantive requirements of rule 14a-8(i), including rule 14a-8(i)(3), (i)(4), (i)(5), (i)(6), (i)(9), (i)(10), (i)(11), (i)(12), and (i)(13). In this regard, if the Proposal were adopted, all "qualified proposals" would be required to be included in the Company's proxy materials. As such, under the Proposal, the Company would be required to include any future "qualified proposal" in its proxy materials, including any "qualified proposals" relating to:

- the redress of a personal grievance against the Company (which otherwise would be excludable in reliance on rule 14a-8(i)(4));

- *de minimus* operations of the Company not otherwise significantly related to the Company's business (which otherwise would be excludable in reliance on rule 14a-8(i)(5));

- a policy or requirement (*e.g.*, requiring directors' independence without providing a mechanism to cure) that the Company lacks the power or authority to implement (which otherwise would be excludable in reliance on rule 14a-8(i)(6));

- a proposal that directly conflicts with one of the Company's own proposals to be submitted to shareholders at the same meeting (which otherwise would be excludable in reliance on rule 14a-8(i)(9));

- the policies or corporate governance matters that the Company has substantially implemented (which otherwise would be excludable in reliance on rule 14a-8(i)(10));

- a proposal that substantially duplicates another proposal previously submitted to the Company by another proponent that will be included in the Company's proxy materials for the same meeting (which otherwise would be excludable in reliance on rule 14a-8(i)(11));

- a proposal dealing with substantially the same subject matter as another proposal or proposals that have been previously included in the Company's proxy materials (within the preceding 5 calendar years) and failed to receive a sufficient percentage of the vote to evidence shareholder interest in the subject matter (which otherwise would be excludable in reliance on one of the three subparagraphs of rule 14a-8(i)(12)); and

- specific amounts of cash or stock dividends (which otherwise would be excludable in reliance on rule 14a-8(i)(13)).

Further, requiring the inclusion of any "qualified proposal" in the Company's proxy materials could result in the inclusion in the Company's proxy materials of "qualified proposals" containing impugning or derogatory statements regarding the Company's officers and directors or statements that are materially false and misleading (which otherwise would be excludable in reliance on rule 14a-8(i)(3)).

Therefore, not only does this Proposal violate rule 14a-8(i)(8), as established and interpreted by the Commission, but it also violates the other substantive bases under which a "qualified proposal" would no longer be excludable by the Company should this Proposal be implemented. Therefore, it is appropriate to exclude the Proposal and Supporting Statement from the Company's proxy materials in reliance on rules 14a-8(i)(3), (i)(4), (i)(5), (i)(6), (i)(8), (i)(9), (i)(10), (i)(11), (i)(12), and (i)(13), both individually and collectively.

C. The Proposal may be excluded in reliance on rule 14a-8(i)(7) because it relates to the Company's ordinary business matters (*i.e.*, the required disclosure of ordinary business matters in Company filings with the Commission beyond that required by the Commission's rules and regulations).

The Proposal provides only three substantive requirements with regard to the subject matter of a "qualified proposal" -- a "qualified proposal" must be "valid under applicable law," "a proper action for stockholders under state law," and it may not "deal with a matter relating to the [Company's] ordinary business operations." As such, the Proposal requests that the Company seek a shareholder vote on an amendment to the Company's Certificate of Incorporation or Bylaws that would require the Company to include disclosure (*i.e.,* "qualified proposals") in future proxy statements beyond those required to be disclosed/included by rule 14a-8.

In its no-action letter to Johnson Controls (Oct. 26, 1999), the Staff expressed its view that proposals "requesting additional disclosures in Commission-prescribed documents should not be omitted under the 'ordinary business' exclusion solely because they relate to the preparation and content of documents filed with or submitted to the Commission," but stated that it would "consider whether the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business; where it does, we believe it may be excluded under rule 14a-8(i)(7)" (emphasis added).[23] As mentioned above, if implemented, the Proposal would require the Company to include all future "qualified proposals" in its proxy materials so long as the "qualified proposal" was "valid under applicable law," was "a proper action for stockholders under state law" and "deal[t] with a matter relating to the [Company's] ordinary business operations." Following the Staff's position in Johnson Controls, the determination to be made, based on the language of the Proposal, is whether the Proposal (if implemented) could require the Company to include shareholder proposals in future proxy statements that the Company would be permitted to exclude from its proxy materials because they involve "ordinary business operations," as that term is defined in rule 14a-8(i)(7).

In an attempt to address this issue, the language of the Proposal excludes from its definition of "qualified proposals" any shareholder proposal that "deal[s] with a matter relating to the [Company's] ordinary business operations." This language mimics the language in rule 14a-8(i)(7), which permits the exclusion of a proposal if it "deals with a matter relating to the company's ordinary business operations." Despite its use of the same language as that in rule 14a-8(i)(7), the Proposal fails to respond adequately to the Staff's Johnson Controls position because it does not indicate whether the language in the Proposal -- which would be part of the Company's Certificate of Incorporation or Bylaws (if implemented) and, therefore, subject to interpretation under state corporate law -- has the same meaning, and should be interpreted in the same manner, as the language in rule 14a-8(i)(7), which is a federal provision that is subject to interpretation by the Commission, its Staff, and federal courts. In this regard, the meaning of the "ordinary business" exclusion in rule 14a-8(i)(7) has been interpreted countless times by the Staff, has been the subject of numerous Commission rulemakings and interpretations, and has been interpreted by the federal judiciary for over 30 years.

The meaning of the phrase "a matter relating to ordinary business operations" in a company's governing documents, conversely, would be subject to state corporate law interpretation. The Proposal provides no guidance as to whether that state corporate law interpretation should be identical to, broader than, or narrower than the interpretation of the term under federal law. As such, while the Proposal does provide a subject matter limitation on the information it would require to be included (*i.e.*, "qualified proposals") in a document required by Commission rules (*i.e.*, the Company's proxy materials), the failure of that limitation to match the limitation in rule 14a-8(i)(7) results in a failure to equate the subject matter of "qualified

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23 *See also* Exxon Mobil Corporation (Mar. 3, 2007) (omitting pursuant to rule 14a-8(i)(7) a proposal requesting the company to list all proposals, including shareholder proposals, by title on the Notice page of the proxy statement, as relating to ordinary business operations) and Alaska Air Group, Inc. (March 14, 2008) (omitting pursuant to rule 14a-8(i)(7) a proposal seeking the board of directors to amend the company's bylaws and other governing documents to require the company to provide complete identification information on all individuals or parties reported in any communication or report to shareholders, as relating to ordinary business operations).

proposals" to those that may not be omitted in reliance on rule 14a-8(i)(7). As such, the Proposal's subject matter limitation fails to provide any certainty that the requested information may not relate to ordinary business matters that are not *required* to be disclosed in the proxy under the federal proxy rules, including rule 14a-8. Therefore, the Proposal, if implemented, would require the Company to include disclosure in its proxy materials beyond that required under the Commission's rules and the subject matter of that additional information may relate to the Company's ordinary business matters. As such, consistent with the Staff's position in the Johnson Controls, Exxon Mobil, and Alaska Air no-action letters, it is appropriate to exclude the Proposal and Supporting Statement from the Company's proxy materials in reliance on rule 14a-8(i)(7), as relating to the Company's ordinary business matters.

D. The Proposal may be excluded in reliance on rule 14a-8(i)(3) because it is so vague and indefinite that neither shareholders in voting on it, nor the Company in implementing it (if adopted), would be able to determine with any reasonable certainty what actions are required.

The Proposal seeks for EA's Board of Directors to submit to shareholder vote a proposal to amend the Company's Certificate of Incorporation or Bylaws to require the inclusion of "qualified proposals" in the Company's future proxy materials. However, neither the Proposal nor the Supporting Statement provide any guidance as to how such an amendment should operate in relation to (*i.e.,* in opposition to or concurrently with) rule 14a-8.

Rule 14a-8(i)(3) permits a company to exclude a proposal or supporting statement, or portions thereof, that are contrary to any of the Commission's proxy rules, including rule 14a-9, which prohibits materially false and misleading statements in the proxy materials. Pursuant to Staff Legal Bulletin 14B (Sept. 15, 2004), reliance on rule 14a-8(i)(3) to exclude a proposal or portions of the supporting statement may be appropriate in only a few limited instances, one of which is when the resolution contained in the proposal is so inherently vague or indefinite that neither the shareholders 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. *See also* Philadelphia Electric Company (Jul. 30, 1992). Furthermore, the Staff has noted that a proposal may be materially misleading as vague and indefinite where "any action ultimately taken by the Company upon implementation [of the proposal] could be significantly different from the actions envisioned by the shareholders voting on the proposal." *See* Fuqua Industries, Inc. (March 12, 1991).

The failure of either the Proposal or the Supporting Statement to provide any guidance as to how a process created by the proposed amendment to the Company's Certificate of Incorporation or Bylaws would operate in conjunction with rule 14a-8 renders the Proposal so vague and indefinite that neither the shareholders in voting on it, nor the Company in implementing it (if adopted), would be able to determine with any reasonable certainty what actions are required.

Because the Proposal attempts to create a company-specific approach to the inclusion of shareholder proposals in the Company's proxy materials, shareholders will not be able to determine with any certainty whether the Proposal intends to eliminate the application of rule 14a-8 to the Company.

As evidenced by the rule changes proposed in 1982 that would have amended rule 14a-8 to permit companies to adopt alternative approaches to shareholder proposals, absent amendment to that rule, public companies are not permitted to "opt out" of compliance with rule 14a-8, even if such an opt-out were to be proposed by shareholders. The Proposal, however, would (if implemented) establish an alternative, company-specific approach to shareholder proposals that is fundamentally different from rule 14a-8 and such an "opting out" of the federal proxy rules may be the intended purpose of the Proposal. Indeed, reasonable shareholders may understand that to be the effect of the Proposal. Unfortunately, it is not possible to ascertain whether the Proposal is intended to operate concurrently with rule 14a-8 or supersede rule 14a-8 in its entirety, as neither the Proposal nor the Supporting Statement provide any guidance to shareholders as to its effect in this regard. Because an understanding of this point is critical to permitting shareholders to form any reasonable understanding of the intended operation and effect of the Proposal, any action ultimately taken by the Company upon implementation of the Proposal could be significantly different from the actions envisioned by the shareholders voting on the Proposal.

The Proposal and Supporting Statement are so inherently vague and misleading with regard to the Proposal's operation in conjunction with rule 14a-8 that neither the shareholders in voting on it, nor the Company in implementing it (if adopted), would be able to determine with any reasonable certainty what actions are required.

As discussed above, absent an amendment to rule 14a-8, public companies may not "opt out" of compliance with rule 14a-8. While shareholders will be fundamentally misled as to this point (as discussed in the preceding paragraph), if the Proposal were adopted and the Company were to implement the Proposal, the Company would be required to have two very different shareholder proposal processes -- one that is mandated by the federal proxy rules and one that is unique to the Company and is adopted as an amendment to its Certificate of Incorporation or Bylaws that complies with the terms of the Proposal.

The Proposal's interaction with rule 14a-8 is fundamentally uncertain, as the Proposal attempts to create a company-specific shareholder proposal process that:

- mimics certain of the procedural and substantive requirements of rule 14a-8 (*e.g.*, the required ownership of $2,000 of company securities continuously for one year, the required representation to hold such securities through the date of the annual meeting, the 500-word limitation on proposals, and the requirement that the proposal be "a proper action for stockholders under state law");

- modifies certain of the procedural requirements of rule 14a-8 (*e.g.,* unlike the notice requirement in paragraph (f) of rule 14a-8, the Proposal would not require a notice of all curable failures to meet the procedural requirements of the company-specific process and, unlike the 14-day response period in paragraph (f) of rule 14a-8 for shareholders to cure all curable defects, the Proposal would establish a 21-day response period with regard to proponent eligibility and to enable the Company to "comply with applicable law"); and

- fundamentally alters the subject-matter limitations on the "qualified proposals" that would be required to be included in the Company's proxy materials, as discussed above.

The dual operation of rule 14a-8 and a company-specific approach to shareholder proposals under the Proposal raises a number of fundamental issues regarding the operation of the Proposal that cause the proposal to be so vague and indefinite that neither shareholders in voting on it, nor the Company in implementing it (if adopted), would be able to determine with any reasonable certainty those actions that are required. For example:

- The Proposal requires that "to the extent permitted by law" a "qualified proposal" (which is a proposal that is "valid under applicable law") shall be voted on at an annual meeting and included in the Company's proxy materials. However, the Proposal does not provide any context as to how the qualifications "to the extent permitted by law" or "valid under applicable law" are intended to enable the Company to comply with the federal proxy rules.[24] Further, while rule 14a-8 is "applicable" to the Company, it is clear that the Proposal intends to require the inclusion of shareholder proposals in the Company's proxy materials far beyond those required by rule 14a-8 and, therefore, it is fundamentally uncertain as to what it means for a "qualified proposal" to be "valid under applicable law." As neither the shareholders nor the Company will be able to determine with any reasonable certainty manner in which the proposed amendment is intended to interact with rule 14a-8, the meaning of the primary substantive requirement of the Proposal -- that a "qualified proposal" that is "valid under applicable law" be subject to a shareholder vote and included in the proxy materials "to the extent permitted by law" -- is so vague and indefinite that neither the shareholders nor the Company will be able to determine with any reasonable certainty the manner in which the Proposal is intended to operate.[25]

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24 Neither "to the extent permitted by law" nor "valid under applicable law" is a term defined in rule 14a-8; however, paragraphs (i)(1)-(i)(3) relate to the exclusion of proposals that are improper under state law, could cause the company to violate any state, federal, or foreign law, and/or are contrary to the Commission's proxy rules. Presumably, "to the extent permitted by law" is intended to mean that a qualified proposal would not violate (or cause the Company to violate) state, federal (including Commission rules and regulations), or foreign law, thereby encompassing some or all of the substantive restrictions in paragraphs (i)(1)-(i)(3).

25 *See* Peoples Energy Corporation (Nov. 23, 2004) (proposal urging the board of directors to take the necessary steps to amend Peoples Energy's articles of incorporation and bylaws to provide that officers and

- While the Proposal requires that a "qualified proposal" must meet procedural requirements that are similar to those in rule 14a-8, it is not clear how the Proposal's procedural requirements would interact with the procedural requirements in rule 14a-8.[26] This uncertainty is so fundamental to an understanding of the Proposal that neither the shareholders nor the Company will be able to determine with any reasonable certainty the operation of the procedural requirements in the Proposal. The following examples illustrate that the procedural requirements for "qualified proposals" that would be established if the Proposal were implemented that would be fundamentally different from, and inconsistent with, those in rule 14a-8:

  - The procedural requirements that would be included in the Company's Certificate of Incorporation or Bylaws pursuant to the Proposal do not include the provisions in rule 14a-8(f) that require a company to provide a proponent with timely notice of all curable deficiencies and permit an opportunity for the proponent to remedy all such deficiencies before it may exclude a proposal. Instead, the procedural requirements for "qualified proposals" that would be included in the Company's Certificate of Incorporation or Bylaws pursuant to the Proposal relate only to the time during which a proponent must respond to a company's "reasonable request" for information regarding "eligibility to submit a [q]ualified [p]roposal or to enable the [c]ompany to comply with applicable law." Importantly, those requirements place no limitation on the time period during which the Company may make such a "reasonable request." Accordingly, for example, a "qualified proposal" that failed the 500-word limitation that would be established in the Company's Certificate of Incorporation or Bylaws pursuant to the Proposal could be excluded as improper under the Company's Certificate of Incorporation or Bylaws with no requirement that the proponent be made aware of the failure to comply with that requirement or be given an opportunity to cure that failure. Conversely, under the 500-word limitation in rule 14a-8(d), a proposal that failed to comply with that requirement could be excluded properly under rule 14a-8 *only* after appropriate notice and opportunity to cure the failure was provided to the proponent.

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directors shall not be indemnified from personal liability for acts or omissions involving gross negligence or "reckless neglect" omitted under (i)(3) because the term "reckless neglect" was central to the purpose and intent of the resolution, but had no common meaning and was undefined by the proposal or supporting statement).

26 *See* Berkshire Hathaway Inc. (Mar. 2, 2007) (proposal seeking to restrict Berkshire from investing in securities of any foreign corporation that engages in activities prohibited for U.S. corporations by Executive Order of the President of the United States omitted under (i)(3) as vague and indefinite -- because, in part, the proposal was drafted broadly so as to encompass all past and future Executive Orders, while the supporting statement focused almost exclusively on Sudan). Similarly here, the Proposal tracks the language and terminology of rule 14a-8 (giving rise to the impression that such terms and phrases should be interpreted as they are under that rule), all the while seeking to implement a shareholder proposal process wholly inconsistent with the framework of the rule.

- The procedure for "qualified proposals" that would be established in the Company's Certificate of Incorporation or Bylaws pursuant to the Proposal would not require the Company to provide any notice to a proponent if the Company determined that the proposal did not meet the requirements of a "qualified proposal." Conversely, under rule 14a-8(j), a public company that believes that it is permitted by rule 14a-8 to exclude a proposal from its proxy materials is required to submit a timely notice of that belief (as well as the basis for that belief) to both the Commission and the proponent, with the proponent being given an opportunity to respond to that submission. As discussed above, the Proposal mimics a number of provisions in rule 14a-8 but provides not guidance as to whether those provisions should be interpreted under the Proposal in the same manner as under rule 14a-8. For example, assuming adoption and implementation of the Proposal, the Company may be faced with a situation regarding the interpretation of the requirement that the proposal not relate to "ordinary business operations." If the Company believed that a shareholder proposal could be omitted under rule 14a-8(i)(7), it would be required to provide the Commission and the proponent with its reasoning, with the proponent being given an opportunity to respond and the Commission Staff indicating its views, but if the Company believed that it could omit the proposal because it did not meet the Delaware General Corporation Law standard for "ordinary business operations," it would merely omit the proposal from its proxy materials as improper under its Certificate of Incorporation or Bylaws and would not be required to provide any such notice.

- As discussed above, the Proposal and Supporting Statement are very clear in their intention to require the Company to include shareholder proposals in its proxy materials even where rule 14a-8 would provide a basis for excluding those proposals. However, there is no indication as to whether or not the procedural requirements in the definition of "qualified proposal" are intended to similarly override the procedural requirements in rule 14a-8. The override of the procedural requirements of rule 14a-8 does not appear to be the legal effect of the Proposal because it is likely that the rule 14a-8 procedural requirements (including the notice and remedy provisions) would continue to apply to the Company in its compliance with rule 14a-8.[27] In this regard, the language of the Proposal and the Supporting Statement is so vague and uncertain as to the interaction between the Proposal and rule 14a-8 that neither shareholders nor the Company will be able to

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27 In this regard, rule 14a-8 specifically addresses "when a company *must include* a shareholder's proposal in its proxy statement." And paragraph (a) of rule 14a-8 defines a "proposal" as a shareholder's "recommendation or requirements that the company and/or its board of directors take action, which [a shareholder] intend[s] to present at a meeting of the company's shareholders." Therefore, the Company would have to treat a "qualified proposal" submitted by a shareholder to the Company for inclusion in the proxy, and who intended to present it at the annual meeting, as a rule 14a-8 proposal and any exclusion of the qualified proposal from the proxy for procedural deficiencies would have to meet the procedural requirements of rule 14a-8.

determine with reasonable certainty the effect of adoption of the Proposal on the procedural rights provided to shareholders under rule 14a-8.

For the reasons stated above, both individually and collectively, it is appropriate to exclude the Proposal and Supporting Statement from the Company's proxy materials in reliance on rule 14a-8(i)(3) as they are so vague and indefinite that neither shareholders in voting on the Proposal, nor the Company in implementing it (if adopted), would be able to determine with any reasonable certainty what actions are required.

III. Conclusion

Based on the foregoing, on behalf of the Company, we respectfully request the concurrence of the Staff that the Proposal and Supporting Statement may be excluded from the Company's proxy materials for the 2008 Annual Meeting.

If you have any questions or would like any additional information regarding the foregoing, please do not hesitate to contact the undersigned or Rebekah Toton at O'Melveny & Myers LLP at 202-383-5107. Please transmit your response by fax to the undersigned at 202-383-5414. The fax number for the Proponent is 617-812-0554.

Please acknowledge receipt of this letter by stamping and returning the enclosed receipt copy of this letter. Thank you for your prompt attention to this matter.

Sincerely,

Robert Plesnarski
of O'MELVENY & MYERS LLP

Attachment

cc: Lucian Bebchuk
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