



DIVISION OF
CORPORATION FINANCE

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

February 21, 2019

Ronald O. Mueller
Gibson, Dunn & Crutcher LLP
shareholderproposals@gibsondunn.com

Re: Bank of America Corporation
Incoming letter dated December 21, 2018

Dear Mr. Mueller:

This letter is in response to your correspondence dated December 21, 2018 concerning the shareholder proposal (the "Proposal") submitted to Bank of America Corporation (the "Company") by Ellen Cassilly and Frank Konhaus (the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. We also have received correspondence on the Proponents' behalf dated January 29, 2019. Copies of all of the correspondence on which this response is based will be made available on our website at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml>. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

M. Hughes Bates
Special Counsel

Enclosure

cc: Sanford J. Lewis
sanfordlewis@strategiccounsel.net

February 21, 2019

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Bank of America Corporation
Incoming letter dated December 21, 2018

The Proposal requests that the Company report on its global median gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent.

We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(c). In our view, the Proponents have submitted only one proposal. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(c).

We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(i)(7). In our view, the Proposal does not seek to micromanage the Company to such a degree that exclusion of the Proposal would be appropriate. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Lisa Krestynick
Attorney-Adviser

DIVISION OF CORPORATION FINANCE
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

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

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

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

SANFORD J. LEWIS, ATTORNEY

Via electronic mail

January 29, 2019

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Shareholder Proposal to Bank of America Corporation Regarding Gender Pay Equity
filed by Arjuna Capital on behalf of Ellen Cassilly and Frank Konhaus

Ladies and Gentlemen:

Ellen Cassilly and Frank Konhaus (the “Proponents”) are beneficial owners of common stock of Bank of America Corporation (the “Company”). Arjuna Capital, on behalf of the Proponents, has submitted a shareholder proposal (the “Proposal”) to the Company. I have been asked by the Proponent to respond to the letter dated December 21, 2018 (“Company Letter”) sent to the Securities and Exchange Commission by Ronald O. Mueller of Gibson, Dunn & Crutcher LLP. In that letter, the Company contends that the Proposal may be excluded from the Company’s 2019 proxy statement.

I have reviewed the Proposal, as well as the letter sent by the Company, and based upon the foregoing, as well as the relevant rules, it is my opinion that the Proposal must be included in the Company’s 2019 proxy materials and that it is not excludable under Rule 14a-8. A copy of this letter is being emailed concurrently to Ronald O. Mueller of Gibson, Dunn & Crutcher LLP.

SUMMARY

The Proposal, entitled Gender Pay Equity, begins by reciting the impacts of the gender pay gap on women, including their underrepresentation in leadership due to the difficulty retaining their participation, as well as the related impacts on stock performance and emerging public policy risks based on the efforts of states and countries like the United Kingdom to close the gender pay gap.

The Resolved clause requests a report on the company’s global median gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The Company Letter claims the Proposal calls for two separate reports, and is therefore comprised impermissibly of two Proposals. However, reading the resolved clause of the Proposal in context, it is clear that it requests a single, unified report regarding the gender pay gap and related risks. Therefore, the proposal is not excludable pursuant to Rule 14a-8(c).

The Company Letter next claims the Proposal should be excluded because it deals with matters related to the Company's ordinary business. However, the Proposal addresses a recognized, significant policy issue of discrimination, has a clear nexus to the company, and does not micromanage by probing too deeply into the Company's management, and therefore is not excludable under Rule 14a-8(i)(7). In particular, the Company asserts that requesting reporting of the metric of "median wage gap" would micromanage the Company's implementation of its management of the gender pay gap. However, the Company's existing implementation is inconsistent with commonly understood mechanisms for reporting the gender pay gap, as the reporting of median gender pay gap is the most commonly utilized metric for representing this issue. Further, the company's current reporting alone presents a misleadingly rosy picture of the gender pay gap among its employees, such that it provides an inadequate indicator for investor review of the Company's performance through a gender lens.

BACKGROUND

The gender pay gap is present across our society and no industries or geographies are immune. The median income for women working full-time in the United States is reported to be 80% of that of their male counterparts, or about \$10,470 a year.¹ This disparity can add up to nearly half a million dollars over the course of a career. Disturbingly, the gap for African American and Latina women gapes wider at 62% and 55% respectively.² And at the current rate of change, women will not reach pay parity until 2059.³ This is not only bad for women, it is bad for the economy, and it's bad for investors. PwC's 2018 Women in Work Index estimates the gender pay gap costs the economies of the Organization for Economic Cooperation and Development (OECD) countries \$2 trillion annually.⁴

As reported in Forbes, "*What You Need To Know About Gender Lens Investing*" Bhakti Mirchandani, January 3, 2019:

Increasingly discussed in asset management firms and the financial press alike, gender lens investing is one of the most rapidly growing segments of sustainable investing. Specifically, gender lens investing is an investment thesis that seeks to turn the abstract idea of an investment's benefit to women into a functional investment strategy. It integrates gender-based factors into investment decisions with goals ranging from enhancing risk-adjusted returns to driving gender equality.

The basis of the investment thesis is manifold. Studies show that greater gender diversity on boards is a predictor of long-term value creation and lower stock price volatility and that European firms with a larger share of women in senior positions have significantly

¹ <https://iwpr.org/publications/gender-wage-gap-2017-race-ethnicity/>

² <https://iwpr.org/publications/gender-wage-gap-2016-earnings-differences-gender-race-ethnicity/>

³ <https://iwpr.org/publications/gender-wage-gap-2016-earnings-differences-gender-race-ethnicity/>

⁴ <https://www.pwc.co.uk/services/economics-policy/insights/women-in-work-index.html>

higher returns. The limited access of women-run businesses to capital is also well documented—just 3% of venture capital funding was raised by female CEOs. In addition, the International Finance Corporation (IFC) estimates a \$320 billion financing gap for female entrepreneurs in formal sector small and medium enterprises in developing countries alone; naturally, the global total across firm sizes and including the informal sector is larger. According to the law of diminishing returns, where capital is scarce, returns to that the capital should generally be greater than where capital is plentiful.

In 2014, the Proponent, Arjuna Capital, launched an investor effort to close the gender pay gap when it filed a proposal with technology firm, eBay. Arjuna asserted that managing pay parity is essential to improving diversity in leadership and therefore corporate performance. Based on research from leading management consulting firms, Arjuna made the business case that if companies can successfully attract and retain female talent through a commitment to equal pay, companies can move more women into positions of leadership and realize the performance benefits such diverse leadership affords. In 2015, the eBay proposal went to a vote of shareholders for the first time. The proposal asked the company to “report the percentage pay gap between male and female employees, policies to improve performance, and quantitative reduction targets.” And while the 2015 vote garnered a modest 8% of shareholder support as an “emerging” investor issue, the following year, in 2016, investor support grew sixfold, to 51%, and eBay’s CEO committed to pay parity the day of the vote.

Growing legislative initiatives and media coverage helped make 2016 a watershed year for investor and corporate action regarding gender pay equity. Out of nine shareholder proposals Arjuna put before major tech firms, six were withdrawn for corporate commitments to disclose information and close the gender pay gap. The momentum generated from the shareholder campaign led top proxy advisory firms like Institutional Shareholder Services (ISS) and Glass Lewis to recommend voting in favor of these proposals, leading to majority vote at eBay. By year end, seven out of nine technology firms took substantial action to address gender pay equity through “equal pay for equal work” disclosures. And gender pay equity moved from the category of “emerging” issue to “competitive” issue, as investors judged progress on the issue as critical to companies’ ability to attract and retain top talent. 2016 also saw the gender pay gap narrow for the first time since the Great Recession, illustrating incremental progress in the U.S.⁶

The effort has continued to grow with approximately 33 resolutions filed between 2014 and the 2018 proxy season. Ten different investor entities have engaged with at least 47 companies, resulting in almost 70 resolutions since the first resolution vote at eBay in 2015. The shareholder campaign has further expanded its outreach through productive dialogues with companies without the need for shareholder resolutions.

This proxy season, Arjuna Capital has filed 12 proposals with financial services and technology firms focused, again, on gender pay equity, but highlighting the need for not only statistically adjusted “equal pay” disclosures, but “median pay” disclosures as well. As of January 16th, Citigroup became the first U.S. company to disclose its median gender global pay gap of 71% and U.S. minority pay gap of 93% along with its global equal pay disclosure of 99%. This disclosure

was a natural global extension of the UK median pay numbers published in 2018, to which many U.S. firms, including Citibank, and Bank of America, responded.

Adjusted vs Median Pay Gaps

The gender pay gap is defined as the difference between male and female median earnings expressed as a percentage of male earnings according to the Organization for Economic Cooperation and Development.

To date, U.S. companies have taken first steps to approach the issue of gender pay equity by measuring “equal pay,” that is pay through the lens that men and women holding like jobs, with like seniority, like performance, and/or like geography, should be paid equally for their work. Many U.S. companies report “adjusted equal pay gaps,” which include compensation data statistically adjusted for factors such as job category, seniority, and geography. At least 13 U.S. companies report gender pay gap percentages in the vicinity of 99% to 99.9%. Five companies report they have achieved 100% equal pay, including Apple, Intel, Microsoft, Alphabet, and Starbucks. Four additional companies committed to publish their pay gap numbers by the end of 2018.

However, a different picture is presented when analysis is conducted regarding median pay gaps. Reporting of median pay gaps depicts a profile of the relative compensation of men and women across a workforce, including the relative representation of women in executive and leadership positions. Inclusion of median pay gaps is an essential addition to understanding the gender pay gap in a comprehensive manner.

Median pay gap disclosures are currently required by regulatory mandate of U.K. operations. Prior to Citigroup’s January 16th announcement, no companies had reported both adjusted and median global pay gap numbers. Adding these metrics establishes a benchmark through which investors can track progress in narrowing the gap over time and whether companies are moving women into higher paying jobs and leadership positions. Only through comprehensive reporting will corporations be accountable to investors and employees alike, and able to fully manage gender inequity.

The Business Case for Tracking Gender Pay Equity

A host of research illustrates the business case for gender pay equity, including greater diversity. Diverse leadership is correlated with multiple performance benefits from more innovation to “radical innovation,” better risk management, higher profit margins, stronger Return on Equity (ROE), and better stock price performance.

A report published January 2019 from the Harvard Business Review⁵ was based on a study of a group of companies in the wake of a new Danish law that required employers with more than 35

⁵ Bennedsen, Morten, Elena Simintzi, Margarita Tsourtsoura and Daniel Wolfenzon, “Research: Gender Pay Gaps

employees to report their gender pay gaps. They found that, over five years, the companies that had to disclose the information shrunk their gaps; wage disparities of those that did not have to report did not improve. The report authors noted:

.... we have just conducted the first empirical study on the impact of mandatory wage transparency. That study's results suggest that disclosing disparities in gender pay does in fact narrow the gender wage gap. It also can:

Increase the number of women being hired, indicating that the supply pool of female employees increases as gender pay transparency improves.

Increase the number of female employees being promoted from the bottom of the hierarchy to more senior positions.

Lower companies' overall wage bills, largely by slowing down the growth of male wages.

In its coverage of the Harvard Business Review study as well as recent developments at Citigroup, Fortune⁶ magazine notes:

Citigroup last week made a blunt admission that's rare among U.S. corporations. It revealed that, on the whole, women at the firm globally earn 29% less than men. In the U.S., Citi said minority employees earned 7% less than non-minorities.

In going public with the figures, of course, Citi introduced itself to criticism that tighter-lipped companies shield themselves from. So why make the disclosure?

Perhaps most importantly, there was shareholder pressure to do so.

Last year, Arjuna Capital convinced Citi—along with Bank of America and Wells Fargo—to reveal pay gap data after arguing for more information on compensation. When Citi released an “adjusted” pay gap that revealed that men and women with the same job title, education, and experience earned roughly the same pay, Arjuna filed a shareholder proposal that Citi report its a median firm-wide gender pay gap in a more

Shrink When Companies Are Required to Disclose Them,” 1/23/2019, <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them/>

⁶ Zillman, Claire, “It's an Ugly Number: CEO Michael Corbat on Why Citi Revealed the Pay Gap Data Few Banks Want to Share,” 1/23/19, www.fortune.com/2019/01/23/citi-ceo-michael-corbat-pay-gap/

straightforward fashion.

The resulting 29% figure is “an ugly number on the surface,” Citigroup CEO Michael Corbat admitted in a Bloomberg interview on the outskirts of the World Economic Forum in Davos, Switzerland on Tuesday.

“But you really have to get below it; you can’t fix it until you get below it and until you acknowledge what it is,” he said.

What the median gap revealed, Corbat said, is not an imbalance at the firm in terms of female representation. In fact, the bank is more than 50% female overall. What gap did show, however, was an “imbalance at the senior job and leadership level,” Corbat said. Men populate high-paid roles; women are concentrated lower on the corporate ladder, where pay is less.

“You’re not going to fix that overnight; you’re not going to fix that by hiring externally, and you’re not going to simply fix it organically,” he said. Instead, the bank has set a goal of upping representation at its assistant vice president to managing director tiers to 40% female and 8% African American in the U.S. by the end of 2021.

* * *

Mercer finds managing pay equity “is associated with higher current female representation at the professional through executive levels and a faster trajectory to improved representation.”

McKinsey states, “the business case for the advancement and promotion of women is compelling.”⁷ McKinsey identifies best practices for increased female representation including “tracking and eliminating gender pay gaps.”⁸ MSCI has found gender diverse leadership teams led to a 36.4% improvement in return on equity.⁹

⁷ <https://www.mckinsey.com/business-functions/organization/our-insights/promoting-gender-parity-in-the-global-workplace>

⁸ <https://www.mckinsey.com/business-functions/organization/our-insights/promoting-gender-parity-in-the-global-workplace>

⁹ Research from Catalyst and McKinsey indicates that men and women think, lead, and solve problems differently, and that a diversity of approaches leads to more innovation and better financial results. https://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf <https://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth> The Journal of Innovation-Management Policy & Practice found that “gender diversity within research teams fosters novel solutions leading to radical innovation in the company and in the market.” García, C.(2012) Gender diversity within R&D teams: Its impact on radicalness of innovation. Innovation-Management Policy & Practice, June 2013. 15 (2), 149

THE PROPOSAL

Gender Pay Equity

Whereas: The World Economic Forum estimates the gender pay gap costs the economy 1.2 trillion dollars annually. The median income for women working full time in the United States is 80 percent of that of their male counterparts. This disparity can equal nearly half a million dollars over a career. The gap for African American and Latina women is 60 percent and 55 percent. At the current rate, women will not reach pay parity until 2059.

United States companies have begun reporting statistically adjusted equal pay for equal work numbers, assessing the pay of men and women performing similar jobs, but mostly ignore median pay gaps. The United Kingdom now mandates disclosure of median gender pay gaps. And while Bank of America reported a 30.5 percent median pay gap for its United Kingdom operations, it has not published median information for its global operations. The median pay gap for United Kingdom financial services companies is 22 percent.

Bank of America reports women earn 99 percent of the compensation received by men on a statistically adjusted equal pay basis. Yet, that statistically adjusted number alone fails to consider how discrimination affects differences in opportunity. In contrast, median pay gap disclosures address the structural bias that affects the jobs women hold, particularly when men hold most higher paying jobs.

Women account for 54 percent of our company's United States workforce, but only 32 percent of senior leadership. Mercer finds female executives are 20 to 30 percent more likely to leave financial services careers than other careers. Actively managing pay equity "is associated with higher current female representation at the professional through executive levels and a faster trajectory to improved representation."

Research from Morgan Stanley, McKinsey, and Robeco Sam suggests gender diverse leadership leads to superior stock price performance and return on equity. McKinsey states, "the business case for the advancement and promotion of women is compelling." Best practices include "tracking and eliminating gender pay gaps."

Public policy risk is of concern, not only in the United Kingdom, but in the United States as well. The Paycheck Fairness Act pends before Congress. California, Massachusetts, New York, and Maryland have strengthened equal pay legislation. The Congressional Joint Economic Committee reports 40 percent of the wage gap may be attributed to discrimination.

Resolved: Shareholders request Bank of America report on the company's global median gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The gender pay gap is defined as the difference between male and female median earnings expressed as a percentage of male earnings (Organization for Economic Cooperation and Development).

Supporting Statement: A report adequate for investors to assess company strategy and performance would include the percentage global median pay gap between male and female employees across race and ethnicity, including base, bonus and equity compensation.

ANALYSIS

I. The Company has not met its burden of demonstrating that the Proponent has submitted two proposals.

The Company Letter first asserts that the Proposal consists of two distinct proposals, rather than a singular, unified one. However, the wording of the resolved clause, taken in context of the entirety of the Proposal including the title, the whereas clauses, and the supporting statement, demonstrates that the Proposal reads as a single proposal directed toward the Company's global median gender pay gap.

The Staff has determined that a single proposal made up of several separate components does not constitute more than one proposal if the components "are closely related and essential to a single well-defined unifying concept." SEC Release No. 2412,999 (Nov. 22, 1976). See also: AT&T Wireless Services, Inc. (avail. Feb. 11, 2004) (request contained components essential to a single-well defined unifying concept).¹⁰ The Proposal, in this case has a unifying concept—the global median gender pay gap. The elements of analysis, including the focus on impacts on recruitment and retainment, are singularly focused on the impacts of that global median gender pay gap on the Company.

The title of the Proposal is "Gender Pay Equity." The whereas clauses of the Proposal describe the gender pay gap globally and in the United States, and current approaches to the issue by the Company. In particular, the clauses note that women are underrepresented in senior leadership positions at the Company, which may have an effect on company performance. The whereas clauses also note emerging public policies to address gender pay equity.

¹⁰ The companies in NaPro BioTherapeutics, Inc. (Apr. 17, 2003) ("NaPro") and Exxon-Mobil Corp. (Mar. 10, 2003) ("Exxon-Mobil") unsuccessfully argued that the proposals in question consisted of distinct and unrelated components regarding senior executive or director compensation, which encompass salary, bonus, equity based compensation, and related disclosures.

The resolved clause of the Proposal states:

Resolved: Shareholders request Bank of America report on the company’s global median gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The Company asserts that this resolved clause reflects two different requests, one for a report on the global median gender pay gap, and a separate report on risks related to recruiting and retaining female talent. Reading the resolved clause in context, makes clear it is not subject to that interpretation.

The first clause in the Proposal states the overall request for a report on the risks associated with the emerging public policies addressing the gender pay gap. This defines the subject of the Proposal, and the rest of the sentence delineates the scope of that report.

The Company, however, parses out the last element of scope relating to recruitment and retaining female talent, claiming it stands apart from all the preceding scope items directly preceding it. The Company argues that the comma after the “operational risks” separates recruitment entirely from the overall median gender pay gap report, and that the Proposal therefore requests a separate report relating to recruitment.

But the use of a serial comma, particularly when viewed in context, does not demonstrate that “recruitment” is intended to be a separate issue outside the scope of the report on gender pay equity. The Chicago Manual of Style states that “Items in a series are normally separated by commas.”¹¹ The proposal addresses a series of risks related to the report topic of the Company’s global median gender pay gap, with risks regarding the “recruiting and retaining female talent” listed as merely one type of risk, provided along with others, to define the overall scope of the gender pay gap report.

The alternative interpretation suggested by the Company is implausible, especially when reading the resolved clause in context. The Proposal’s whereas clauses provide context that dispels the Company’s alternative interpretation. Beginning with the title, “Gender Pay Equity” and carried throughout the entirety of the background section of the report, it is clear that the Proposal relates to gender pay equity rather than general issues of recruitment on their own.

The supporting statement includes two paragraphs expanding on the link between the main gender pay gap issue, and female recruitment and retainment, as is intended by the Proposal’s language. The third paragraph of the supporting statement discusses how the gender pay gap is intertwined

¹¹ <https://www.chicagomanualofstyle.org/search.epl?q=comma>

with women's job opportunities, when it comes to both recruitment and retention. The Proposal states that statistically adjusted numbers alone fail to consider "how discrimination affects differences in opportunity, and that "In contrast, median pay gap disclosures address the structural bias that affects the jobs women hold, particularly when men hold most higher paying jobs." It also discusses how managing pay equity is a means of improving female representation at executive levels.

Thus, neither the Board nor investors reading the Proposal would be likely to adopt the implausible interpretation discussed in the Company's letter—that the Proposal is requesting a report on recruitment and retention as a stand-alone issue.

Further context is provided by a review of literature and industry reports regarding the wage gap issue. A 2017 report published by PricewaterhouseCoopers addresses how measures to eradicate pay inequity "must be woven into recruitment activities" and that "Employers need to embed measures to close this gap into their recruitment activities, ranging from monitoring for and fixing pay discrepancies to establishing processes that prevent them from occurring in the first place."¹² The report also states that nearly half of the women in the study said, "it was important to them that an employer publicly discloses the gender pay gap across its organisation" when deciding whether or not to work for an employer, and that "this is most important to female career starters." Thus, there is also a widespread understanding that recruitment issues are a critical component in addressing the gender pay gap.

We note in passing that the history of how the language of the proposal was generated in response to the company's deficiency notice is not relevant to interpreting the Proposal, because the complete language of the Proposal as it is currently written, encapsulates the only language that would be presented to investors, and therefore speaks for itself.

Therefore, the Company Letter has not demonstrated that the Proposal represents two proposals, and the proposal is not excludable under Rule 14a-8(c).

II. The Proposal does not micromanage, and therefore is not excludable pursuant to Rule 14a-8(i)(7).

Even though the subject matter of the Proposal touches on matters related to ordinary business (employment), the focus of the Proposal on the gender pay gap transcends the ordinary business exclusion. The Staff has found that where a proposal's subject matter involves ordinary business, it may transcend the ordinary day-to-day business matters threshold when they regard a significant policy issue.¹³ The Staff has frequently found issues involving employment, specifically those dealing with leveling the playing field for employees, to transcend the ordinary business exclusion. In *Citigroup Inc.* (February 2, 2016), the shareholder proposal requested the company prepare a report demonstrating it does not have a gender pay gap. The Staff was unable to concur that the

¹² <https://www.pwc.com/gx/en/about/diversity/iwd/iwd-female-talent-report-web.pdf>

¹³ Cracker Barrel Old Country Stores, Inc. Release No. 34-40018 (May 21, 1998)

company may exclude the proposal under Rule 14a-8(i)(7), even though Citigroup argued the gender pay gap is excludable as ordinary business because it relates to employment and compensation matters. In *ExxonMobil Corporation* (March 18, 2015), the company also unsuccessfully argued for the exclusion of a proposal under rule 14a-8(i)(7) where the Proposal requested the company report to shareholders the percentage of women at specified compensation percentiles. There, as in Citigroup, the Staff was unable to concur that the company could exclude the proposal on the basis of rule 14a-8(i)(7), as the heart of each of those proposals went to discrimination in gender compensation.

Furthermore, in both *Walmart* (April 3, 2002) and *Newell Rubbermaid, Inc.* (February 21, 2001), the Staff did not find those companies could exclude a Proposal addressing the “glass ceiling” based on Rule 14a-8(i)(7). In each case, the proposal was similar to the one presented here by the Proponents, in that it called for a report based in part on gender and related earnings. Also, in *Citigroup Inc.* (February 2, 1999) the Staff concluded that a proposal requesting a report on an employment issue regarding equality in the workforce based on affirmative action policies and programs, may not be omitted based on Rule 14a-8(i)(7). The Staff came to the same conclusion in *R.R. Donnelley & Sons Company* (January 6, 1999) request the Board of Directors undertake a pay equity study to ascertain whether *all* women and minority employees are paid equitably relative to men and non-minorities performing similar jobs with comparable skills not excludable under Rule 14a-8(i)(7), where the proposal in question also focused on gender and pay, in that it requested the Board conduct a study to determine equitable pay between women and minority employees, compared with men and non-minorities employees.

There are numerous additional employment related cases where the Staff did not find them to be excludable under 14a-8(i)(7), including: *OGE Energy Inc.* (February 24, 2004) (request that company amend its equal employment opportunity policy to explicitly prohibit discrimination based on sexual orientation and take steps to substantially implement that policy); *National Fuel Gas Company* (November 18, 1999) (request that Board of Directors create, appoint, and direct a committee to issue a plan to eliminate the impact of discrimination in employment at the company and its subsidiaries by increasing minority employment to reflect the demographic makeups of the customers, populations and places of business served); *Oracle Corporation* (August 15, 2000) (request to implement employee labor practices and standards in China); *General Electric Company* (February 10, 2015) (request that Board of Directors make all possible efforts to increase activity on a list of equal opportunity principles identified in the proposal); *Wendy's International, Inc.* (February 10, 2005) (request that the Board issue a sustainability report to shareholders using Global Reporting Initiative's Sustainability Reporting Guidelines, which include labor and employment matters, as well as employee compensation); *Pacific Gas and Electric Company* (January 21, 1997) (request to have shareholders vote on a resolution regarding the company's Chief Executive Officer's and the Directors' stance on the California Civil Rights Initiative, Proposition 209).

Notably, the Company in its response, does not argue the gender pay gap is not a significant policy issue for the Company. Instead, the Company's argument is that the proposal micromanages by its focus on this metric. **This is a fatally flawed argument, since the metric in question is a**

principal lens through which the social policy issue of the gender pay gap is most commonly articulated.

Putting the issue of micromanagement in the context of Commission Guidance

The Company's assertions of micromanagement and its detailed articulation of the complexity of the underlying decision-making come at a time in which recent Staff decisions and Staff Legal Bulletin 14 J appear to invite companies to make new arguments that proposals entail micromanagement as applied to a particular company. This has resulted in numerous no action requests for the 2019 season going to lengths to assert that complex issues (like management of greenhouse gases, the use of antibiotics in the supply chain, promotion of gender equity, management of the firm's pollution impacts, impacts on civil rights, etc.) involve complex operational decisions and that the proposals would undermine the board and management's well-considered decisions, priorities and strategies regarding how to address the issue.

These claims of micromanagement are incongruent with the well-functioning shareholder proposal process as administered and refined over the course of decades by the SEC. Shareholders have a long-standing and appropriate role of engaging with portfolio companies through the shareholder proposal process to track and improve a company's strategy for addressing various impacts on society. Proposals directed toward guiding and even redirecting large business strategy decisions on significant policy issues have long been at the core of the shareholder proposal process, and not a basis for exclusion.

The claims that exclusion is appropriate because existing processes are complex, decisions and strategies are well-considered, and priorities have been set, amounts to an assertion that the performance and goals that the Company has in place reflect the management and board's strategy, and that such a strategy is not subject to intervention by the Company's investors. If this were the case, it would eliminate many if not most shareholder proposals directed toward improving performance or reducing negative impacts of companies.

In Staff Legal Bulletin 14 J, the Staff attempted to consolidate its discussion of micromanagement and noted an intent to consider the potential for micromanagement in proposals addressing timelines and methods. The Staff also noted that it was the staff's intention to implement the framework "consistent with the Commission's guidance in this area." Therefore, it is crucial to apply the Bulletin with consideration of the Commission's latest pronouncement on this issue which makes it very clear that the Commission has not endorsed or proposed an absolute restriction against requests for timelines or specific methods. Quite to the contrary, the Commission in the 1998 Release - the most recent and authoritative Commission-level statement regarding the application of micromanagement made it clear that requests regarding methods and timelines can be acceptable:

.... in the Proposing Release we explained that one of the considerations in making the ordinary business determination was the degree to which the proposal seeks to micro-manage the company. We cited examples such as where the proposal seeks intricate detail, or seeks to impose specific time-frames or to impose specific methods for implementing complex policies. Some commenters thought that the examples cited seemed to imply that all proposals seeking detail, or seeking to promote time-frames or methods, necessarily amount to ordinary business.

We did not intend such an implication. **Timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations.** [emphasis added]

Accordingly, to apply the micromanagement doctrine consistent with the 1998 Release, if the proposal addresses a significant policy issue that is significant for the company, the appropriate questions for assessing micromanagement appear to be:

- Are large differences at stake between the company's approach and the proposal?
- Is it practical for shareholders to weigh in on the timelines or reasonable details included in the proposal?

Below we will provide information for assessing these questions consistent with the 1998 Release. We believe the evidence demonstrates compellingly that there are large differences at stake and that it is practical for shareholders to weigh in on the details included in the proposal. As we have noted above, the Proposal is consistent with a long line of related prior proposals on employment, diversity and discrimination that the Staff has considered in light of the 1998 Release's criteria, and which have not been found to not be excludable under Rule 14a-8(i)(7). The proposals were not excludable despite company claims asserting ordinary business or micromanagement, because, as in the present Proposal, they were directed toward the company's strategic responses and goals and at a level of detail that was practical for shareholder consideration.

The circumstances of the Company are neither unique, nor a compelling argument for finding that the Proposal micromanages

The Company letter asserts that the Proposal is engaging in micromanagement because the Company already invests significant time and resources in implementing "complex and intertwined policies and practices to address gender pay equity." The board "oversees the management's execution of these strategies." In essence, the Company Letter is asserting that additional accountability and transparency as requested by the proposal "delves too deeply" for purposes of involvement by shareholders.

To the contrary, the Proposal is consistent with a long line of shareholder proposals seeking disclosure consistent with investor-relevant metrics. In this instance, the median pay gap represents

a key performance indicator that market-leading analysts and organizations have identified as appropriate for disclosure to investors.

As discussed above, the Company's closest reporting metric reflects analysis of whether employees receive *equal pay for equal work*.¹⁴

The Company's strategy on the gender pay gap as articulated in the background section of the Company Letter on page 3 is to ensure equal pay for equal work. For instance, the Company notes that its rigorous approach ensures that:

.... individual differences in employee compensation for equal roles are identified and factors such as the individual's role in the organization, experience, work location, and the most recent year's performance are considered.

Using this approach, the Company notes that it has been successful in elevating the pay received by women for equal jobs to 99% of that received by men.

In contrast, the Proposal and its focus on the median gender pay gap reflects the gender pay gap through the lens of distribution of employee pay levels and promotion demographics. The median gender pay gap, the most commonly used metric for evaluating gender pay equity, reflects the relative distribution of higher and lower paying jobs within a company.

The Company acknowledges that female representation across all roles in the company affects median compensation levels and the gender pay gap, but takes a more diffuse and unmeasurable approach to addressing this:

After careful consideration of the complex issues confronting the Company and its workforce, the Company has determined that pay equality based on the median compensation levels of male and female employees is best addressed in the broader context of supporting gender equality in the workforce and efforts to drive for parity in male and female representation in all roles across the Company.

The Company articulated its rationale for not reporting these median levels:

However, the Company believes comparing compensation of male and female employees at the median without adjusting for their different roles, experiences, performance, locations and other factors is misleading....

In contrast, the Proposal's requested metric (which requires quite a bit less statistical maneuvering than "equal pay" to calculate) addresses a broader issue, combining the problem of disparities in pay, with the shortage of promotional opportunities for women within the Company. It has long

¹⁴ Of note, a median pay gap disclosure is a request for a raw, unadjusted number, that should require far less resources to measure than a statistically adjusted number.

been the case that proposals can request such market-leading, relevant metrics. By distinction, the Proposal does not impose specific actions on the company that would constitute micromanagement. For instance, it does not require the company to achieve a specific metric by a particular date, which would be the analogous situation for many of the micromanagement exclusion decisions of 2018 cited by the Company.

Notably, the Company's background document provides an important metric justifying further investor inquiry into the causes of the gender pay equity gap at the company, in noting that "its senior level employees and managers are 45% female and more than 40% female, respectively" (Company Letter page 4). These numbers are telling, and provide helpful background regarding the importance of seeing the median gender pay equity data. And while the Company has not released its global median pay gap, as the Proposal requests, its U.K. disclosure indicates the median pay of women is 59.2 cents on the dollar for base compensation, and 45.4 cents on the dollar for bonus compensation compared to men.

While the Company asserts that gender pay equity cannot be boiled down to a single ratio, leading experts and advocates in the field believe this ratio is the single most telling way of parsing this issue in a manner that is comparable from company to company. For instance, a report by the American Association of University Women (AAUW) notes regarding the gender pay gap:

The Simple Truth about the Gender Pay Gap

The **gender pay gap** is the gap between what men and women are paid. Most commonly, it refers to the median annual pay of all women who work full time and year-round, compared to the pay of a similar cohort of men. Other estimates of the gender pay gap are based on weekly or hourly earnings, or are specific to a particular group of women.

$$\text{EARNINGS RATIO} = \frac{\text{WOMEN'S MEDIAN EARNINGS}}{\text{MEN'S MEDIAN EARNINGS}}$$

$$\text{2017 EARNINGS RATIO} = \frac{\$41,997}{\$52,146} = 80\%$$

No matter how you analyze it, the gender pay gap is real, persistent, and harmful to women's economic security.

Accordingly, the Proposal requests reporting on a relevant metric that is not reflected in the

company's current reporting. This is a top-level request and does not constitute micromanagement.

CONCLUSION

Based on the foregoing, we believe it is clear that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2019 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the Company that it is denying the no action letter request. If you have any questions, please contact me at 413 549-7333 or sanfordlewis@strategiccounsel.net.

Sincerely,



Sanford Lewis

cc: Ronald O. Mueller

December 21, 2018

VIA E-MAIL

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

Re: *Bank of America Corporation*
Submission of Ellen Cassilly and Frank Konhaus
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, Bank of America Corporation (the “Company”), intends to omit from its proxy statement and form of proxy for its 2019 Annual Meeting of Stockholders (collectively, the “2019 Proxy Materials”) a stockholder submission (the “Proposal”)¹ and statements in support thereof (the “Supporting Statement”) received from Arjuna Capital on behalf of Ellen Cassilly and Frank Konhaus (the “Proponents”).

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

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2019 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponents.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that stockholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponents that if the Proponents elect to submit additional correspondence to the Commission or the Staff with

¹ As addressed in this letter, we believe the submission constitutes two separate proposals and therefore is excludable under Rule 14a-8(c). Nevertheless, for each reference, we have defined the submission as “the Proposal” and refer to it as such.

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respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal requests a “report on the company’s *global median* gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent.”

The Supporting Statement further instructs that the report on the Company’s “*global median* pay gap” should “include the percentage *global median* pay gap between male and female employees across race and ethnicity, including base, bonus and equity compensation.”

A copy of the Proposal and the Supporting Statement, as well as related correspondence from the Proponents, is attached to this letter as Exhibit A.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2019 Proxy Materials pursuant to:

- Rule 14a-8(c) because the Proposal consists of multiple proposals, and, despite proper notice, the Proponents have failed to correct this deficiency; and
- Rule 14a-8(i)(7) because the Proposal relates to the Company’s ordinary business operations.

BACKGROUND

The Company is committed to ensuring that its policies, practices, products and programs align to advance the Company’s purpose of making its customers’ financial lives better through the power of every connection. The Company achieves its purpose by pursuing Responsible Growth, which entails growing and winning in the marketplace by remaining committed to its customer-focused strategy and by managing risk well. Under the Company’s Responsible Growth strategy, this growth must be sustainable, by sharing success with the communities it serves, being the best place to work for its teammates, and remaining committed to operational excellence so it can continue to invest in its employees and its capabilities.

To be a great place to work, the Company strives to provide an inclusive and rewarding experience and fair and equitable pay. Its pay-for-performance philosophy and approach to

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compensation begin with setting clear expectations with managers at all levels of the Company. The compensation process includes thorough analyses and reviews, with oversight from the most senior leaders in the Company, including the management team, CEO, and the Company's Board of Directors (the "Board"). Additionally, as part of regular work to support a gender and race neutral pay-for performance philosophy, the Company has retained outside compensation experts that use rigorous processes and analyses to examine pay before year-end compensation decisions are finalized. Through this rigor, individual differences in employee compensation for equal roles are identified and factors such as the individual's role in the organization, experience, work location, and the most recent year's performance are considered. When appropriate, the Company takes action to bring an individual employee's pay in line with comparable peer positions. This process, which has been in place for over a decade, is designed to reinforce a culture and commitment to paying employees equitably.

As the Company has publicly reported to its stockholders,² in the Company's most recent review of total compensation for U.S. and U.K. employees (approximately 80% of its global workforce), results showed that compensation received by women is equal to on average 99% of that received by men. Results also showed that compensation received by minority teammates is equal to on average 99% of non-minority teammates. These results continue to inform both pay-for-performance practices, including how the Company continues to bridge gaps that exist or may exist in the future, as well as overall efforts to continue to attract, develop, and advance women and racially or ethnically diverse employees. The Company is committed to expanding this compensation analyses by its outside compensation expert to include review of additional international locations on an annual basis.

The Company also maintains focus on the important issue of gender pay equality. After careful consideration of the complex issues confronting the Company and its workforce, the Company has determined that pay equality based on the median compensation levels of male and female employees is best addressed in the broader context of supporting gender equality in the workforce and efforts to drive for parity in male and female representation in all roles across the Company. Certain jurisdictions in which the Company operates require disclosures related to pay based on median compensation levels of male and female employees. However, the Company believes comparing compensation of male and female employees at the median without adjusting for their different roles, experiences, performance, locations and other factors is misleading, and is not common for pay equity comparisons in the United States. The

² See Bank of America Corporation, 2018 Proxy Statement at 26, *available at* http://media.corporate-ir.net/media_files/IROL/71/71595/BOAM_2018_Proxy.pdf. In that disclosure, and as discussed further below, the Company also reported on the diversity among its U.S.-based and global workforce, and among its senior leadership.

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Company's pay practices are based on market competitive pay opportunities commensurate with role and individual performance, not by median gender or ethnicity data.

The Company's gender pay equity policies and practices are just one aspect of the Company's numerous robust programs dedicated to the critical issue of providing opportunity, advancement and equality for women. The Company believes this multi-faceted issue cannot be boiled down to a single ratio, and the Company strives each day to recruit, retain, fairly compensate, promote and motivate all of its employees, not just those of a particular gender.

Developing Women Leaders at Every Level

The Company also works to attract the most talented people to join the Company and drive Responsible Growth. Through partnerships with hundreds of organizations, outreach to targeted educational institutions, and regular signature events, the Company is building a pipeline of female talent to participate in the Company's dynamic career opportunities. These efforts show strong results that have been achieved as the Company emerged from the financial crisis. Today,

- the Company's global workforce is more than 50% female; more than 45% of its U.S.-based workforce is racially or ethnically diverse
- its senior leadership is diverse; 7 of its 16 Board members and 7 of the CEO's 13 direct reports are women and/or persons of color
- its senior level employees and managers are 45% female and more than 40% female, respectively
- its most recent campus recruiting class was 41% female and in the U.S. was more than 50% diverse, as the Company focuses on building the next generation of leaders

The Company's Diversity and Inclusion ("D&I") achievements have been recognized globally. It was named World's Best Bank for D&I in 2018 and 2016 by Euromoney. It was #21 on the Top 100 Companies for Diversity ranking by Fortune Magazine. It was recognized as the #1 Most Just company in the financial services industry and ranked #1 for its commitment to gender pay equity and management gender diversity. It has garnered a leadership position in the Bloomberg Financial Services Gender Equality Index each year since the inception of the index in 2016. It has been a Working Mother Magazine 100 Best Companies for 30 consecutive years and was named a Top Companies for Women Technologists by the Anita Borg Institute.

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The Company's efforts have been recognized by employees in its 2018 Employee Satisfaction Survey, which recorded the highest employee engagement scores in the Company's history, with female engagement scores are 2 points higher than men's. In addition, the survey's D&I index, which measures inclusion, also had the highest scores to date and is above Financial Services Industry benchmarks.

The Company offers extensive programs to support employees' professional growth. Last year, more than 86% of eligible managers participated in some form of manager development program. For example:

- The Company's Learning & Leadership Development team actively supports women at the Company with guidance through career and life changes, one-on-one executive support, and tailored development plans and pathing to help women advance their careers;
- The Company's annual Global Women's Conference brings together female leaders to engage on leadership and advocacy, and the Company's Women's Executive Development Program offers a 10-month program to develop and retain female talent – studies show attendees are seven times more likely to be promoted;
- The Company's Investing in Women Leadership Council for senior executives and employee networks for women at all levels play key roles in building the culture of the Company, focusing on recruitment, development, networking, culture and community engagement;
- The Women's Next Level Leadership Program is a seven-month virtual development experience providing strategies and tactics to overcome the unique challenges multicultural women face in progressing their careers; and
- Through the Global Ambassadors Program, the Company empowers its female employees to share their insights with women outside the Company, helping more women use their skills to impact the world. The program connects women leaders of social enterprises and small businesses to women executives for mentoring to help them realize their economic potential.

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ANALYSIS

I. The Proposal May Be Excluded Under Rule 14a-8(c) Because The Proposal Consists Of Multiple Proposals

A. Proposal Background

On November 7, 2018, the Proponents submitted proposals (the “Initial Submission”) to the Company via overnight mail, which the Company received on November 8, 2018. A copy of the Initial Submission is attached to this letter as Exhibit B. After reviewing the Initial Submission, the Company sent a letter to the Proponents (the “Deficiency Notice”) on November 21, 2018, which was within 14 days of the date on which the Initial Submission was received, notifying the Proponents of the Company’s belief that the Initial Submission contained more than one stockholder proposal in violation of Rule 14a-8(c) and of the Proponent’s obligation to “indicat[e] which proposal the Proponents would like to submit and which proposal the Proponents would like to withdraw.” A copy of the Deficiency Notice is attached to this letter as Exhibit C.

Specifically, the Resolved clause of the Initial Submission set forth the first proposal (the “Policy Risk Report” proposal) by stating:

Resolved: Shareholders request Bank of America report on the risks to the company associated with emerging public policies addressing the gender pay gap, including associated reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The gender pay gap is defined as the difference between male and female *median* earnings expressed as a percentage of male earnings (Organization for Economic Cooperation and Development).

Separately, the supporting statement of the Initial Submission requested a second report (the “Company Median Pay Gap Report”) disclosing “the percentage *global median* pay gap between male and female employees across race and ethnicity, including base, bonus and equity compensation.”

On November 29, 2018, the Proponents responded via email to the Deficiency Notice. The Proponents’ response included the Proposal, the relevant text of which is set forth above under “The Proposal” and which is attached in full to this letter as Exhibit A. Instead of indicating which of the two distinct proposals the Proponents wished to submit and which the

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Proponents wished to withdraw, the Proponents revised the Initial Submission by combining and revising language from the two proposals in the Resolved clause of the Proposal. Notwithstanding the Proponents' revisions, the Proposal continues to request two separate and distinct reports in a single proposal in violation of Rule 14a-8(c):

1. the Initial Submission's Company Median Pay Gap Report was combined with a portion of the Policy Risk Report – namely regarding the “associated policy, reputational, competitive, and operational risks” – to request a “report on the company's *global median* gender pay gap, including associated policy, reputational, competitive, and operational risks” (collectively, the “Expanded Company Median Pay Gap Report”); and
2. a separate report that consists of the second part of the Policy Risk Report and requests “a report on the company's ... risks related to recruiting and retaining female talent” (the “Recruiting Report”).

Notably, whereas in the Initial Submission the Recruiting Report was phrased as being part of the “risks to the company *associated with* emerging public policies addressing the gender pay gap,” the Proponents revised that language so that the Recruiting Report is not limited to risks associated with the Company's global median gender pay gap.³

B. Analysis

The Proposal may be omitted pursuant to Rule 14a-8(c) because the Proponents have combined two separate and distinct matters into a single proposal in violation of Rule 14a-8(c). Specifically, after receiving the Initial Submission, the Company timely provided the Deficiency Notice stating that the Initial Submission consisted of two proposals and instructing how the Proponents could cure the deficiency. Then, instead of curing the deficiency, the Proponents submitted revised language that continues to consist of two proposals requesting separate and distinct reports.

³ Throughout this letter, references to the Company's “global median gender pay gap” are used only to reflect the language of the Proposal, and should not be read as an acknowledgement that a gender pay gap would in fact be reflected if the Company were to prepare gender pay reports using alternative methodologies, such as the one that the Proposal requests. As discussed further in this letter, the Company's view is that the gender pay equity reporting that it has provided is best suited for reporting to the Company's employees and its stockholders on the Company's policies and practices.

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Rule 14a-8(c) provides that a stockholder “may submit no more than one proposal to a company for a particular [stockholders]’ meeting.” The Staff has consistently recognized that Rule 14a-8(c) permits the exclusion of proposals combining separate and distinct elements that lack a single well-defined unifying concept, even if the elements are presented as part of a single program and relate to the same general subject matter. For example, in *General Motors Corp.* (avail. Apr. 9, 2007, *recon. denied* May 15, 2007), the submission requested that the board “seek shareholder approval for the restructuring of the [company]” and proceeded to set forth several transactions that the restructuring plan should entail. The company explained that though the overall transaction contemplated the separation of four company operations into separate companies, the transaction entailed distinct steps and a variety of elements that are “intended to be independent.” The Staff concurred in the company’s exclusion of the submission under Rule 14a-8(c). Similarly, in *PG&E Corp.* (avail. Mar. 11, 2010), the Staff concurred with exclusion of a submission asking that, pending completion of certain studies of a specific power plant site, the company: (i) mitigate potential risks encompassed by those studies; (ii) defer any request for or expenditure of public or corporate funds for license renewal at the site; and (iii) not increase production of certain waste at the site beyond the levels then authorized. Notwithstanding the proponent’s argument that the steps in the proposal would avoid circumvention of state law in the operation of the specific power plant, the Staff specifically noted that “the proposal relating to license renewal involves a separate and distinct matter from the proposals relating to mitigating risks and production level.”

The Staff has concurred in the availability of Rule 14a-8(c) even in cases where the stockholder’s submission was phrased in terms of a series of specific but separate actions that related to a common theme. For example, in *Textron, Inc.* (avail. Mar. 7, 2012), the Staff concurred in the exclusion of a proposal that sought to allow stockholders to make director nominations in the company’s proxy materials where the proposal also included a provision that addressed whether operation of the nomination process would constitute a change of control of the company. The Staff concurred that this collateral provision “constitute[d] a separate and distinct matter from the proposal relating to the inclusion of stockholder nominations for director in Textron’s proxy materials,” and accordingly that the submission was excludable under Rule 14a-8(c). Similarly, in *Parker-Hannifin Corp.* (avail. Sept. 4, 2009), the Staff concurred in the exclusion of a proposal that sought to create a “Triennial Executive Pay Vote” program that consisted of three elements: (i) a triennial executive pay vote to approve the compensation of the company’s executive officers; (ii) a triennial executive pay vote ballot that would provide stockholders an opportunity to register their approval or disapproval of three components of the executives’ compensation; and (iii) a triennial forum that would allow stockholders to comment on and ask questions about the company’s executive compensation policies and practices. The Staff concurred in the exclusion under Rule 14a-8(c), specifically noting that the third part of the proposed program was a “separate and distinct matter” from the first and second parts and,

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therefore, that all of the proposals could be excluded. *See also American Electric Power Company, Inc.* (avail. Jan. 2, 2001) (concurring in the exclusion of a stockholder proposal which sought to: (i) limit the term of director service, (ii) require at least one board meeting per month, (iii) increase the retainer paid to the company's directors, and (iv) hold additional special board meetings when requested by the chairman or any other director, where the Staff found that the proposal constituted multiple proposals despite the proponent's argument that all of the actions were about the "governance of [the company]"); *Duke Energy Corp.* (avail. Feb. 27, 2009) (concurring in the exclusion of a stockholder proposal to impose director qualifications, to limit director pay and to disclose director conflicts of interest, despite the proponent's claim that all three elements related to "director accountability"); *Morgan Stanley* (avail. Feb. 4, 2009) (concurring in the exclusion of a proposal requesting stock ownership guidelines for director candidates, new conflict of interest disclosures and restrictions on director compensation, notwithstanding the proponent's argument that each of those items related to the broad concept of "improving director accountability"); *Centra Software, Inc.* (avail. Mar. 31, 2003) (concurring in the exclusion of a proposal requesting amendments to the bylaws to require separate meetings of the independent directors and that the chairman of the board not be a company officer or employee, where the company argued the proposals would amend "quite different provisions" of the bylaws and were therefore unrelated).

Like the multiple-proposal submissions described in the precedents above, the Proposal actually contains two proposals that request specific and separate actions in violation of Rule 14a-8(c). Specifically, the Proposal plainly requests the Company to prepare and issue two separate reports that address two separate subject matters: the Expanded Company Median Pay Gap Report and the Recruiting Report. Instead of selecting one of the two proposal topics contained in the Initial Submission, the Proponents attempted to cure the two-proposal deficiency in the Initial Submission by dropping language regarding risks associated with emerging public policies and instead attempted to integrate the two proposals.

As a result of the Proponent's revisions to the Initial Submission, the request for a report on "policy, reputational, competitive, and operational risks" is now limited and directly connected to the gender pay gap request because the Proposal only seeks information on those risks "associated" with the "global gender pay gap." In contrast, the Recruiting Report is plainly separate and distinct from the Expanded Company Median Pay Gap Report because it is not limited to recruiting and retention risks that are "associated" with the "global gender pay gap."

The broader focus of the Recruiting Report is most clearly demonstrated by reviewing the way in which the Proponent revised the Initial Submission in response to the Deficiency Notice, as reflected in the comparison of the Proposal marked against the Initial Submission attached to this letter as Exhibit D. If the goal had been to limit the Recruiting Report to risks associated

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with the company's global median gender pay gap, the Proponent could have merely revised the Initial Submission to substitute the words "the company's global median gender pay gap" for the words "emerging public policies addressing the gender pay gap."⁴ Instead, when the Initial Submission was revised, the unifying language "risks to the company associated with" was deleted, resulting in language that asks for two separate risk assessments; one report addresses policy, reputational, competitive, and operational risks associated with the company's global median gender pay gap, and a second addressing risks related to recruiting and retaining female talent (which is not limited to risks associated with the company's global median gender pay gap). Although the Proponent may argue that the Proposal is intended to be read such that both the Expanded Company Median Pay Gap Report and the Recruiting Report are related, we do not believe that is how the language of the Proposal is structured, given the juxtaposition of the two references to "risk", and the use of a comma to separate Recruiting Report language from the description of the Expanded Company Median Pay Gap Report, with the result that stockholders could easily view the Proposal as requesting a Recruiting Report that addresses issues beyond the company's global median pay gap.

Thus, the scope of the Recruiting Report is distinct from, and much broader than, a report addressing gender pay gap risks. For example, the Company could face a variety of risks if it is not able to continue to successfully recruit and retain female talent, and those risks could be unrelated to any risks that might be associated with a global gender pay gap. Moreover, the Supporting Statement does not unify the two reports requested in the Proposal. Instead, the Supporting Statement refers only to the first report requested by the Resolved clause and mandates specific parameters for how the Company is to determine and report the "*global median pay gap*." Finally, we note that the Company satisfied its obligations under Rule 14a-8 by sending the Deficiency Notice; it had no obligation to notify the Proponents that their rewriting of the Proposal in response to the Company's proper and timely Deficiency Notice created a new but different multiple proposals deficiency.

Thus, because the Proposal requests two separate and distinct reports, and because the Proponents failed to limit the Proposal to a single proposal after timely and proper notice, the Proposal may be excluded under Rule 14a-8(c).

⁴ If the Proponent had taken this approach, the Proposal would read, "Shareholders request Bank of America report on the risks to the company associated with the company's global median gender pay gap, including associated reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent."

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

A. Background

Pursuant to Rule 14a-8(i)(7), a stockholder proposal may be excluded if it “deals with a matter relating to the company’s ordinary business operations.” According to the Commission’s release accompanying the 1998 amendments to Rule 14a-8, the term “ordinary business” refers to matters that are not necessarily “ordinary” in the common meaning of the word, but instead the term “is rooted in the corporate law concept [of] providing management with flexibility in directing certain core matters involving the company’s business and operations.” Exchange Act Release No. 40018 (May 21, 1998) (the “1998 Release”). In the 1998 Release, the Commission explained that the underlying policy of the ordinary business exclusion is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for stockholders to decide how to solve such problems at an annual shareholders meeting,” and identified two central considerations that underlie this policy. The first is that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.” The second consideration relates to “the degree to which the proposal seeks to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.” *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). The 1998 Release further states that “[t]his consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” Moreover, as is relevant here, under Rule 14a-8(i)(7) a proposal that seeks to micro-manage a company’s business operations is excludable even if it involves a significant policy issue.

Framing the stockholder proposal in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983) (the “1983 Release”). In Staff Legal Bulletin No. 14J (Oct. 23, 2018) (“SLB 14J”), the Commission reaffirmed that the framework for evaluating whether a proposal micro-manages a company’s ordinary business operations “applies to proposals that call for a study or report.” Under that framework, if “the substance of the report relates to the imposition or assumption of specific timeframes or methods for implementing complex policies” it may properly be excluded under Rule 14a-8(i)(7) on micro-management grounds. *Id.*

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In keeping with the guidance of the 1998 Release and SLB 14J, the Staff has concurred that proposals that seek to direct how a company evaluates complex policies and to impose specific prescriptive methods and metrics to implement those policies attempt to micro-manage a company, and thus are excludable under Rule 14a-8(i)(7). *See, e.g., Amazon.com, Inc.* (avail. Mar. 6, 2018); *Deere & Co.* (avail. Dec. 27, 2017); *Apple Inc. (Jantz)* (avail. Dec. 21, 2017) (each concurring with the exclusion of a proposal requesting the company prepare a report that sought to impose a specific time-frame and specific method for implementing complex policies related to a significant policy issue where the company had already made complex business decisions related to that issue).

B. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Seeks To Micro-Manage The Company

As discussed above in “Background,” the Company is committed to fairly and equitably compensating all of its employees. The Company has invested significant time and resources in establishing, implementing and reporting on the complex and intertwined policies and practices to address gender pay equity that it believes are best suited for the Company, its employees and its stockholders. The Board oversees management’s execution of these strategies and the thorough activities the Company has in place to recruit, retain, train, promote, provide benefits and fairly compensate all employees.

Here, the Proposal requests that the Company prepare reports regarding the “*global median gender pay gap*, including associated policy, reputational, competitive, and operational risks” (the Expanded Company Median Pay Gap Report) as well as “risks related to recruiting and retaining female talent.” The Supporting Statement further dictates that “an adequate” Expanded Company Median Pay Gap Report would include reporting the “percentage *global median pay gap* between male and female employees across race and ethnicity” and must include “base, bonus and equity compensation.” Thus, the Proposal seeks to micro-manage how the Company reports and how the Company analyzes the implications of its gender pay equity initiatives. Notably, the Expanded Company Median Pay Gap Report is similar to (but differs from)⁵ the reporting technique that was mandated in the U.K. As the Company noted when it made the U.K. disclosures under the prescribed format, “companies are required to disclose the mean (average) and median pay gap between women and men across an entire organization. The report does not focus on the compensation that women and men receive for performing the same

⁵ Among other differences, the U.K law provides for separate reporting of “ordinary” (base pay or salary) and “bonus” compensation, and applies only to employees in the U.K.

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or comparable roles.”⁶ The requested Expanded Company Median Pay Gap Report likewise differs from the analysis that the Company prepares when conducting its annual pay equity inspection process (which serves as the basis for the pay equity disclosure that the Company provided in its 2018 proxy statement⁷). In that process, described above in “Background,” the Company and its experts take into account factors such as role in organization, experience, work location and performance. Accordingly, instead of focusing on a policy issue (such as whether the Company should report on or seek to address gender pay equity, both of which the Company already does), the Proposal seeks to dictate that the Company use a specific approach to reporting and analyzing the complex issue of gender pay equality regardless of role, experience or performance. As applied to the Company’s operations, the Proposal thus seeks to address a complex issue by imposing on the Company a prescriptive method to be used as the requested report’s sole metric, and dictates to the Company how that standard is to be applied. Thus, the Proposal falls squarely within the scope of the 1998 Release by “prob[ing] too deeply into matters of a complex nature” and SLB 14J by imposing a “specific method[] for implementing complex policies.”

The Company has thoughtfully established robust policies and practices to help guide pay decisions. The Company’s human resources team, Company leadership and the Board are involved on an ongoing basis to monitor gender pay equity. Under the Company’s existing policies, the Company engages in a thorough and rigorous annual inspection process, and the Company has reported on its gender pay equity under that framework.

As in *Amazon*, *Deere* and *Apple*, the Proposal impermissibly seeks to replace management’s informed and reasoned judgments on how to report, analyze, and act on a complex operational and business issue. As a result, the Proposal seeks to micro-manage the Company’s ordinary business by imposing specific methods for implementing complex policies. Accordingly, the Proposal may be excluded under Rule 14a-8(i)(7).

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2019 Proxy Materials.

⁶ See Bank of America Merrill Lynch UK Gender Pay Gap Report, available at <https://about.bankofamerica.com/en-us/what-guides-us/uk-pay-gap-report.html#fbid=99KvLWRHYA4>.

⁷ See Bank of America Corporation, 2018 Proxy Statement at 26, available at http://media.corporate-ir.net/media_files/IROL/71/71595/BOAM_2018_Proxy.pdf.

GIBSON DUNN

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We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company's Corporate Secretary, at (980) 388-6878.

Sincerely,



Ronald O. Mueller

Enclosure

cc: Ross E. Jeffries, Jr., Bank of America Corporation
Natasha Lamb, Arjuna Capital

EXHIBIT A

Gender Pay Equity

Whereas: The World Economic Forum estimates the gender pay gap costs the economy 1.2 trillion dollars annually. The median income for women working full time in the United States is 80 percent of that of their male counterparts. This disparity can equal nearly half a million dollars over a career. The gap for African American and Latina women is 60 percent and 55 percent. At the current rate, women will not reach pay parity until 2059.

United States companies have begun reporting statistically adjusted equal pay for equal work numbers, assessing the pay of men and women performing similar jobs, but mostly ignore *median* pay gaps. The United Kingdom now mandates disclosure of median gender pay gaps. And while Bank of America reported a 30.5 percent median pay gap for its United Kingdom operations, it has not published median information for its global operations. The median pay gap for United Kingdom financial services companies is 22 percent.

Bank of America reports women earn 99 percent of the compensation received by men on a statistically adjusted equal pay basis. Yet, that statistically adjusted number alone fails to consider how discrimination affects differences in opportunity. In contrast, median pay gap disclosures address the structural bias that affects the jobs women hold, particularly when men hold most higher paying jobs.

Women account for 54 percent of our company's United States workforce, but only 32 percent of senior leadership. *Mercer* finds female executives are 20 to 30 percent more likely to leave financial services careers than other careers. Actively managing pay equity "is associated with higher current female representation at the professional through executive levels and a faster trajectory to improved representation."

Research from *Morgan Stanley*, *McKinsey*, and *Robeco Sam* suggests gender diverse leadership leads to superior stock price performance and return on equity. *McKinsey* states, "the business case for the advancement and promotion of women is compelling." Best practices include "tracking and eliminating gender pay gaps."

Public policy risk is of concern, not only in the United Kingdom, but in the United States as well. The Paycheck Fairness Act pends before Congress. California, Massachusetts, New York, and Maryland have strengthened equal pay legislation. The Congressional Joint Economic Committee reports 40 percent of the wage gap may be attributed to discrimination.

Resolved: Shareholders request Bank of America report on the company's *global median* gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The gender pay gap is defined as the difference between male and female *median* earnings expressed as a percentage of male earnings (Organization for Economic Cooperation and Development).

Supporting Statement: A report adequate for investors to assess company strategy and performance would include the percentage *global median* pay gap between male and female employees across race and ethnicity, including base, bonus and equity compensation.

From: [Natasha Lamb](#)
To: [Jeffries, Ross E. - Legal](#)
Cc: [Walter, Geoffrey E.](#)
Subject: Re: Bank of America Corporation
Date: Thursday, November 29, 2018 2:43:25 PM
Attachments: [image001.png](#)
[Gender Pay Equity Proposal Bank of America 2019 Amended.pdf](#)

[External Email]

Thank you Ross and Geoffrey for bringing the procedural deficiency to our attention. I have made a modest amendment to ensure that it is a single proposal. Please confirm that you have received and accepted the amendment attached. Let me know if you need anything additional. I too look forward to continuing our dialog.

All my best,
Natasha



Natasha Lamb

MANAGING PARTNER / PORTFOLIO MANAGER

WWW.ARJUNA-CAPITAL.COM
natasha@arjuna-capital.com
978.704.0114

Disclaimer: This message and any attachments are intended solely for the use of the intended recipient(s) and may contain information that is privileged, confidential or proprietary. If you are not an intended recipient, please notify the sender, and then please delete and destroy all copies and attachments, as taking of any action on the information is prohibited. Unless specifically indicated, this message is not financial advice or a solicitation of any investment products or other financial product or service. Arjuna Capital is registered under the Investment Advisers Act of 1940, as amended. More information about Arjuna Capital is available on our Form ADV Part 2, available upon request.

From: "Jeffries, Ross E. - Legal" <ross.jeffries@bankofamerica.com>
Date: Wednesday, November 21, 2018 at 3:30 PM
To: Natasha Lamb <natasha@arjuna-capital.com>
Subject: Bank of America Corporation

Natasha,

I hope you are well. This note is to let you know in advance that you will be receiving a deficiency letter from our counsel for the shareholder proposal Arjuna Capital submitted on behalf of Ellen Cassilly and Frank Konhaus. The letter is part of the legal/compliance

review of shareholder proposals and will explain how the deficiency may be cured.

We look forward to continuing our ongoing dialogue with you.

Happy Thanksgiving,
Ross

Ross E. Jeffries, Jr.
Deputy General Counsel and Corporate Secretary
Bank of America Legal Department
100 N. Tryon Street
NC1-007-53-31
Charlotte, NC 28255
(980)388-6878 (o)
(704)517-4711 (m)

This message, and any attachments, is for the intended recipient(s) only, may contain information that is privileged, confidential and/or proprietary and subject to important terms and conditions available at <http://www.bankofamerica.com/emaildisclaimer>. If you are not the intended recipient, please delete this message.

EXHIBIT B

Gender Pay Equity

Whereas: The World Economic Forum estimates the gender pay gap costs the economy 1.2 trillion dollars annually. The median income for women working full time in the United States is 80 percent of that of their male counterparts. This disparity can equal nearly half a million dollars over a career. The gap for African American and Latina women is 60 percent and 55 percent. At the current rate, women will not reach pay parity until 2059.

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Women account for 54 percent of our company's United States workforce, but only 32 percent of senior leadership. *Mercer* finds female executives are 20 to 30 percent more likely to leave financial services careers than other careers. Actively managing pay equity "is associated with higher current female representation at the professional through executive levels and a faster trajectory to improved representation."

Research from *Morgan Stanley*, *McKinsey*, and *Robeco Sam* suggests gender diverse leadership leads to superior stock price performance and return on equity. *McKinsey* states, "the business case for the advancement and promotion of women is compelling." Best practices include "tracking and eliminating gender pay gaps."

Public policy risk is of concern, not only in the United Kingdom, but in the United States as well. The Paycheck Fairness Act pends before Congress. California, Massachusetts, New York, and Maryland have strengthened equal pay legislation. The Congressional Joint Economic Committee reports 40 percent of the wage gap may be attributed to discrimination.

Resolved: Shareholders request Bank of America report on the risks to the company associated with emerging public policies addressing the gender pay gap, including associated reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The gender pay gap is defined as the difference between male and female *median* earnings expressed as a percentage of male earnings (Organization for Economic Cooperation and Development).

Supporting Statement: A report adequate for investors to assess company strategy and performance would include the percentage *global median* pay gap between male and female employees across race and ethnicity, including base, bonus and equity compensation.

ARJUNA  CAPITAL
ENLIGHTENED INVESTING

November 7, 2018

VIA OVERNIGHT MAIL

Bank of America Corporation
ATTN: Ross Jeffries, Jr., Corporate Secretary
Hearst Tower
214 North Tryon Street
NC1-027-18-05
Charlotte, North Carolina 28255

To whom it may concern:

Arjuna Capital is an investment firm focused on sustainable and impact investing.

I am hereby authorized to notify you of our intention to lead file the enclosed shareholder resolution with Bank of America Corporation on behalf of our clients Ellen Cassilly and Frank Konhaus. Arjuna Capital submits this shareholder proposal for inclusion in the 2019 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934 (17 C.F.R. § 240.14a-8). Per Rule 14a-8, Ellen Cassilly and Frank Konhaus hold more than \$2,000 of BAC common stock, acquired more than one year prior to today's date and held continuously for that time. Our clients will remain invested in this position continuously through the date of the 2019 annual meeting.

Enclosed please find verification of this position and letter from Ellen Cassilly and Frank Konhaus authorizing Arjuna Capital to undertake this filing on their behalf. We will send a representative to the stockholders' meeting to move the shareholder proposal as required by the SEC rules.

We would welcome discussion with Bank of America Corporation Incorporated about the contents of our proposal.

Please direct any written communications to me at the address below or to natasha@arjuna-capital.com. Please also confirm receipt of this letter via email.

Sincerely,



Natasha Lamb
Managing Partner
Arjuna Capital
1Elm Street
Manchester, MA 01944

Enclosures

October 31, 2018

Natasha Lamb
Managing Partner
Arjuna Capital
353 W. Main Street
Durham, NC 27701

Dear Ms. Lamb,

We hereby authorize Arjuna Capital to file a shareholder proposal on our behalf at Bank of America Corp (BAC) regarding gender pay equity for the company's annual meeting in 2019.

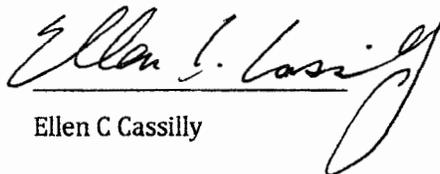
We are the beneficial owners of more than \$2,000 worth of common stock in Bank of America Corp (BAC) that we have held continuously for more than one year. We intend to hold the aforementioned shares of stock through the date of the company's annual meeting in 2019.

We specifically give Arjuna Capital full authority to deal, on our behalf, with any and all aspects of the aforementioned shareholder proposal. We understand that our names may appear on the corporation's proxy statement as the filers of the aforementioned proposal.

Sincerely,



Frank B Konhaus



Ellen C Cassilly

c/o Arjuna Capital
353 W. Main Street
Durham, NC 27701

charles SCHWAB

November 7, 2018

ARJUNA CAPITAL LLC
353 W MAIN ST
DURHAM NC 27701

To WHOM IT MAY CONCERN:

Re: Ellen Casilly & Frank Konhaus / ***

This letter is to confirm that Charles Schwab & Co. is the record holder for the beneficial owner of the account above ***, which Arjuna Capital manages and which holds 110 shares of common stock in Bank of America (BAC).*

As of November 7, 2018, Ellen Casilly & Frank Konhaus held, and have held continuously for at least one year, 110 shares of Bank of America (BAC) stock.

This letter serves as confirmation that the account holder listed above is the beneficial owner of the above referenced stock.

Sincerely,



Jonnalee Owens
Relationship Specialist/Advisor Services



Case ID # AM-2172378

Independent investment advisors are not owned by, affiliated with, or supervised by Charles Schwab & Co., Inc. ("Schwab"). ©2016 Charles Schwab & Co., Inc. All rights reserved.

Member SIPC. CRS 00038 (0609-9534) 09/16 SGC48613-00

EXHIBIT C

November 21, 2018

VIA EMAIL

Natasha Lamb
Arjuna Capital
1 Elm Street
Manchester, MA 01944
natasha@arjuna-capital.com

Dear Ms. Lamb:

I am writing on behalf of Bank of America Corporation (the “Company”), which received on November 8, 2018, the stockholder proposals you submitted on behalf of Ellen Cassilly and Frank Konhaus (the “Proponents”) entitled “Gender Pay Equity” pursuant to Securities and Exchange Commission (“SEC”) Rule 14a-8 for inclusion in the proxy statement for the Company’s 2019 Annual Meeting of Stockholders (the “Proposals”).

The Proposals contain certain procedural deficiencies, which SEC regulations require us to bring to your attention.

Pursuant to Rule 14a-8(c) under the Exchange Act, a stockholder may submit no more than one proposal to a company for a particular stockholders’ meeting. We believe that the Proposals constitute more than one stockholder proposal. Specifically, while the Resolved clause relates to a report on the risks associated with emerging public policies addressing the gender pay gap, we believe that the Supporting Statement sets forth a separate proposal because it calls for a different report. The Proponents can correct this procedural deficiency by indicating which proposal the Proponents would like to submit and which proposal the Proponents would like to withdraw.

The SEC’s rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me care of Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue NW, Washington, DC 20036.

If you have any questions with respect to the foregoing, please contact me at 202-955-8500. For your reference, I enclose a copy of Rule 14a-8.

Sincerely,



Ronald O. Mueller

Enclosure

Rule 14a-8 – Shareholder Proposals

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

(a) *Question 1: What is a proposal?* A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) *Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?*

(1) 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.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D (§240.13d-101), Schedule 13G (§240.13d-102), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter) and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) *Question 3:* How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) *Question 4:* How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) *Question 5:* What is the deadline for submitting a proposal?

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q (§249.308a of this chapter), or in shareholder reports of investment companies under §270.30d-1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) *Question 6:* What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under §240.14a-8 and provide you with a copy under Question 10 below, §240.14a-8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) *Question 7:* Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) *Question 8:* Must I appear personally at the shareholders' meeting to present the proposal?

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) *Question 9:* If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

(1) *Improper under state law:* If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Note to paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) *Violation of law:* If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) *Violation of proxy rules:* If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including §240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) *Personal grievance; special interest:* If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) *Relevance:* If the proposal relates to operations which 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;

(6) *Absence of power/authority:* If the company would lack the power or authority to implement the proposal;

(7) *Management functions*: If the proposal deals with a matter relating to the company's ordinary business operations;

(8) *Director elections*: If the proposal:

- (i) Would disqualify a nominee who is standing for election;
- (ii) Would remove a director from office before his or her term expired;
- (iii) Questions the competence, business judgment, or character of one or more nominees or directors;
- (iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- (v) Otherwise could affect the outcome of the upcoming election of directors.

(9) *Conflicts with company's proposal*: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to paragraph (i)(9): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) *Substantially implemented*: If the company has already substantially implemented the proposal;

Note to paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by §240.14a-21(b) of this chapter a single year (i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by §240.14a-21(b) of this chapter.

(11) *Duplication*: If the proposal 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;

(12) *Resubmissions*: If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

- (i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;
- (ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or
- (iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) *Specific amount of dividends*: If the proposal relates to specific amounts of cash or stock dividends.

(j) *Question 10*: What procedures must the company follow if it intends to exclude my proposal?

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) *Question 11*: May I submit my own statement to the Commission responding to the company's arguments? Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) *Question 12*: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) *Question 13*: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, §240.14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before its files definitive copies of its proxy statement and form of proxy under §240.14a-6.

EXHIBIT D

Gender Pay Equity

Whereas: The World Economic Forum estimates the gender pay gap costs the economy 1.2 trillion dollars annually. The median income for women working full time in the United States is 80 percent of that of their male counterparts. This disparity can equal nearly half a million dollars over a career. The gap for African American and Latina women is 60 percent and 55 percent. At the current rate, women will not reach pay parity until 2059.

United States companies have begun reporting statistically adjusted equal pay for equal work numbers, assessing the pay of men and women performing similar jobs, but mostly ignore *median* pay gaps. The United Kingdom now mandates disclosure of median gender pay gaps. And while Bank of America reported a 30.5 percent median pay gap for its United Kingdom operations, it has not published median information for its global operations. The median pay gap for United Kingdom financial services companies is 22 percent.

Bank of America reports women earn 99 percent of the compensation received by men on a statistically adjusted equal pay basis. Yet, that statistically adjusted number alone fails to consider how discrimination affects differences in opportunity. In contrast, median pay gap disclosures address the structural bias that affects the jobs women hold, particularly when men hold most higher paying jobs.

Women account for 54 percent of our company's United States workforce, but only 32 percent of senior leadership. *Mercer* finds female executives are 20 to 30 percent more likely to leave financial services careers than other careers. Actively managing pay equity "is associated with higher current female representation at the professional through executive levels and a faster trajectory to improved representation."

Research from *Morgan Stanley*, *McKinsey*, and *Robeco Sam* suggests gender diverse leadership leads to superior stock price performance and return on equity. *McKinsey* states, "the business case for the advancement and promotion of women is compelling." Best practices include "tracking and eliminating gender pay gaps."

Public policy risk is of concern, not only in the United Kingdom, but in the United States as well. The Paycheck Fairness Act pends before Congress. California, Massachusetts, New York, and Maryland have strengthened equal pay legislation. The Congressional Joint Economic Committee reports 40 percent of the wage gap may be attributed to discrimination.

Resolved: Shareholders request Bank of America report on ~~the risks to the company associated with emerging public policies addressing the~~[the company's global median](#) gender pay gap, including associated [policy](#), reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

The gender pay gap is defined as the difference between male and female *median* earnings expressed as a percentage of male earnings (Organization for Economic Cooperation and Development).

Supporting Statement: A report adequate for investors to assess company strategy and performance would include the percentage *global median* pay gap between male and female employees across race and ethnicity, including base, bonus and equity compensation.