Bulldog Investors, LLC, [redacted]

March 9, 2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

Phillip Goldstein
Managing Member

cc via email: Alison Pampinella
Thomas B. Winmill, President, Dividend and Income Fund
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The Division of Investment Management

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