December 9, 2021

Via e-mail (rule-comments@sec.gov) to

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

Re: Proposed Rule, Proxy Disclosures (File Number S7-11-21)

Dear Ms. Countryman:

We at the Free Enterprise Project[1] of the National Center for Public Policy Research[2] appreciate the opportunity to submit this comment on the above-styled proposed rule that would expand reporting requirements for investment houses that exercise proxies on behalf of ultimate beneficial owners of the underlying shares.

While we agree that enhanced disclosure by parties who exercise proxies on behalf of other ultimate beneficiaries would be a good idea, we must object to the way that this proposed rule is structured. It establishes categories and subcategories for reporting based on the sorts of proposals in which investment-house proxy exercisers showed the most interest in 2020. That though, is the wrong metric. The reporting categories, if they are necessary at all, should not

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[1] Launched in 2007, the National Center for Public Policy Research's Free Enterprise Project (FEP) focuses on shareholder activism and the confluence of big government and big business. FEP is the conservative movement's leading shareholder activism and education program: It files shareholder resolutions, engages corporate CEOs and board members at shareholder meetings, petitions the U.S. Securities and Exchange Commission (SEC) for interpretative guidance, and sponsors effective media campaigns to create the incentives for corporations to stay focused on their missions. More information is available here.

[2] The National Center for Public Policy Research is a communications and research foundation dedicated to providing free market solutions to today's public policy problems. We believe that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. More information is available here.

correspond to the proposals that the proxy exercisers were most engaged about, but rather the subjects about which the ultimate beneficial owners are legitimately interested. The reporting is for their benefit, not that of the proxy exercisers, and the reporting is, in theory, supposed to be designed to give those ultimate beneficial owners the chance to review and critique the whole of proxy exercisers' behaviors, including their decisions about what to focus on. Any categories and subcategories of disclosure should be based on the interests and concerns of those ultimate beneficial owners, not proxy exercisers.

Focus on the actions taken by proxy exercisers also necessarily places great weight on the shareholder proposals that have reached issuers' annual proxy statements to be voted on. But that also is a fatally skewed perspective, because all parties agree that 95 percent of the proposals that are submitted every year are submitted by a coalition of explicitly left-of-center organizations or their allies, a group that expressly labels proposals submitted by the primary organization that regularly submits proposals from right-of-center (which, full disclosure, is the Free Enterprise Project) "conservative" in contrast.[3] But this 95/5 split in no way represents – and surely wildly misrepresents – the genuine interests of ultimate beneficial owners. Those ultimate beneficial owners must, absent objective evidence to the contrary, be assumed to inculpate a spectrum of viewpoints and interests in roughly the same proportion as Americans generally, which is to say over time to evince an approximate 50/50 right/left split. Reporting categories and subcategories should reflect that wide diversity of viewpoints and interests, not the narrow concentration achieved by current leftwing capture of this mode of corporate influence.

This imbalance and impropriety are greatly exacerbated by an exclusive focus on the proposals that made it to proxy ballots in 2020. In the fall of 2019, the SEC staff announced the last in a series of rule changes, and later enacted procedural changes, that made its decision-making process both much less rule-based and much less transparent.[4] And arguably as a result of those changes, but certainly in their wake, in 2020 the staff permitted companies to omit virtually all right-of-center proposals that companies sought to omit. As we will discuss below, these decisions – which were not explained – create the impression and raise the distinct possibility that the SEC staff applied its own personal-policy preferences rather than neutral and objective decision-making principles in its review process. The result is that there are almost no right-of-center proposals considered in the inexplicably narrow pool of proposals that the proposed rule focuses on in establishing its reporting categories and subcategories – all aside from the fact that proposals, and proxy-exerciser attention to them, is entirely the wrong metric anyway.

A well-constructed rule would establish categories and subcategories, if it established them at all, on the basis of an objective and fulsome determination of the issues and concerns of the broad run of ultimate beneficial owners of the stocks (or fractional interests in the stocks, if held through mutual funds or exchange-traded-funds). It might instead simply require that proxy exercisers briefly summarize the import of each proposal, rather than trying to jam them all into

[3] *See* As You Sow, PROXY PREVIEW 2021, at 5 (March 2021), available at https://www.proxypreview.org/2021/report.

[4] *See infra* at 5-8.

pre-set categories. At all events, though, the proposed rule wholly fails to address, far less to require, disclosure of the information most relevant to ultimate beneficial owners. This vital information is the objective basis and underlying research upon which the proxy exercisers will have relied in deciding to cast the proxies as they did. The proposed rule is correct to recognize that ultimate beneficial owners should be able to ascertain whether proxy exercisers are legitimately casting proxies to advance the pecuniary interests of shareholders, or are instead acting in accord with personal policy preferences, either their own or those of some superior decision-maker at the investment house. But ultimate beneficial owners can only make that determination if they understand the proxy exerciser's thought process, the data upon which it is based, and the objectivity, completeness and reliability of that data.

It is this information the disclosure of which this rule should require. It should also include an admonition that where this fulsome research and objective evaluation has not been undertaken, proxy exercisers should not be casting the proxies at all.

I. <u>Background</u>

As the Commission rightly recognizes in its proposed rule, the popularity of fractional-share ownership, first primarily through mutual funds and now increasingly through exchange-traded funds, has greatly multiplied the number of shares that are ultimately beneficially owned by investors who use these services, but the proxy votes for which are exercised by the investment houses on behalf of those shareholders.

For many years this development remained benign, as investment houses broadly declined to vote their investors' proxies on matters of social or political import where the direct, unbiased and fully researched relationship between the proposal at issue and the long-term pecuniary interest of the relevant company was unavailable or demonstrably negative. More recently, however, large investment houses have begun to vote these proxies. When they have done so they have largely acted on the basis either of the raw personal-policy preferences of the proxy exerciser or some superior of the proxy exerciser; or on the basis of biased and incomplete research that somehow always ends up supporting the independently expressed personal-policy preferences of investment-house executives.[5]

This is unacceptable behavior. As the Commission also rightly recognized, investment houses owe fiduciary duties to their shareholders and to their investors. Except in instances in which an investment vehicle is clearly and contractually identified as one that invests on the basis of certain specified social or political commitments without regard to the pecuniary effect on the company and votes the investors' proxies accordingly, investment houses must act, and vote proxies, with a sole focus on the pecuniary benefit to investors. (So, for example, an

[5] *See, e.g.*, Mahoney, Paul G. and Mahoney, Julia D., *The New Separation of Ownership and Control: Institutional Investors and ESG*, __ COLUMBIA BUS. L. REV. __ 2021(2), *available at* https://ssrn.com/abstract=3809914; Stefan J. Padfield, *Corporate Governance and the Omnipresent Specter of Political Bias*, 104 MARQ. L. REV. 47 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623407.

explicitly ESG fund that explained to investors that it would invest with, say, carbon-elimination goals in mind rather than pecuniary goals would also be justified in casting the proxies of the fund's investors in a consistent manner. But other funds that do not advertise and clearly communicate such intentions cannot reconcile policy-based or incompletely researched voting consistent with their fiduciary duty.)

Proper proxy voting by proxy exercisers, then, must generally proceed without regard to anyone's social or political preferences. It therefore requires abstaining from any proxy votes in which a clear, objective and complete determination as to the pecuniary effects of any particular proxy vote has not been established. And it counsels that the SEC, in its statutorily limited role of ensuring particularly that retail investors have the knowledge they need to avoid being taken advantage of by institutional players,[6] should propose and adopt a regulation that requires proxy exercisers to disclose how they have voted the proxies accruing by dint of their clients' investments, and also the research and analysis upon which they relied to reach the conclusion that their decision to vote, and to vote as they did, was demonstrably in the pecuniary best interest of the relevant company, and therefore of the investor, rather than on any other basis.

II. <u>The Proposed Rule & its Fundamental Flaws</u>

While the proposed rule would require certain disclosures from investment houses that vote their investors' proxies, it fails entirely to require the disclosures that are rightly within the SEC's remit and that would do what the Commission itself purports to do with this rule. As the Commission explains in the proposed rule, "investors have an interest in how funds vote," and a right to ensure that an "investment advisor [does] not place its own interests ahead of the interests of its client."[7] This proposed rule, though, makes no effort whatever to gauge and reflect the concerns of investors or to require investment houses to reveal the research and rationale that led them to the conclusion that voting at they had is in the best pecuniary interest of the relevant company, and therefore of investors.

Instead, the proposed rule would require companies to report their votes according to a series of categories and subcategories established by the Commission. These mandatory categories and subcategories are supposed to assist investors in their efforts to determine whether investment houses are acting in their best interests, and according to their desires.

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[6] *See, e.g., What We Do*, SEC.GOV, *available at* https://www.sec.gov/about/what-we-do:

> For more than 85 years since our founding at the height of the Great Depression, we have stayed true to our mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.
>
> Our mission requires tireless commitment and unique expertise from our staff of dedicated professionals who care deeply about protecting Main Street investors and others who rely on our markets to secure their financial futures.

[7] *See* Proposed Rule § I.

Instead, though, whether by design or otherwise, they have been crafted to reflect and concretize the leftwing biases already shot through the shareholder-proposal process.

First, it is not clear why Commission-mandated categories and subcategories are necessary in the first place. Why should not investment houses simply report the title of the proposal they had voted on, a short summary of its import, and then supply or link to their background analysis and research? This would provide all the information that investors need, without any extraneous manipulation by the Commission. And if it were provided in searchable form, as the rule requires, it would conveniently provide that information.

If for some legitimate reason Commission-mandated categories and subcategories are necessary, then in view of the Commission's stated reason for the proposed rule, those categories and subcategories ought to be established with reference to what *ultimate beneficial investors* care about and would like to see proxy exercisers voting on, and in which direction, because it is those investors for whose benefit this disclosure is being required. But the Commission has made no effort to determine what these investors care about or how they wish to see corporations behave. Neither has the Commission fallen back to the logical background presumption that investor interests, concerns and desires broadly reflect those of the public as a whole.

Rather, in establishing its categories and subcategories, the Commission looked not to the actual or likely interests of the ultimate beneficial shareholders at all, but rather looked to the proxy votes made by proxy exercisers in only one year, 2020. But every part of that focus is incoherent, given the stated (and only permissible) purpose of the proposed rule, and – again, whether purposely or not – introduces deep bias inappropriately and avoidably into the rule and the disclosure regime that it would establish.

First, as has already been suggested, the parties whose interests and concerns are relevant here are those of ultimate beneficial shareholders, not the proxy exercisers. In fact, the only legitimate purpose of this rule – as the proposed rule itself first recognizes, but then forgets – is to allow ultimate beneficial shareholders to monitor and respond to proxy-exerciser biases, which counsels strenuously against incorporating those biases, without evaluation, directly into the disclosure structure. But this is exactly what the Commission has done with this rule. As per the rule itself: "[t]he proposed categories and subcategories are designed to cover matters on which *funds* frequently vote, based on *our staff's* experience and review of the matters on which funds voted in 2020."[8] But it is fund behavior and bias that this rule is purportedly designed to allow ultimate beneficial shareholders to monitor. Building that bias into the very warp and woof of the reporting system itself is incoherent.

This problem is deeply exacerbated by looking only to how proxy exercisers have voted in response to the proxy proposals that have been submitted. The As You Sow coalition of shareholder activists itself proudly recognizes that it and associated allies submit approximately 95 percent of all shareholder proposals.[9] And it recognizes that these proposals are intendedly

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[8] *See id.* § II.C.2.

[9] *See supra* note 3.

left-of-center by their designation of other proposals (primarily from the FEP) as "conservative," and urge votes against them.[10] But that 95/5 split in no way captures the ideological diversity or distribution of the ultimate beneficial owners on whose behalf this rule is purportedly meant to work. Ultimate beneficial owners and their interests are not represented by a system built on the basis of a wildly unrepresentative set of decisions made about a wildly unrepresentative set of proposals and underlying concerns.

The deep bias of this structure is further multiplied by the proposed rule's exclusive focus on 2020. Without a very good reason to do so, the exclusive focus on a single year's shareholder proposals upon which to build a system of reporting categories would seem definitionally arbitrary and capricious. But as part of an accumulating set of indicia of an intent to bias this rule in ideologically driven ways, it becomes purposeful and nefarious.

The 2020 shareholder season was characterized in particular by two significant changes – one procedural, one substantive – the SEC staff made to the method by which it determined whether it would allow companies to exclude proposals submitted by shareholders. As a procedural matter, it announced that it would largely stop issuing any written explanation for its decisions, reserving such explanations – reserving any precedential meaning, or guidance to shareholder proponents – for cases in which, in the staff's sole determination, the decision would have broad applicability.[11]

Additionally, it made a further change to its "ordinary-business exception" ground for excluding shareholder proposals. This change was the culmination of a series of changes that expanded that rule to make it more porous. The ordinary-business exception appears in the Rule at 14a-8(i)(7). In its entirety, it permits exclusion of a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[12]

The initial Rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Bulletin in 2002. There the staff explained that

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. …[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues . . . would not be considered to be

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[10] *See id.*

[11] *See, e.g.,* Ben Maiden, *Industry gets first insight into SEC's 14a-8 no-action shift*, IR MAGAZINE (Jan. 24, 2020), *available at* https://www.irmagazine.com/regulation/industry-gets-first-insight-secs-14a-8-no-action-shift (last accessed February 13, 2020).

[12] 17 C.F.R. § 240.14a-8(i)(7).

> excludable because the proposals would transcend the day-to-day business matters.'[13]

As the amendment itself explained, in detail particularly relevant to our considerations here,

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain 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. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues *(e.g., significant discrimination matters)* generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.[14]

There matters stood until 2017. In a bulletin issued that November, the staff asserted that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[15] It therefore invited corporations, in arguing for an ordinary-business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of those proposals.[16]

The staff expanded this guidance further in October of 2018.[17] It suggested that a company should be expansive in its communications with the staff in order to demonstrate its board's analysis of the substantiality of an issue. In particular, the staff would welcome details about:

- The extent to which the proposal relates to the company's core business activities.

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[13] *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998), *available at* https://www.sec.gov/rules/final/34-40018.htm*)* (last accessed February 13, 2020).

[14] *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added).

[15] *See Staff Legal Bulletin* No. 14I (Nov. 17, 2017) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

[16] *See id.* ("Accordingly, going forward, we would expect 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. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

[17] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed February 13, 2020).

- Quantitative data, including financial statement impact, related to the matter that illustrate whether a matter is significant to the company.
- Whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.[18]

The staff expressly noted that in seeking this information as part of its review, it was turning its analysis into a very fine-grained, multi-factor test that would likely result in very different results at different companies despite the proposals being very similar in form or content. "[A] proposal that the staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another."[19]

Another burst of staff guidance appeared in the fall of 2019, so that it applied to all proposals submitted for the 2020 shareholder season.[20] In that bulletin, the staff relevantly underscored the value of "delta analysis," which is to say the difference between what the shareholder has proposed and what the company currently does; and of "prior voting results," or a discussion of the results of previous related shareholder votes. With regard to the latter, the staff explained that "the board's analysis may be more helpful if it includes, for example, a robust discussion that explains how the company's subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company."[21]

The upshot of all of this was that by the time that the staff was reviewing proposals for the 2020 shareholder season (the one on which this rule focuses exclusively for developing its categorization system), had been entirely opaque (except at the staff's discretion) at exactly the same time as it had become maximally discretionary and case-specific – *i.e.,* giving the staff maximum discretion.

This is illegitimate. Government agencies are not permitted to make what are in effect judicial decisions on the basis of staff whim or personal policy preference. Written – and detailed – decisions are vital when a decision-maker undertakes very fact- and entity-specific determinations that can vary significantly from case to case depending upon the details of each case. When such very case-specific decisions are made, but no explanations are provided,

[18] *Id.* at B.2. (internal citation deleted).

[19] *Id.*

[20] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019).

[21] *Id.* at B.3.b.

parties are left with no idea at all what factors were decisive and which were less or not relevant, and how all of the various factors fit together. This leaves parties with no information about how to proceed in future cases. It increases party frustration, as parties (in this case, shareholder proponents) find it impossible to know how to craft their efforts to increase their chances of success. And it leads to suspicions of bias if the SEC staff seems regularly to reject some shareholder proposal efforts while waving through technically similar proposals by parties with different ideological dispositions. If the results in similar circumstances are consistently different, while no meaningful explanations are forthcoming, concerns about bias will be not only understandable, but fully warranted. (These rule changes and their implications and consequences are discussed more fully in a policy analysis included in Word format as Appendix A, below.)

The results in 2020 (and in 2021, when the same illegitimate combination of opacity and discretion remained in place[22]) fully justified these concerns about staff bias. While in previous years FEP resolutions survived staff review about 50 percent of the time, afterward exactly no FEP proposals that were challenged by companies survived staff review. This was true even though the proposals submitted were patterned on previous proposals that the staff had found non-omissible, except that the subject matter was shifted to a center/right concern. Consider, for instance, that the staff permitted proposals that, if successful, would have required companies to study the risks associated with a failure to protect against discrimination on the basis of sexual orientation or gender identity. But it allowed companies to omit proposals that sought the same study about the risks of failing to protect against discrimination on the basis of viewpoint and ideology.[23] Similarly, the staff in the past had forbidden companies to exclude proposals that sought reports about political giving, trade-association involvement and even charitable-giving itself – proposals that included imprecations against *right of center* parties and concerns. But during the 2020-2021 lacuna of maximum discretion and minimum transparency the staff denied proposals that sought reporting about charitable giving from FEP even if those proposals mentioned current controversies in an entirely neutral way.[24]

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[22] On November 3, 2021 the staff issued an additional *Staff Legal Bulletin*, No. 14L, that rescinded *Staff Legal Bulletins* 14I, 14J and 14K. The staff rescinded this guidance "after a review of staff experience applying the guidance in them." This itself constitutes an acknowledgement by the staff that the guidance that was in place for the 2020 season, and the decisions made on the basis of that guidance, were flawed. This in turn renders an exclusive reliance on the 2020 non-omitted proposal pool wholly inappropriate. As no no-action decisions have yet been rendered under the new guidance on center/right proposals, it is unclear whether the modified rules will result in a decrease in unexplained omission consents that appear to arise from bias. But we do note that to our knowledge the staff has not reversed its retreat from transparent explanations of the bases for its decisions.

[23] *See, e.g., Walgreens Boots Alliance, Inc.,* (avail. Nov. 25, recon. denied Dec. 10, 2020).

[24] *See, e.g., AT&T, Inc.* (avail. Jan. 15, 2021). It may of course be possible for the Commission or its staff to provide *post hoc* justification for these decisions, but that in no way solves the problem. If there were legitimate grounds to concur with the no-action request those grounds should have been explained in writing at the time that the no-action request was granted. Providing this information would provide a number of vital services. It would create precedent to which the staff would then be obliged to adhere in future. It would reduce both the scope for and the potential for an impression of bias. And it would allow shareholder proponents to have some idea about how to proceed in future. An adjudication system that

All of this renders the laser focus on 2020 pernicious. And it also highlights the complete impropriety of relying on proxy exercisers and their interest in proposals as the right metric upon which to build reporting categories. Center/right proposals generally receive almost no institutional support – that is, support from the proxy exercisers. (This comes in part, but only in part, because such proposals are always opposed by the proxy advisor duopoly of ISS and Glass Lewis.[25] In this regard note that in 2020 a rule that would have required even minimal reporting from those duopolistic institutions about how they make their decisions was promulgated, but one of the first actions of new Chairman Gary Gensler was to announce that under his leadership the SEC would refuse to enforce this duly instituted rule.[26] If ISS and Glass Lewis were required to account for their decision-making, they would be less able to advise in ideologically driven ways, and more obliged to make decisions on the legitimate basis of fully and neutrally researched determinations of the value of their recommended votes to the substantiated continuing fiduciary value of the company. Refusal to enforce the proxy-advisory rule supports the conclusion that this proposed rule, and the SEC generally under its current leadership, is functioning as a partisan organ rather than an objective administrative agency.) This being the case, relying on proxy-exerciser opinions as the grounds for this proposed rule is wholly incompatible with the stated purpose of the rule.

And the need for a rule that is honestly designed to provide ultimate beneficial shareholders full and unbiased information about how proxy exercisers are behaving, and on what justification, becomes clearer every day. Consider that BlackRock, the largest institutional investor, recently announced that it would allow *other institutional investors* to vote their own proxies.[27] Ultimate beneficial owners, however, are granted no such respect. And BlackRock's decision ratifies, rather than ameliorates, the indifference with which institutions treat the wishes of their ultimate clients. But it is these ultimate beneficial owners – the genuine little

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lacks written explanations for the decisions made is itself arbitrary and capricious, without regard to the content of the decisions made.

[25] *See, e.g.*, PROPOSED ISS BENCHMARK POLICY CHANGES FOR 2021, *available at* https://www.issgovernance.com/file/policy/proposed-benchmark-policy-changes-2021.pdf; *Your New Woke 401(k)*, WALL ST. J. (Oct. 20, 2021) ("DOL says small plans can reduce their costs by relying on the recommendations of proxy advisers that happen to be the left-leaning proxy duopolists Glass Lewis and Institutional Shareholder Services.) (emp. added), *available at* https://www.wsj.com/articles/your-new-woke-401-k-retirement-savings-esg-erisa-biden-administration-department-of-labor-proposal-11634753095; *Meet the Biggest "Stakeholders,"* WALL ST. J. (Aug. 27, 2019), *available at* https://www.wsj.com/articles/meet-the-biggest-stakeholders-11566948582.

[26] *See, e.g.*, *SEC avoids enforcement of Trump-era proxy advisor rules*, NewsNow (June 2, 2021), *available at* https://quebecnewstribune.com/news/business/sec-avoids-enforcement-of-trump-era-proxy-advisor-rules-12684/.

[27] *See, e.g.*, Dawn Lim, *BlackRock Gives Big Investors Ability to Vote on Shareholder Proposals*, WALL ST. J. (Oct. 7, 2021), *available at* https://www.wsj.com/articles/blackrock-gives-big-investors-ability-to-vote-on-shareholder-proposals-11633617321.

guys – whom the SEC is bound to protect through disclosure rules. This proposed rule asserts appropriate intentions – but then in fact does the opposite.

The decisions that the Commission made in this proposed rule, and the structure that it has created within it, are not merely arbitrary and capricious; rather, they are antithetically opposed to both the stated and the only permissible purpose of this rule. They cannot be retained in the rule if the rule is to honor the SEC's statutory remit or survive judicial scrutiny.

III. Suggested Alterations

As we have suggested throughout, the SEC would be justified in establishing a rule that forces additional disclosures from those who exercise the proxies generated by investments in mutual funds, ETFs, or other fractional-share investment vehicles. But the proposed rule fails to require the right disclosures and establishes a reporting system that almost seems designed to obscure the information that should be going to ultimate beneficial shareholders, rather than providing that information in a neutral, unbiased and flexible way.

We respectfully suggest that this proposed rule be withdrawn, and another substituted in its place. The replacement rule would ideally not establish categories and subcategories of reporting at all. Rather, it would simply require proxy exercisers to report, in easily accessible and searchable form, the names of the proposals on which they had cast votes, a brief, objective summary of the proposal, and a brief explanation of the basis for their vote, along with links to the research and other evidence upon which they relied.

That, and nothing more, with no artificial, SEC-mandated categories and subcategories to distort and potentially bias or obscure the reporting, is what's required.

If for some reason the SEC were to insist on establishing categories and subcategories, those divisions should reflect not the types of proposals that managed to make it past the SEC staff in a year of maximal staff discretion and opacity of decision – with the towering specter of bias that flows from that combination – and the way that proxy exercisers reacted to that narrow band of considerations, but rather the broad set of concerns and predilections that likely characterize ultimate beneficial shareholders. In the absence of better evidence, those ultimate beneficial shareholders should be presumed to represent the American people generally. So the categories and subcategories should reflect their concerns, objectively and impartially derived. Under no circumstances should the predilections of proxy exercisers be relevant, as it's for the purpose of ultimate beneficial shareholders *monitoring* proxy-exerciser predilections and actions that this rule is ostensibly proposed.

Meanwhile, we also urge the SEC to promulgate a rule that would require its staff to provide written explanations for its no-action decisions and to stick to established precedent without regard to the perceived policy inclination of any proposals. Otherwise, the no-action process will continue to look – and perhaps very much to be – rigged.

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Thank you for your time and consideration. Please do not hesitate to contact us if we can be of any further assistance in this matter.

Sincerely,

Scott Shepard
Director
Free Enterprise Project
National Center for Public Policy Research
The National Center
[redacted]

Appendix

SEC Decisions Raise Specter of Bias, McCarthyism

National Policy Analysis No. 681 (Feb. 21, 2020)

Scott Shepard

Recent decisions and procedural changes by the U.S. Securities and Exchange Commission ("SEC") staff, taken together, threaten to make the shareholder proposal review process much less transparent and reliable, and thus much more susceptible to both the appearance and reality of institutional bias.

As a default rule, with certain express and limited exceptions, shareholders – that is to say, owners – who own a certain minimum threshold of equity in a company are permitted to submit proposals that will be included in the materials for that company's annual shareholder meeting and voted on by the company's shareholders. The Free Enterprise Project ("FEP") of the National Center for Public Policy Research submits a significant number of proposals every year in its ongoing campaign to counter the efforts of a large coalition of liberal groups who are systematically working to render American corporations yet another servant to the overarching progressive worldview.

If a corporation wishes to exclude a shareholder's proposal from its shareholder-meeting materials, it petitions the SEC by letter for a decision by the SEC that it will take no legal action against the corporation if it excludes the proposal. The SEC staff plays the central – and in the vast majority of cases, the only – role in reviewing these corporate requests. Within the last few months, deep concerns about this process have arisen.

The substance of some of the staff's decisions support an inference that real bias is at work. Most relevantly, while the SEC staff recently required a corporation to submit to its shareholders a proposal to require the board to study the risks that arise from a failure to ban discrimination against gays,[28] the staff shortly thereafter allowed Apple to exclude an FEP proposal that would have required Apple's board to study the risks that arise from a failure to ban discrimination on the basis of political affiliation or viewpoint – which, these days and especially in Silicon Valley, means discrimination against conservatives.[29] The FEP proposal was explicitly a copy of the earlier proposal that the staff had permitted; the only thing that was changed was the group against whom the effects of discrimination were to be studied.[30] Yet the staff allowed Apple to exclude FEP's proposal. The minimal justification the staff provided

[28] *See generally CorVel Corp.* (issued June 5, 2019), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/waldenasset060519-14a8.pdf (last accessed February 13, 2020), and *infra* at 7-8 and *passim*.

[29] *See generally Apple, Inc.* (issued Dec. 20, 2019), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/ncpprapple122019-14a8.pdf (last accessed February 13, 2020), and *infra* at 9 and *passim.*

[30] *See infra* at 7-8.

(relying on the opacity of its new procedures) demonstrated that it rested this apparent bias on its new interpretive methods.

As this development illustrates, the SEC staff's innovations create the space for biased decision-making, while its first full use of these innovations strongly suggests that they have immediately been used to enact and then cover for bias. All of this drains credibility away from the SEC's shareholder-proposal review process and from the SEC itself. This is bad news for corporations, for shareholders, for stock markets, for the economy, and for the integrity of the SEC. Quick correction is required.

History

Shareholders were granted the right to submit proposals to the vote of their fellow shareholders by the Securities Exchange Act of 1934[31] as formally interpreted in the Code of Federal Regulation at what is commonly referred to as Rule 14a-8 ("the Rule").[32] The Rule also delineates the methods by which, and circumstances under which, corporations may petition the SEC's staff to permit them to withhold those proposals.

The limited and specific nature of the grounds for exclusion was first established in the introduction to the Rule itself. "Under a *few specific* circumstances, the company is permitted to exclude [shareholder] proposal[s], but only after submitting its reasons to the Commission."[33]

The Rule then spells out 13 unique grounds on which a petition to withhold a proposal can be successfully maintained.[34] Reasons for exclusion include redundancy with other proposals submitted that year; interference by the proposal with the ordinary business affairs of the corporation, and other unique grounds. The staff has provided additional guidance, which while not carrying the authority of duly-enacted legislation has nevertheless had a significant influence on the process.[35]

Despite occasional expansions of the guidance the SEC has provided to shareholders submitting proposals and to corporations attempting to withhold them,[36] the system has remained essentially stable for quite a while. When a corporation sought to withhold a proposal, it sent a

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[31] *See* SECURITIES EXCHANGE ACT OF 1934, *available at* https://legcounsel.house.gov/Comps/Securities%20Exchange%20Act%20Of%201934.pdf (last accessed February 13, 2020) (emphasis added).

[32] *See* 17 C.F.R. § 240.14a-8 (shareholder proposals), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-8 (last accessed February 13, 2020).

[33] *Id.* (emphasis added).

[34] *See id.* at 14a-8(i)(1) through 14a-8(i)(13).

[35] *See Staff Legal Bulletin* No. 14 (July 13, 2001), *available at* https://www.sec.gov/interps/legal/cfslb14.htm (last accessed February 13, 2020).

[36] *See* STAFF LEGAL BULLETINS, *available at* https://www.sec.gov/interps/legal.shtml (last accessed February 13, 2020), for a collation of the staff guidance issued since 2001.

letter asking the SEC staff to issue a letter confirming that it would take "no action" against the corporation for its exclusion of the proposal. In this letter, the corporation cited the unique Rule provisions on which it sought the decision, and explained why it thought each provision applied. It provided evidence in support of its arguments that went to the specific Rule provision in question. The shareholder who had submitted the proposal was then permitted to send a response letter, attempting to refute the company's position ground by ground. After that, the SEC staff issued a decision letter, siding either with the corporation or the proponent, and briefly explaining why. Finally, the losing side enjoyed the opportunity to petition the SEC commissioners themselves to reconsider the staff decision, if particularly pressing or generally applicable concerns about the decision arose.

Recent Developments

Recently, the process has begun to change. The SEC staff has announced that it will no longer issue written decisions in all instances, reserving those for cases in which, in its opinion, the decision will have broad applicability.[37] Additionally, it has changed its treatment of the "ordinary-business exception" ground for excluding shareholder proposals.

The ordinary-business exception appears in the Rule at 14a-8(i)(7). In its entirety, it permits exclusion of a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[38]

The initial Rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Bulletin in 2002. There the staff explained that

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. …[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues . . . would not be considered to be excludable because the proposals would transcend the day-to-day business matters.'[39]

As the amendment itself explained, in detail particularly relevant to our considerations here,

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks

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[37] *See, e.g.*, Ben Maiden, *Industry gets first insight into SEC's 14a-8 no-action shift*, IR MAGAZINE (Jan. 24, 2020), *available at* https://www.irmagazine.com/regulation/industry-gets-first-insight-secs-14a-8-no-action-shift (last accessed February 13, 2020).

[38] 17 C.F.R. § 240.14a-8(i)(7).

[39] *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998), *available at* https://www.sec.gov/rules/final/34-40018.htm) (last accessed February 13, 2020).

> 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. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues *(e.g., significant discrimination matters)* generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.[40]

There matters stood until 2017. In a bulletin issued that November, the staff recognized that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[41] It therefore invited corporations, in arguing for an ordinary-business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of those proposals.[42]

The staff expanded this guidance further in October of 2018.[43] It suggested that a company should be expansive in its communications with the staff in order to demonstrate its board's analysis of the substantiality of an issue. In particular, the staff would welcome details about:

- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.
- Whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.

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[40] *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added).

[41] *See Staff Legal Bulletin* No. 14I (Nov. 17, 2017) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

[42] *See id.* ("Accordingly, going forward, we would expect 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. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

[43] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed February 13, 2020).

- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.[44]

The staff expressly noted that in seeking this information as part of its review, it was turning its analysis into a very fine-grained, multi-factor test that would likely result in very different results at different companies despite the proposals being very similar in form or content. "[A] proposal that the staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another."[45]

Another burst of staff guidance appeared this past fall.[46] In that bulletin, the staff relevantly underscored the value of "delta analysis," which is to say the difference between what the shareholder has proposed and what the company currently does; and of "prior voting results," or a discussion of the results of previous related shareholder votes. With regard to the latter, the staff explained that "the board's analysis may be more helpful if it includes, for example, a robust discussion that explains how the company's subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company."[47]

Analysis: Opacity and the Opportunity for and Potential Appearance of Bias

In short, then, two major changes have occurred. The first is that the staff has abandoned providing any written explanations (the administrative-law equivalent of court opinions) in most of its cases. The second is that the staff has allowed a company to include essentially any information it cares to in asserting that an issue that would otherwise be so substantial as to transcend the ordinary-business exception is nevertheless not substantial as it affects *that particular company* because of the ways in which that unique company has already dealt with the issue.

Neither of these changes need necessarily have raised any concern. With regard to the first change: not all decisions do require written explanations, as courts have long recognized. Rote decisions that cannot possibly have any precedential value need not necessarily be written (though it is unclear that refusing to write what have historically been very short letter decisions really saves all that much staff time).

Written – and detailed – decisions are vital, however, when a decision-maker undertakes very fact- and entity-specific determinations that can vary significantly from case to case depending upon the details of each case. When such very case-specific decisions are made, but no explanations are provided, parties are left with no idea at all what factors were decisive and

[44] *Id.* at B.2. (internal citation deleted).

[45] *Id.*

[46] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019).

[47] *Id.* at B.3.b.

which were less or not relevant, and how all of the various factors fit together. This leaves parties with no information about how to proceed in future cases. And while it might seem as though this confusion could lead to fewer filings in the future, the odds are that it will increase filings as shareholder proponents – left without meaningful guidance – try, in essence, everything. This will increase staff workloads. At the same time, it will increase party frustration, as shareholder proponents find it impossible to know how to craft their efforts to increase their chances of success. It will also lead to suspicions of bias if the SEC staff seems regularly to reject some shareholder proposal efforts while waving through technically similar proposals by parties with different ideological dispositions. If the results in similar circumstances are consistently different, while no meaningful explanations are forthcoming, concerns about bias will be not only understandable, but fully warranted.

Meanwhile, the staff's revisions to the way it analyzes the ordinary-business exception have introduced exactly the sort of case-specific, multi-factor analysis that renders detailed written explanations so vital. As the review above illustrates, the staff has explicitly invited wide-ranging discussion by companies of their boards' analyses, and has essentially invited them to include any information that they consider relevant – the very epitome of a multi-factored (or even "all-the-factors") test.[48] It has further explicitly declared that this multi-factored analysis will result in conclusions that will differ, potentially significantly, by case.[49] These are just the circumstances in which the credibility of a decision-maker requires that it provide detailed, written explanations and analyses of the bases for its decisions.

The problem is compounded here because some of the factors that the staff has explicitly agreed to consider in determining the case-specific substantiality of proposals under the ordinary-business exception are factors that more truly go – and heretofore have gone – to the analysis of some of the 12 grounds under the Rule *other than* the ordinary-business exception. For instance, "[t]he extent to which the proposal relates to the company's core business activities"[50] is already addressed by another of the Rule's provisions. Notably, though, that ground has *specific* triggers, permitting withholding of the proposal only if it relates to operations that account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business.[51]

Similarly, "[w]hether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken"[52] is already addressed, but again more specifically, in a different ground that "[t]he company has "already *substantially implemented the proposal*."[53] Note that this

[48] *See Staff Legal Bulletin* No. 14J, at B.2.

[49] *See id.*

[50] *See id.*

[51] Rule 14a-8(i)(5), available at https://www.sec.gov/interps/legal/cfslb14.htm (last accessed February 13, 2020).

[52] *See Staff Legal Bulletin* No. 14J, at B.2.

[53] Rule 14a-8(i)(10) (emphasis added).

is a much sterner standard than what the staff is now considering relevant under the ordinary-business exception, namely that the company has addressed somewhat related issues to some degree. Likewise, "[t]he extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement"[54] goes directly to this ground: "The proposal deals with *substantially the same* subject matter as another proposal or proposals that previously has or have been included in the company's proxy materials within a specified time frame and did not receive a specified percentage of the vote."[55] But once again, the stand-alone ground's standard is much more structured, and much harder to reach, than the newly articulated, purportedly ordinary-business-related standard.

All of this means that the staff has effectively turned the ordinary-business exception into a mélange ground under which companies can make arguments that really go to, but would be insufficient to justify exclusion under, other grounds. It then weighs that otherwise-insufficient evidence to determine whether it feels that a company can exclude a proposal, and issues a yes-or-no decision, without any meaningful explanation of its thinking at all.

This leaves tremendous room for confusion, for the perception of bias, and for actual bias. Because now, facts that on their own would be insufficient to trigger any other ground to permit exclusion can be amalgamated together to somehow result in exclusion under the ordinary-business exception – and the staff will, at its sole determination, refuse to explain just how that alchemy occurred. This will leave room for the inference that the staff is merely excluding proposals with which it disagrees on the basis of substantive policy, even though such subject-matter considerations are, by regulation, supposed to play no part in its analysis.[56] Where the information submitted by a company appears not to have any particular relevance to the questions rightly at issue under the ordinary-business exception – *i.e.,* the importance of the issue and the interference of the details of the proposal with the fundamental operations of the business – this inference will be warranted. Where the information submitted does nothing to distinguish the circumstances at issue from separate circumstances in which a substantially similar proposal – different only in the substantive content (i.e., the ideological import) of the proposal – was treated differently, the inference is effectively required.

As will be considered in the next section, such an instance has already arisen.

Actual Bias Already in Evidence?

Walden Asset Management ("Walden") submitted a shareholder proposal to CorVel Corporation in February of 2019 that stated:

> RESOLVED Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting "sexual orientation" and "gender identity" from its written equal employment

[54] *See Staff Legal Bulletin* No. 14J, at B.2.

[55] Rule 14-a(8)(i)(12).

[56] *See Staff Legal Bulletin* No. 14A, at B.6-7.

> opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.[57]

The SEC staff ultimately agreed with Walden that "[i]n our view, the Proposal transcends ordinary business matters,"[58] and refused CorVel's no action request.

Taking note of this decision, we at FEP modeled our viewpoint-diversity proposal exactly on this staff-sanctioned approach, submitting a proposal the resolution of which followed the Walden text exactly, except with regard to the locus of protection.

> RESOLVED Shareholders request that Apple Inc. ("Apple") issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omit proprietary information.[59]

Despite the similarity of these two proposals, the SEC staff granted Apple's no-action request against us, on the ground that our proposal, unlike the Walden proposal, *did* fall within the ordinary-business exception.[60]

This is a very strange outcome. The only distinction between the two proposals is the party meant to be protected from discrimination, which should in no way change whether the proposals are or are not within the ambit of the companies' ordinary business. This creates an inference, if not necessarily a presumption, that the staff's inconsistent decisions were influenced by its bias in favor of stopping discrimination on the basis of sexual orientation, but against stopping discrimination against those with disfavored worldviews – which, at Apple certainly and in corporate America broadly these days, positively means against those to the right of center.[61]

The inference in favor of bias is bolstered by the fact that neither Apple in its request for a no-action decision nor the SEC staff in granting it even mentioned the *CorVel* decision, much less distinguished the two cases. By way of justifying its support of Apple withholding our proposal, rather, it declared, *in toto*:

> In reaching our position, we considered the board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company's current policies and practices. In addition, the committee's analysis noted that a shareholder

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[57] *CorVel Corp.* (issued June 5, 2019) file at 43-45.

[58] *Id.* at 2.

[59] *Apple, Inc.* (issued Dec. 20, 2019) file at 51.

[60] *See id.* at 2.

[61] *See infra* at 9-10.

> proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote.[62]

The problem with this analysis is that Apple, in its no-action request, had done nothing to demonstrate that viewpoint discrimination is not a problem at Apple, or that it has established any protections against viewpoint discrimination at all. Instead, it reported on irrelevant activities (*i.e.,* how it prohibits discrimination against groups and on grounds *other* than the one we raised), while failing even to try to suggest that these other sorts of discrimination prohibition effectively achieved viewpoint non-discrimination. Regarding viewpoint discrimination, Apple's only relevant statement was that "the Company's Equal Employment Opportunity Policy … does not explicitly include 'ideology' or 'viewpoint' discrimination."[63] It then indicated that on one page of its extensive website, it has included the sentence "We welcome all voices and all beliefs."[64]

The distance between a non-discrimination policy that includes a prohibition against viewpoint discrimination and a stand-alone, generalized sentence on the website is itself a very significant one. And the distance is made greater by the very fact of Apple's fierce fight against even studying whether it should include viewpoint discrimination in its otherwise fulsome protections. Additionally, Apple carefully failed in any way in its no-action request letter, a public document, to suggest that its current policy plus the cited sentence *already does* prohibit against viewpoint discrimination, as such an admission might conceivably provide a basis on which an employee might in future stand.

Apple was eager to *imply* that it protected against viewpoint discrimination while being careful to say no such thing. Neither did it suggest, as it easily could have, that it intends to rectify the oversight in its non-discrimination policy by adding viewpoint discrimination protection, to bring the actual policy in line with what it suggests to be the import of the single sentence from its website.

Likewise, Apple did not indicate that it has any plans to study the problem of potential viewpoint discrimination on its own, despite direct and public communication of a problem of viewpoint discrimination at Apple from employees to the CEO Tim Cook.[65] Nor did it, despite this direct evidence about problems at Apple as well as increasing problems with and perceptions of viewpoint discrimination in Silicon Valley and nationally,[66] provide any

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[62] *Apple, Inc.* (issued Dec. 20, 2019) file at 2.

[63] *Id*. at 16.

[64] *Id.* at 17.

[65] *See, e.g.,* Troy Wolverton, *Tim Cook says conservative Apple employees who feel shunned should 'come talk to me,'* BUSINESS INSIDER (Mar. 1, 2019), *available at* https://www.businessinsider.com.au/apple-supports-employees-range-politics-tim-cook-2019-3?r=US&IR=T (last accessed February 13, 2020).

[66] *See, e.g.,* Nitasha Tiku, *Survey Finds Conservatives Feel Out of Place in Silicon Valley: Online poll adds to concerns that political divisions are affecting tech workplaces*, WIRED (Feb. 2, 2018), *available at* https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/ (last accessed February 13, 2020); Olivia Solon, *'There was a witch-hunt': Silicon Valley conservatives decry Google groupthink,* THE GUARDIAN (Aug. 9, 2017), *available at*

contradictory evidence that viewpoint discrimination presents no real, legitimate problem at the company.

In short, Apple is not doing *anything at all* about a real, current viewpoint-discrimination problem, and effectively admitted as much to the SEC staff. Nevertheless, the staff decided that this was good enough, and so used "the delta" between Apple's (nonexistent) efforts and our proposal as a justification for excluding our resolution.

The second consideration that the staff relied on was that "a shareholder proposal submitted to [Apple] shareholders last year regarding a related issue received 1.7% of the vote."[67] But Apple did not include any information to the SEC staff about its board's analysis of the comparison between the previous proposal and our 2019 proposal except the bare, unsupported assertion that the board had concluded that the prior proposal had a "substantially identical policy focus."[68] Meanwhile, our response letter had explained the differences between the two proposals in great detail,[69] specifying just how the focus, subject, purpose and intended result of the proposals were all entirely different.[70] Because the Apple board's analysis was no more than conclusory, and could have added nothing to the staff's analysis, it should have carried no weight.[71] But instead, the staff allowed Apple's unexplained and unsupported assertion to weigh (apparently fairly decisively) in its decision against us.

All of this creates a serious concern that the staff is enacting its personal policy bias. Discrimination on the basis of political viewpoint is so well-established a problem in American life that it has a name – McCarthyism – and has until recently been almost universally abjured. Now, though, the reality and perception of viewpoint discrimination is reappearing in Apple's industry and at Apple specifically. Though its CEO has promised to take action, he and Apple have done nothing, as Apple's submission to the SEC staff illustrated. But based on Apple having done nothing at all, and its unsupported assertion that our proposal is very like another proposal that had been voted down last year, the SEC staff somehow concluded that our proposal falls within the ambit of "ordinary business," even though an *identical* (except that it

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https://www.theguardian.com/technology/2017/aug/09/google-diversity-memo-conservatives-react (last accessed February 13, 2020); Mark Bergen & Ellen Huet, *Google Fires Author of Divisive Memo on Gender Differences,* BLOOMBERG (Aug. 7, 2017), *available at* https://www.bloomberg.com/news/articles/2017-08-08/google-fires-employee-behind-controversial-diversity-memo (last accessed February 13, 2020); *Mozilla CEO Resignation Raises Free Speech Issues*, USA TODAY (April 5 2014), *available at* https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/ ((last accessed February 13, 2020).

[67] *Apple, Inc.* (issued Dec. 20, 2019) at 2.

[68] *Id.* at 16.

[69] *Id.* at 7-9.

[70] *Id.*

[71] See *Staff Legal Bulletin* No. 14K (October 16, 2019); *Staff Legal Bulletin* No. 14J (October 23, 2018) ("The discussions we found most helpful focused on the board's analysis and the specific substantive factors the board considered in arriving at its conclusion. Less helpful were those that described the board's conclusions or process without discussing the specific factors considered.").

targeted sexual-orientation discrimination instead of viewpoint discrimination) proposal a few months before did not constitute ordinary business.

If a conclusion of staff bias were to have been avoided in this instance, the staff would have needed to explain in detail how the extra information provided by Apple – that by all appearances added up to nothing at all – instead created a firm basis on which to reach, in our case, the opposite conclusion than was reached in *CorVel, Inc.* Instead, the staff thwarted our attempt to get a fuller review and (at least) an explanation of the decision in a move, and in a way, that further increases the presumption of bias.

As permitted by SEC practice, we sought reconsideration of the SEC staff's decision by the SEC commissioners themselves. With the staff decision having been posted on the last work day before Christmas and New Year's weeks, we submitted our request for reconsideration on January 8, 2020.[72] Apple responded on January 15, 2020 to oppose our request for reconsideration.[73] Its response largely recapitulated its previous arguments.[74] (It did finally mention *CorVel*, *Corp.*, but only in effect to ratify our assertion that the proposals were exactly the same except with regard to the grounds on which non-discrimination protections were sought.[75]) It also asserted, without evidence, that it had begun printing its proxy materials on January 6, 2020, and had begun mailing them out on January 9, and that it would prove expensive to have to print and send out updated mailings including our proposal.

The SEC staff went on to deny our request for rehearing on the ground that it would be unfair to ask Apple to reprint and resend its proxy materials.[76]

This is a disturbing decision for a number of reasons. First, as noted, the SEC staff had issued its no-action response on the Friday before Christmas week. Our reply was filed on January 8, 2020, or a week into the new work year. There is no specific time by which requests for reconsideration must be filed, but one work week after the year-end holidays does not seem overly long. Second, Apple provided no evidence that it had actually begun, very conveniently, printing its proxy materials on January 6, two days before our request for reconsideration was filed, while it by its own admission began mailing those materials *the day after* it received our reconsideration request. Surely it is not an objective position to allow Apple to plead in opposition to our request for rehearing costs that it had admitted that it had voluntarily incurred *after* it had received our reconsideration request.

Finally, and most importantly, as the SEC staff admitted in its initial granting of Apple's no-action request, "We note that the Company did not file its statement of objections to including

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[72] *See Apple, Inc.* (recons. denied Jan. 17, 2020) file at 7, *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/ncpprapplerecon011720-14a8.pdf (last accessed February 13, 2020).

[73] *See id.* at 3.

[74] *See id.* at 3-6.

[75] *See id.* 5 ("the proposal in *CorVel Corp.* addressed a different social policy issue than does [our] Proposal").

[76] *See id.* at 1.

the Proposal in its proxy materials at least 80 calendar days before the date on which it will file definitive proxy materials as required by rule 14a-8(j)(1). Noting the circumstances of the delay, we waive the 80-day requirement."[77]

In short, Apple had an initial 80-day filing-period requirement. It failed to meet that requirement. The SEC staff waived that missed deadline. In part because of that missed deadline, the SEC's decision only issued on the last business day before Christmas week. We filed our request for reconsideration one week into the new business year. There is no time limit for filing such reconsideration requests, and so we were not technically late. Apple asserted that it had begun to print its proxy materials two days before we filed our request for reconsideration – a time shorter than the period by which it missed its initial deadline. It then voluntarily mailed out these materials after receiving our request for consideration, creating their own expenses and potential for confusion, and then pled that cost and potential for confusion in seeking denial of reconsideration.[78] And the SEC staff, denying us the latitude and understanding it had so generously shown to Apple, denied our request for reconsideration as untimely.

All of these circumstances, taken together, approach a textbook case of bias. Certainly, withal, the course of events reasonably raises the presumption of bias. And while the presumption might conceivably have been explained away, part of the process itself has been at every turn to evade any such meaningful explanations.

Unavoidable Conclusions & The Way Forward

The events just related do not prove that the SEC staff actively set out to create new procedures and interpretive methods that would give it opportunities for substituting its personal policy preferences for neutral decisions when evaluating shareholder proposals – though such a conclusion is not inconsistent with these events either. What they do prove is that the new procedures and methods *do* create extra opportunities for such bias and for the reasonable perception of bias, while one of the first review processes fully to follow enactment of those changes showed many, many indications of bias with no evidence to undermine such a conclusion.

In other words, the innovations and their early use have created both the unavoidable perception of bias and a strong inference that staff personal policy preferences are in fact at play in decision making.

This state of affairs cannot continue.

We at FEP continue to urge the SEC staff to review, clarify and rethink these recent developments. It should not turn the ordinary-business exception into a multi-factor test under which facts that would fail to permit exclusion of a proposal on other grounds can nevertheless

[77] *Apple, Inc.* (issued Dec. 20, 2019) file at 2.

[78] *See Apple, Inc.* (reconsid. denied Jan. 17, 2020) file at 3-4.

be aggregated to allow a sort of Frankenstein's Monster of grafted-together, misfit exclusion parts. It should particularly avoid allowing such aggregation if it is also going to refuse to explain in significant detail how and why the proffered evidence is genuinely relevant to the inquiry (as it was not in Apple's challenge to our proposal), how it all fits together, and how shareholder proponents should in the future proceed to get their issues in front of shareholders.

To do otherwise would be to turn SEC staff no-action decisions into a black-box process that, like the one detailed here, will be open to the perception and reality of staff bias. This will bring the reliability and objectivity of the SEC staff into question and doubt. And that, in turn, will legitimately raise the concern that the SEC itself has ceased to function as a legitimate and objective administrator, and has become a politicized and biased broker. If this is, or becomes, true, then surely the roles of and civil-service protections afforded to SEC staffers should be modified accordingly.

The burden has now fallen on the SEC staff to further revise its procedures to restore both the perception and reality of objectivity to its proceedings. Failing that, it must at least not stand in the way of our next attempt to place our concerns squarely before the SEC's commissioners for their evaluation, review, and decision.

Should the SEC staff fail to act, and should it continue to stand in the way of full SEC-commissioner review, then executive or congressional oversight operations will become necessary. The SEC cannot be permitted to allow a reasonable inference to arise that its staff's personal policy preferences dictate relations between shareholders and corporate boards, and thus the fate of markets, investors and employees nationwide.