

February 10, 2020

Via email: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

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

Re: Bank of America Supplemental Request to Exclude Shareholder Proposal

Ladies and Gentlemen:

We are in receipt of the supplemental letter from Bank of America regarding its no action request on our proposal regarding the Statement of Purpose of the Corporation. In its latest correspondence, the Company repeats its prior arguments regarding vagueness and ordinary business.

On the vagueness issue, we do not believe we need to add any more to our argument. The proposal would not be difficult for investors to understand, they would not lack information needed in order to decide how to vote, nor would it be difficult for the company and board to know how to implement the Proposal. Therefore, the proposal is not excludable under Rule 14a-8(i)(3).

The latest letter also makes a remarkable suggestion that the Company's commitment to the BRT statement does not represent a paradigm shift. Yet, there is pervasive evidence that the BRT, and the Company as a member, has attempted to convey the new statement as a profound new approach, and the CEO in embracing it certainly raises this question. Moreover, the debate surrounding the Statement certainly demonstrates that other observers believe it is a paradigm shift.

As such, we believe it is appropriate, as requested in the proposal, for shareholders to ask the "Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company's governance documents, policies or practices."

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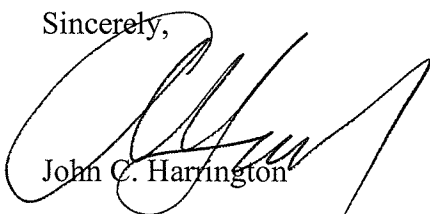
I and my fellow investors know that simple statements of the CEO or management do not hold the same status as the corporation's governance documents. Those governance documents are in effect the corporation's "constitution," and upon which fiduciary duties are built and evaluated. While it may be easy enough for our CEO and others to sign on to the Business Roundtable statement, in the absence of actions like our proposal we believe this will serve as a meaningless gesture until it is enforceable through corporate governance documents or corporate law. The scenario suggested by the company: no enforcement, no legislation, no legal or judicial oversight. No state, municipal or federal law to enforce the new "purpose."

For example, the idea of a change in the corporate "purpose" implicates fundamental governance questions for the company, for whom the governance documents currently state that the only purpose of the company is literally anything the law allows: "engage in any lawful act or activity for which corporations may be organized." We believe, at a minimum, this corporate purpose should be revised consistent with the Statement. But the proposal leaves it for the board to assess issues of this kind.

In its reassertion of ordinary business arguments, Supplemental Letter from the Company attempts again to apply a narrow interpretation of the proposal's significant policy focus, which we have addressed in our prior correspondence. To reiterate concisely here, the thrust of the proposal is clearly on the Company's implementation of the controversial Statement of Purpose signed by the CEO. The Statement of Purpose implicates a significant policy issue as demonstrated by the widespread controversy associated with the statement. The controversy is *significant to the company*, regardless of the board and management's various stakeholder oriented programs, because the CEO signed on to the Statement.

Therefore, we urge the Staff to deny the Company's no action request.

Sincerely,



John C. Harrington

Cc: Ronald Mueller

Via e-mail: [rmueller@gibsondunn.com](mailto:rmueller@gibsondunn.com)

Sanford Lewis

Via e-mail: [sanfordlewis@strategiccounsel.net](mailto:sanfordlewis@strategiccounsel.net)

February 7, 2020

VIA E-MAIL

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

Re: *Bank of America Corporation*  
*Supplemental Letter Regarding Stockholder Proposal of John C. Harrington*  
*Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

On December 20, 2019, we submitted a letter (the “No-Action Request”) on behalf of our client, Bank of America Corporation (the “Company”), to inform the staff of the Division of Corporation Finance (the “Staff”) that the Company intends to omit from its proxy statement and form of proxy for its 2020 Annual Meeting of Stockholder (collectively, the “2020 Proxy Materials”) a stockholder proposal (the “Proposal”) and recitals and a statement in support thereof (such recitals and statement, the “Supporting Statement”) received from John C. Harrington (the “Proponent”). The No-Action Request explains the bases for our view that the Proposal properly may be excluded from the 2020 Proxy Materials pursuant to Rule 14a-8(i)(3), because the Proposal is impermissibly vague and indefinite so as to be inherently misleading, and Rule 14a-8(i)(7), because the Proposal focuses on the Company’s general business practices and policies, and therefore deals with matters relating to the Company’s ordinary business operations.

On January 17, 2020, the Proponent submitted a response to the No-Action Request (the “Response”). A copy of the Response is attached hereto as Exhibit A.

The Proposal relates to the alignment of the Company’s governance documents, policies, plans, goals, metrics and practices with the “Statement of the Purpose of a Corporation” issued by the Business Roundtable (the “BRT Statement”), stating:

**Resolved**, that shareholders request our Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company’s current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company’s governance documents, policies or practices.

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In the Response, the Proponent first asserts that, even though the Proposal requests the Company to address “changes to our Company’s governance documents, policies or practices” to address any incongruities with the BRT Statement, stockholders do not need to know what the BRT Statement says in order to make an informed voting decision. Perhaps recognizing that this assertion is untenable, the Response also claims that by quoting just one of the five principle commitments set forth in the BRT Statement, the Proposal “is complete enough” for stockholders to understand everything that they would be asking the Board to review and change if they were to vote on the Proposal.

We recognize that the Staff has in recent years applied a high standard before concurring that a proposal is so vague and incomplete as to be misleading under Rule 14a-9 and thus to justify exclusion under Rule 14a-8(i)(3). Nevertheless, as demonstrated by *eBay, Inc.* (avail. Apr. 10, 2019)(concurring with exclusion, the Staff noted “neither shareholders nor the Company would be able to determine with any reasonable certainty the nature of the “reform” the Proposal is requesting”), the standard continues to exist. The Proposal and Supporting Statement clearly fail to satisfy that standard. By referencing only one of the five principle components of the BRT Statement, the Supporting Statement would mislead stockholders to believe that the Proposal relates only to environmental sustainability practices. The Response likewise claims that the only part of the BRT Statement that “is relevant for the Proposal” is the part of the BRT Statement addressing communities and the environment. However, as discussed in the No-Action Request, the BRT Statement also addresses commitments to customers, employees, suppliers and stockholders. As in *eBay, Inc.*, the Proposal and Supporting Statement are vague and misleading as to the nature of the “changes” that the Proposal requests. Stockholders would not know that the BRT Statement addresses commitments beyond communities and the environment, and the Company cannot determine whether the Proposal relates only to those commitments, as indicated by the Response, or to other commitments in the BRT Statement or all of the commitments in the BRT Statement. As a result, we respectfully believe that the Proposal is *not* “complete enough” and instead is properly excludable under Rule 14a-8(i)(3).

Less than a page after asserting that stockholders do not need to have read the BRT Statement or even to have any familiarity with the Business Roundtable to be able to understand the Proposal, the Response claims that ***“the Proposal focuses on the significant policy issue of the Company’s sign-on to the Statement, and what this commitment means for the Company”*** (emphasis in original). The Response then sets forth more than five pages of quotes from academics, editorialists and commentators debating, in the abstract and not in the context specifically of the Company, the appropriateness of the commitments set forth in the BRT Statement. Without further analysis, the Response concludes by asserting that the quotes demonstrate that the Proposal addresses a significant policy issue that transcends ordinary business.

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There are, however, at least three faults with these assertions in the Response.

First, the Response's attempt to distinguish between the BRT Statement and the commitments that comprise the BRT Statement is an artificial distinction. This is demonstrated by the language in the Response quoted above, which acknowledges that, to understand the BRT Statement, one must understand the commitments that comprise it and "what this commitment means for the Company."<sup>1</sup> As addressed in the No-Action Request, those commitments involve numerous aspects of the Company's ordinary business operations.

Second, the Proposal does not focus on the "sign-on" to the BRT Statement. Instead, the Proposal addresses the alignment of the Company's governance documents, policies, plans, goals, metrics and practices with the BRT Statement, and requests that the Board report on how the Company's "governance documents, policies or practices" can be changed to reconcile "any incongruities" with the BRT Statement. As such, and as discussed in the No-Action Request, the Proposal is focused on whether and how the Company might change five aspects of the Company's ordinary business operations: its customer relations, its employee relations, its supplier relations, its community relations, and its strategies for enhancing stockholder value.<sup>2</sup> As with *Amazon.com, Inc. (Domini Impact Equity Fund and the New York State Common Retirement Fund)* (avail. Mar. 28, 2019) ("*Amazon 2019*") and the other precedents cited in the No-Action Request, the Proposal encompasses a wide range of issues implicating the Company's ordinary business operations within the meaning of Rule 14a-8(i)(7), and therefore may properly be excluded under Rule 14a-8(i)(7).

Finally, while we cannot speak for all companies, the commitments articulated in the BRT Statement are essentially the same as the principles that already guide how the Company operates. As explained in the No-Action Request, the Company's commitment to its stakeholders is not new, and is thoroughly reflected through the Company's commitment to Responsible Growth, which closely aligns with the BRT Statement's five core commitments. Responsible Growth entails growing and winning in the marketplace through

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<sup>1</sup> The BRT Statement, which is attached to the No-Action Request as Exhibit B, states "We commit to:" and then addresses five topics. See <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>. The Response appears again to misleadingly suggest that the BRT Statement consists of a single commitment when in fact it addresses multiple commitments.

<sup>2</sup> The fact that the Proposal focuses on the Company's "governance documents, policies or practices" is demonstrated by the recent Staff determination in *JPMorgan Chase & Co.* (avail. Feb. 5, 2020), in which the Staff concurred that the company had substantially implemented a substantially similar proposal because the company's governance and management system "already operates in accordance with the principles set forth in the BRT Statement."



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the Company's customer-focused strategy and managing risk well.<sup>3</sup> The Company addresses sustainable Responsible Growth across three areas: sharing the Company's success, including through its focus on ESG leadership; being a great place to work; and driving operational excellence so that the Company can continue to invest in its employees and capabilities. For additional information on the Company's business practices, see <https://about.bankofamerica.com/en-us/what-guides-us/our-business-practices.html>.

Thus, contrary to the Proponent's suggestions in the Response, the Company's commitment to all of its stakeholders through the BRT Statement does not represent a paradigm shift and does not raise a significant policy issue that transcends the Company's ordinary business. Instead, the Proposal focuses on the Company's governance documents, policies and practices as they relate to five aspects of the Company's ordinary business operations. As such, the Proposal may properly be excluded from the 2020 Proxy Materials under Rule 14a-8(i)(7) as involving the Company's ordinary business operations.

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](mailto: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  
John C. Harrington

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<sup>3</sup> In addition to the discussion in the No-Action Request, Responsible Growth is discussed in more detail on the Company's website at <https://about.bankofamerica.com/en-us/what-guides-us/driving-responsible-growth.html> and <https://about.bankofamerica.com/en-us/who-we-are/our-strategy.html#fbid=09IzzpKSEyR>.

**EXHIBIT A**



January 17, 2020  
*Via electronic mail*

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 Statement of Purpose of the Corporation by John Harrington, President, Harrington Investments, Inc.

Ladies and Gentlemen:

I am the beneficial owner of common stock of Bank of America Corporation (the "Company") and have submitted a shareholder proposal (the "Proposal") to the Company. I am in receipt of a letter dated December 20, 2019 ("Company Letter") sent to the Securities and Exchange Commission by Ronald Mueller of Gibson Dunn. In that letter, the Company contends that the Proposal may be excluded from the Company's 2020 proxy statement. A copy of this reply is being emailed concurrently to Ronald Mueller.

### SUMMARY

Proponents submitted a shareholder proposal to Bank of America requesting the following:

**Resolved**, that shareholders request our Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company's governance documents, policies or practices.

The full proposal is attached as Exhibit 1.

The Company argues for exclusion of the Proposal on the basis of Rules 14a-8(i)(3) and 14a-8(i)(7).

The Proposal is not vague or misleading within the meaning of Rule 14a-8(i)(3); it clearly describes the essence of the commitment made by our CEO in endorsing the Statement of Purpose of a Corporation without requiring shareholders to know or have read that document. The proposal states a clear example of what the proponent believes are incongruities in company policy. As such, the Proposal is not excludable on the basis of Rule 14a-8(i)(3).



Nor does the proposal address ordinary business. Instead it addresses a high-profile controversy in which the Company's CEO has, in his endorsement of the Statement of the Purpose of the Corporation, created an obvious inference that the Statement is salient to the Company's own operations. The controversy created by the Statement has to do with the degree to which a corporation is responsible to its stakeholders, beyond its investors. The Business Roundtable articulated the statement in its unequivocal commitment to stakeholder interests, as going "beyond shareholder primacy".

Furthermore, in its focus on the relationship between the Statement of Purpose and the Company's governance documents, the Proposal does not focus on the day to day management of the company or its relationships with stakeholders. Instead its purpose is to encourage the board and management to more rigorously consider, at a governance level, how to address the major policy issues for the Company that are raised by the statement the CEO endorsed, the controversial Statement of Purpose of the Corporation. Accordingly, we do not believe the Proposal is excludable on the basis of Rule 14a-8(i)(7).

## ANALYSIS

### I. Rule 14a-8(i)(3)

The Company Letter argues that the Proposal is vague, because it cannot be understood without referring to materials outside the Proposal. In particular, the Company argues that there are specific terms and requirements of the Statement that are inadequately described in the Proposal.

However, the Proposal clearly enough references the thrust of the Business Roundtable Statement that is relevant for the Proposal itself, specifically that;

"...our Company's Chairman and Chief Executive Officer, in August 2019, signed a 'Statement on the Purpose of a Corporation', committing our Company to all stakeholders, supporting "... the communities in which we work... respect[ing] the people in our communities and protect[ing] the environment by embracing sustainability practices across our businesses".

The Proponents perceive incongruence between *these specific commitments* to "all stakeholders", to respect and support the communities in which the Company operates and protect the environment, and the actions of the Company. The Company's financing of the fossil fuel industry, described in the Proposal, is one example of incongruence in the eyes of the Proponents given the company's ostensible "embrace of sustainability practices across our businesses:"

**Whereas**, in 2016 through 2018, our Company financed the fossil fuel industry with over \$106 billion in loans; and



**Whereas**, according to *Banking on Climate Change: Fossil Fuel Report Card 2019*, our bank was among the top banks funding one hundred key oil, gas and coal companies expanding fossil fuels; and

**Whereas**, our Company financed tar sands production companies, Arctic and ultra- deep-water oil and gas companies, fracked oil and gas producers and transporters and liquefied natural gas companies, mining companies and coal power companies;

The question of vagueness in this context is whether shareholders would have a reasonable idea of what is being discussed, and what they are being asked to vote on in the Proposal. The language of the Proposal clearly explains that our CEO, by signing a certain statement, has made a new commitment on behalf of our Company that appears to be contradicted by company practices and governance documents. It is evident that the description of the Statement contained in the Proposal is complete enough to allow shareholders to vote on whether or not they want the Board to engage in further review of the Statement, and clarify whether the Company's governance documents need to be amended in order to advance this new commitment. The shareholders need not have read the full Statement, or even have any familiarity with the Business Roundtable, to understand what is at issue in the Proposal. The Company tries to argue that the Proposal's request that the Board review the Statement of the Purpose of a Corporation makes the Statement a central aspect of the Proposal, and therefore that it is necessary for stockholders to understand what is contained in the full Statement in order to reasonably determine what actions or measure the Proposal requires. *Company Letter*, pages 7-8. As explained above, this is not the case.

Since shareholders are able to determine what actions or measures the Proposal requires without reference to outside materials, the Proposal is not excludable on the basis of Rule 14a-8(i)(3).

## II. Rule 14a-8(i)(7)

The Company Letter asserts that the issues raised by the proposal constitute ordinary business, excludable for purposes of Rule 14a-8(i)(7). However, as shown below, the Proposal addresses a current, significant policy issue that transcends ordinary business, one which is clearly significant to the Company. Therefore, the proposal is not excludable for purposes of Rule 14a-8(i)(7).

The Company misrepresents the Proposal's core request as seeking a "review of the Company's relations with broad categories of stakeholders", *Company Letter*, page 12, that are the *content* of the Statement, e.g. studying and reporting upon how the Company manages the day-to-day details of "the policies and procedures that the Company has implemented to govern its relations with employees, customers, suppliers and the communities in which the Company operates." *Company Letter*, page 9. For example, the Company reasons that, because the Statement's first commitment is about delivering value to customers, "Therefore the review requested in the Proposal **necessarily means** the Proposal relates to the Company's relations with its customers, as it concerns "matters relating to customer service and satisfaction." *Company Letter*, page 14. The Company makes this argument for each of the five categories of stakeholders. In line with

this reasoning, the Company argues that the Proposal is “fatally over-broad”.

To the contrary, the Proposal in no way addresses the Company's relations with the categories of stakeholders delineated in the Statement. Instead, *the Proposal focuses on the significant policy issue of the Company's sign-on to the Statement, and what this commitment means for the Company.*

It is shocking that the Company writes, “There is nothing more quintessentially ordinary business than asking the Company to review its purpose as a corporation and corporate citizen.” *Company Letter*, page 23. We could not disagree more, especially given the outpouring of research, analysis, journalism and debate following the August 2019 issuance of the Statement.

### ***The Newly Changed Purpose of the Corporation, Promulgated by the BRT Statement of Purpose of the Corporation, is a Significant Policy Issue***

The August 2019 issuance of the Business Roundtable's new Statement on the Purpose of the Corporation quickly gained high visibility in the media and garnered significant positive response from the public, while simultaneously generating a cloud of confusion and controversy. The Statement reignited a long-simmering debate regarding the public and private purposes of the Corporation, and raised this debate to a topic of transcendent policy focus.

The Business Roundtable has had a long-standing practice of issuing Principles of Corporate Governance, beginning in 1997, when those principles articulated the theory of shareholder primacy – that corporations exist principally to serve shareholders, and relegating the interests of any other stakeholders to positions that were strictly derivative of the duty to shareholders. But the new statement, which supersedes prior BRT statements, seems to imply that the duty to stakeholders is no longer derivative of the duty to stockholders.<sup>1</sup>

As many commentators have long observed, the firm's balancing act between interests of shareholders and other stakeholders can be in alignment, but it can also be in conflict. For instance, Law Professor Jill E. Fisch, considering the role of shareholder primacy in consideration of economic efficiency has noted:

Within a framework of welfare economics in which the goal is societal wealth maximization, firm value is conceptually distinct from shareholder value. Corporations provide value to a variety of nonshareholder groups, including managers, employees, creditors, customers, and suppliers. A corporation provides value to its creditors in the form of interest on and repayment of its debt. It provides value to managers and other employees through jobs that yield compensation, fringe benefits, perquisites, and, in some cases, the development of specialized skills or marketable reputations. A corporation provides value to its customers and its suppliers through voluntary surplus-producing market transactions.

Firm value will, by its nature, exceed shareholder value because most or all of the value provided to nonshareholder stakeholders, in the form of salaries, interest payments, and so forth, is explicitly excluded from shareholder-oriented concepts of firm value such as corporate profit. Similarly, because it is distributed to nonshareholder stakeholders, this excess does not affect shareholder returns and ultimately will not be reflected in stock

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<sup>1</sup> *How Will Companies and CEOs Meet the Challenges of Corporate Social Responsibility*. Cydney Posner, [Mondaq.com](http://www.mondaq.com/unitedstates/x/878330/Shareholders/How+Will+Companies+And+CEOs+Meet+The+Challenges+Of+Corporate+Social+Responsibility). December 20, 2019.  
<http://www.mondaq.com/unitedstates/x/878330/Shareholders/How+Will+Companies+And+CEOs+Meet+The+Challenges+Of+Corporate+Social+Responsibility>



price....

Surprisingly, little research demonstrates a correlation between doing well and doing good, that is, a correlation between corporate performance and decisions that favor the interests of nonshareholder stakeholders or the public at large. Despite the existence of an extensive literature arguing for increased corporate social responsibility, there is scant evidence that corporate decisions favoring the interests of workers, customers, or the community actually increase the size of the pie, as opposed to reflecting transfers of wealth from one group of stakeholders to another.

Even if the interests of corporate stakeholders are, in many cases, aligned, sometimes they are not. In at least a subset of corporate decisions, there is a true conflict between the interests of different stakeholders, and a decision that benefits one class of stakeholders will harm another. Moreover, many of the corporate rules ... are addressed to these types of intra-capital structure battles. Takeover regulation, the scope of director and officer liability, board structure, and executive compensation all have the potential to affect wealth transfers between stakeholders.<sup>2</sup>

Numerous legal and corporate scholars have written articles and reports addressing the new statement, arguing that the statement itself violates the fiduciary duties of directors, that it involves misleading communications and that it unlawfully attempts to supplant shareholder primacy.

For instance, an article in *Fiduciary News* asked outright, “Did Business Roundtable Just Break a Fiduciary Oath?”<sup>3</sup> In this article, the author explained:

“The issue of which constituency – or “stakeholder” – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally) possible. That all changed on August 19, 2019.”

While exploring the laudable aspects of commitments to corporate social responsibility, the author of the article returned to the principles put forth by Milton Friedman, in which Friedman noted that;

“the doctrine of ‘social responsibility’ taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book *Capitalism and Freedom*, I have called it a ‘fundamentally subversive doctrine’ in a free society, and have said that in such a society, ‘there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception fraud.’

But the author of the article concluded;

<sup>2</sup> Fisch, Jill E., “Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy” (2006). *Faculty Scholarship*. Paper 1043. [http://scholarship.law.upenn.edu/faculty\\_scholarship/1043](http://scholarship.law.upenn.edu/faculty_scholarship/1043)

<sup>3</sup> Christopher Carosa, “Did Business Roundtable Just Break A Fiduciary Oath?”, *FiduciaryNews.com*. August 27, 2019. <http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/>.

“With this in mind, the next question might be: What potential fiduciary liability might an investment adviser have by knowingly using client assets to purchase shares of companies whose CEOs are on record of subordinating shareholder interest?”

This same concern about subordination of investor interests was also raised by an array of respected voices on corporate governance, from the Council of Institutional Investors to Delaware law expert Charles Elson, in coverage by *Pensions and Investments*:

“In its own statement, the Council of Institutional Investors — whose pension fund, endowment and foundation members hold a collective \$4 trillion in assets — warned the policy shift would diminish shareholder rights and, in the absence of new mechanisms to assure accountability of boards and management, would lead to “accountability to no one.”

Long-term views and strategies are important, CII officials said in the statement, but “if ‘stakeholder governance’ and ‘sustainability’ become hiding places for poor management,” the economy or public equity markets will suffer.

### **‘Very bad results’**

Charles M. Elson, the Edgar S. Woolard Jr. Chair of Corporate Governance and director of the John L. Weinberg Center for Corporate Governance at the University of Delaware, Newark, views the new Business Roundtable policy as “a mistake.”

Before Business Roundtable members adopted the shareholder-first policy in 1997, companies trying to appeal to all stakeholders “led to very bad management and very bad results — for their investors and their employees. The folks who are ultimately hurt are working men and women” whose pension funds invest in the companies, Mr. Elson said.

Returning to that policy “will come back to haunt” company executives, especially if shareholder value drops, Mr. Elson warned. He said he hopes the CEOs will soften their approach as they move to implement the change, and take care to keep shareholders at the front of the line.

“The point is, these people invested in you. What happens the next time you ask for their money?” he said.”<sup>4</sup>

The driving force behind the new Statement appears to be a groundswell of sentiment from the public, and particularly employees, that companies must have a purpose beyond profiteering. As reported in *Fortune Magazine's* coverage of the BRT statement, the driver for this new initiative of BRT was widespread public and employee unrest regarding the purpose of the corporation and the need for a public mission:

“More and more CEOs worry that public support for the system in which they’ve

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<sup>4</sup> Hazel Bradford, “CEOs face pushback over stakeholder refocus”, *Pensions and Investments*, September 02, 2019. <https://www.pionline.com/governance/ceos-face-pushback-over-stakeholder-refocus>.



operated is in danger of disappearing.

“Society gives each of us a license to operate,” [IBM](#) CEO Ginni Rometty told me this August. “It’s a question of whether society trusts you or not. We need society to accept what it is that we do.”

...

*Public interest in corporate responsibility is unusually high:* A July survey of 1,026 adults for Fortune by polling firm New Paradigm Strategy Group found that nearly three-quarters (72%) agree that public companies should be “mission driven” as well as focused on shareholders and customers. *Today, as many Americans (64%) say that a company’s “primary purpose” should include “making the world better” as say it should include “making money for shareholders.”*

*But CEOs invariably say the constituency that’s truly driving their newfound social activism is their employees. Younger workers expect even more from employers on this front. Though, according to the poll, fewer than half of Americans overall (46%) say that CEOs should take a stance on public issues, support for such action is overwhelming among those ages 25 to 44. Millennials, in particular, may be driving the change more than anyone—and, more important, they’re choosing to work at companies that are driving change too. Among those ages 25 to 34 in the Fortune/NP Strategy poll, 80% say they want to work for “engaged companies.”<sup>5</sup> (Emphasis added).*

Those who are longtime observers and participants in the debate on corporate social responsibility, such as Nell Minow of Value Edge Investors, have suggested that the Statement is really more of an attempt to avoid rather than to create accountability:

*“We’ve seen this before.* The last time the BRT deployed stakeholder rhetoric it was during the 1980’s era of hostile takeovers, when a feint to the interests of anyone other than shareholders was the best way to entrench management. The CEOs who signed this statement know that accountability to everyone is accountability to no one. It’s like a shell game where the pea of any kind of obligation is always under the shell you didn’t pick. It’s shoot an arrow at the wall and then draw a bull’s-eye around it goal-setting.

...

There is also a serious credibility problem here. Barry Ritholtz notes dryly, “Scan the list of 181 signatories to the recent memo and it’s a Who’s Who of corporate behavior that has burdened and disadvantaged the very stakeholders they will now champion.” His exhaustive lists include many specific examples of opposition to unions, health, environmental, consumer protection and safety rules, and efforts to reduce shareholder

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<sup>5</sup> Alan Murray, “America’s CEOs Seek a New Purpose for the Corporation”, *Fortune*, August 19, 2019. <https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/>

oversight."<sup>6</sup>

Value Edge Investors has compiled responses to the Statement, collecting all manner of sources, from reader responses to top news publication commentary. For instance, it notes *Fortune* reader responses, like this one:

*"Every CEO focuses extensively on the "needs of society" ... until they have a bad quarter."*<sup>7</sup>

Similarly, on *Bloomberg*:

*"It certainly sounds enlightened — and if Dimon's goal is merely to sound enlightened and thereby improve JP Morgan's image, then his move is a smart one. If, however, he genuinely means what he says, then his proposal is misguided. Its implementation will be at best wasteful and at worst harmful to investors, workers and society... Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril."*<sup>8</sup>

A commentator at *Slate* demonstrates critique:

*"Now, you might be tempted to think that, by issuing a feel good PR statement about how corporations really have society's best interests at heart, and aren't just cold-blooded profit machines, America's CEOs are trying to put a warm face on U.S. capitalism and beat back demands for more fundamental reforms, such as Warren's, that might actually give workers a voice in corporate decision-making. But that would be cynical, wouldn't it?"*<sup>9</sup>

And authors at the *Wall Street Journal*, explain:

"While 181 CEOs say they are committed to serving 'all stakeholders,' when it comes to assessing their own performance, there is really only one master.

Now, even as investor interests are increasingly cast as the root of many social problems, I offer this word of encouragement to shareholders: You may be unpopular, but you are still king.

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How do I know this? The regulatory disclosures of most of the companies at the Business Roundtable represents tell me that senior leaders get paid for performance, and by "performance" we mean stock price. Almost all of their CEOs issue financial guidance, buy back sums of stock that dwarf capital spending and equate a healthy share price with a healthy payday."<sup>10</sup>

As well as:

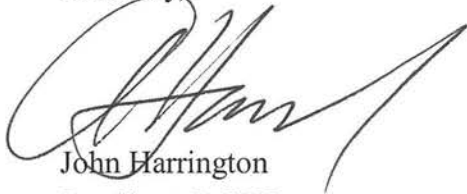
"The Business Roundtable's statement was a significant step in the right direction. But for those who signed—and, by extension, for all American corporations—now comes the hard part: turning this vision into something measurably meaningful."<sup>11</sup>

The debate portrayed in the examples above — which offer only a small slice of the total research, writing and commentary on this current, high profile controversy— demonstrates that the Proposal in fact addresses a significant policy issue that transcends ordinary business. Thus, the Proposal is not excludable for purposes of Rule 14a-8(i)(7).

### CONCLUSION

In conclusion, the Company has failed to demonstrate that the Proposal is excludable on the basis of Rule 14a-8(i)(3) or 14a-8(i)(7). Accordingly, we request that the Company's petition for no-action on the basis of Rule 14a-8 be declined.

Sincerely,



John Harrington

President & CEO

Harrington Investments Inc.

<sup>10</sup> John Stoll, "A Reminder for CEOs Considering a Shift in Focus: Shareholders Are Still King", *Wall Street Journal*, Sept. 6, 2019. <https://www.wsj.com/articles/a-reminder-for-ceos-considering-a-shift-in-focus-shareholders-are-still-king-11567791772>.

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## **Exhibit 1**

### **The Proposal**

#### **Bank of America – 2020**

**Whereas**, Our Company’s management has pledged our Company to policies that may be inconsistent with our governance documents. There needs to be congruity between corporate management policies and our Board’s fiduciary duties reflected in our Company’s bylaws, Articles of Incorporation and Committee Charters.

**Whereas**, in 2016 through 2018, our Company financed the fossil fuel industry with over \$106 billion in loans; and

**Whereas**, according to *Banking on Climate Change: Fossil Fuel Report Card 2019*, our bank was among the top banks funding one hundred key oil, gas and coal companies expanding fossil fuels; and

**Whereas**, our Company financed tar sands production companies, Arctic and ultra- deep-water oil and gas companies, fracked oil and gas producers and transporters and liquefied natural gas companies, mining companies and coal power companies;

**Whereas**, our Company’s Chairman and Chief Executive Officer, in August 2019, signed a ‘Statement on the Purpose of a Corporation’, committing our Company to *all* stakeholders, supporting “... the communities in which we work... respect[ing] the people in our communities and protect[ing] the environment by embracing sustainability practices across our businesses”; and

**Whereas**, however, there is no indication of how that public statement will be implemented in policy, or even if such commitment was considered by our Board of Directors, as a policy to be implemented by amending our Company’s governance documents;

**Resolved**, that shareholders request our Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company’s current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be



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In the proponent's opinion, there is a disconnect between the public statement endorsed by our Chairman and Chief Executive Officer, and other actions of the Company, including the lack of a necessary framework to advance this commitment through our Company's governance documents. Our Board of Directors, as responsible fiduciaries, need to reconcile these incongruities.





January 17, 2020  
*Via electronic mail*

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 Statement of Purpose of the Corporation by John Harrington, President, Harrington Investments, Inc.

Ladies and Gentlemen:

I am the beneficial owner of common stock of Bank of America Corporation (the "Company") and have submitted a shareholder proposal (the "Proposal") to the Company. I am in receipt of a letter dated December 20, 2019 ("Company Letter") sent to the Securities and Exchange Commission by Ronald Mueller of Gibson Dunn. In that letter, the Company contends that the Proposal may be excluded from the Company's 2020 proxy statement. A copy of this reply is being emailed concurrently to Ronald Mueller.

### SUMMARY

Proponents submitted a shareholder proposal to Bank of America requesting the following:

**Resolved**, that shareholders request our Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company's governance documents, policies or practices.

The full proposal is attached as Exhibit 1.

The Company argues for exclusion of the Proposal on the basis of Rules 14a-8(i)(3) and 14a-8(i)(7).

The Proposal is not vague or misleading within the meaning of Rule 14a-8(i)(3); it clearly describes the essence of the commitment made by our CEO in endorsing the Statement of Purpose of a Corporation without requiring shareholders to know or have read that document. The proposal states a clear example of what the proponent believes are incongruities in company policy. As such, the Proposal is not excludable on the basis of Rule 14a-8(i)(3).



Nor does the proposal address ordinary business. Instead it addresses a high-profile controversy in which the Company's CEO has, in his endorsement of the Statement of the Purpose of the Corporation, created an obvious inference that the Statement is salient to the Company's own operations. The controversy created by the Statement has to do with the degree to which a corporation is responsible to its stakeholders, beyond its investors. The Business Roundtable articulated the statement in its unequivocal commitment to stakeholder interests, as going "beyond shareholder primacy".

Furthermore, in its focus on the relationship between the Statement of Purpose and the Company's governance documents, the Proposal does not focus on the day to day management of the company or its relationships with stakeholders. Instead its purpose is to encourage the board and management to more rigorously consider, at a governance level, how to address the major policy issues for the Company that are raised by the statement the CEO endorsed, the controversial Statement of Purpose of the Corporation. Accordingly, we do not believe the Proposal is excludable on the basis of Rule 14a-8(i)(7).

## ANALYSIS

### I. Rule 14a-8(i)(3)

The Company Letter argues that the Proposal is vague, because it cannot be understood without referring to materials outside the Proposal. In particular, the Company argues that there are specific terms and requirements of the Statement that are inadequately described in the Proposal.

However, the Proposal clearly enough references the thrust of the Business Roundtable Statement that is relevant for the Proposal itself, specifically that;

"...our Company's Chairman and Chief Executive Officer, in August 2019, signed a 'Statement on the Purpose of a Corporation', committing our Company to all stakeholders, supporting "... the communities in which we work... respect[ing] the people in our communities and protect[ing] the environment by embracing sustainability practices across our businesses".

The Proponents perceive incongruence between *these specific commitments* to "all stakeholders", to respect and support the communities in which the Company operates and protect the environment, and the actions of the Company. The Company's financing of the fossil fuel industry, described in the Proposal, is one example of incongruence in the eyes of the Proponents given the company's ostensible "embrace of sustainability practices across our businesses:"

**Whereas**, in 2016 through 2018, our Company financed the fossil fuel industry with over \$106 billion in loans; and



**Whereas**, according to *Banking on Climate Change: Fossil Fuel Report Card 2019*, our bank was among the top banks funding one hundred key oil, gas and coal companies expanding fossil fuels; and

**Whereas**, our Company financed tar sands production companies, Arctic and ultra- deep-water oil and gas companies, fracked oil and gas producers and transporters and liquefied natural gas companies, mining companies and coal power companies;

The question of vagueness in this context is whether shareholders would have a reasonable idea of what is being discussed, and what they are being asked to vote on in the Proposal. The language of the Proposal clearly explains that our CEO, by signing a certain statement, has made a new commitment on behalf of our Company that appears to be contradicted by company practices and governance documents. It is evident that the description of the Statement contained in the Proposal is complete enough to allow shareholders to vote on whether or not they want the Board to engage in further review of the Statement, and clarify whether the Company's governance documents need to be amended in order to advance this new commitment. The shareholders need not have read the full Statement, or even have any familiarity with the Business Roundtable, to understand what is at issue in the Proposal. The Company tries to argue that the Proposal's request that the Board review the Statement of the Purpose of a Corporation makes the Statement a central aspect of the Proposal, and therefore that it is necessary for stockholders to understand what is contained in the full Statement in order to reasonably determine what actions or measure the Proposal requires. *Company Letter*, pages 7-8. As explained above, this is not the case.

Since shareholders are able to determine what actions or measures the Proposal requires without reference to outside materials, the Proposal is not excludable on the basis of Rule 14a-8(i)(3).

## II. Rule 14a-8(i)(7)

The Company Letter asserts that the issues raised by the proposal constitute ordinary business, excludable for purposes of Rule 14a-8(i)(7). However, as shown below, the Proposal addresses a current, significant policy issue that transcends ordinary business, one which is clearly significant to the Company. Therefore, the proposal is not excludable for purposes of Rule 14a-8(i)(7).

The Company misrepresents the Proposal's core request as seeking a "review of the Company's relations with broad categories of stakeholders", *Company Letter*, page 12, that are the *content* of the Statement, e.g. studying and reporting upon how the Company manages the day-to-day details of "the policies and procedures that the Company has implemented to govern its relations with employees, customers, suppliers and the communities in which the Company operates." *Company Letter*, page 9. For example, the Company reasons that, because the Statement's first commitment is about delivering value to customers, "Therefore the review requested in the Proposal **necessarily means** the Proposal relates to the Company's relations with its customers, as it concerns "matters relating to customer service and satisfaction." *Company Letter*, page 14. The Company makes this argument for each of the five categories of stakeholders. In line with





this reasoning, the Company argues that the Proposal is “fatally over-broad”.

To the contrary, the Proposal in no way addresses the Company's relations with the categories of stakeholders delineated in the Statement. Instead, *the Proposal focuses on the significant policy issue of the Company's sign-on to the Statement, and what this commitment means for the Company.*

It is shocking that the Company writes, “There is nothing more quintessentially ordinary business than asking the Company to review its purpose as a corporation and corporate citizen.” *Company Letter*, page 23. We could not disagree more, especially given the outpouring of research, analysis, journalism and debate following the August 2019 issuance of the Statement.

### ***The Newly Changed Purpose of the Corporation, Promulgated by the BRT Statement of Purpose of the Corporation, is a Significant Policy Issue***

The August 2019 issuance of the Business Roundtable's new Statement on the Purpose of the Corporation quickly gained high visibility in the media and garnered significant positive response from the public, while simultaneously generating a cloud of confusion and controversy. The Statement reignited a long-simmering debate regarding the public and private purposes of the Corporation, and raised this debate to a topic of transcendent policy focus.

The Business Roundtable has had a long-standing practice of issuing Principles of Corporate Governance, beginning in 1997, when those principles articulated the theory of shareholder primacy – that corporations exist principally to serve shareholders, and relegating the interests of any other stakeholders to positions that were strictly derivative of the duty to shareholders. But the new statement, which supersedes prior BRT statements, seems to imply that the duty to stakeholders is no longer derivative of the duty to stockholders.<sup>1</sup>

As many commentators have long observed, the firm's balancing act between interests of shareholders and other stakeholders can be in alignment, but it can also be in conflict. For instance, Law Professor Jill E. Fisch, considering the role of shareholder primacy in consideration of economic efficiency has noted:

Within a framework of welfare economics in which the goal is societal wealth maximization, firm value is conceptually distinct from shareholder value. Corporations provide value to a variety of nonshareholder groups, including managers, employees, creditors, customers, and suppliers. A corporation provides value to its creditors in the form of interest on and repayment of its debt. It provides value to managers and other employees through jobs that yield compensation, fringe benefits, perquisites, and, in some cases, the development of specialized skills or marketable reputations. A corporation provides value to its customers and its suppliers through voluntary surplus-producing market transactions.

Firm value will, by its nature, exceed shareholder value because most or all of the value provided to nonshareholder stakeholders, in the form of salaries, interest payments, and so forth, is explicitly excluded from shareholder-oriented concepts of firm value such as corporate profit. Similarly, because it is distributed to nonshareholder stakeholders, this excess does not affect shareholder returns and ultimately will not be reflected in stock

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<sup>1</sup> *How Will Companies and CEOs Meet the Challenges of Corporate Social Responsibility*. Cydney Posner, [Mondaq.com](http://www.mondaq.com/unitedstates/x/878330/Shareholders/How+Will+Companies+And+CEOs+Meet+The+Challenges+Of+Corporate+Social+Responsibility). December 20, 2019.  
<http://www.mondaq.com/unitedstates/x/878330/Shareholders/How+Will+Companies+And+CEOs+Meet+The+Challenges+Of+Corporate+Social+Responsibility>



price....

Surprisingly, little research demonstrates a correlation between doing well and doing good, that is, a correlation between corporate performance and decisions that favor the interests of nonshareholder stakeholders or the public at large. Despite the existence of an extensive literature arguing for increased corporate social responsibility, there is scant evidence that corporate decisions favoring the interests of workers, customers, or the community actually increase the size of the pie, as opposed to reflecting transfers of wealth from one group of stakeholders to another.

Even if the interests of corporate stakeholders are, in many cases, aligned, sometimes they are not. In at least a subset of corporate decisions, there is a true conflict between the interests of different stakeholders, and a decision that benefits one class of stakeholders will harm another. Moreover, many of the corporate rules ... are addressed to these types of intra-capital structure battles. Takeover regulation, the scope of director and officer liability, board structure, and executive compensation all have the potential to affect wealth transfers between stakeholders.<sup>2</sup>

Numerous legal and corporate scholars have written articles and reports addressing the new statement, arguing that the statement itself violates the fiduciary duties of directors, that it involves misleading communications and that it unlawfully attempts to supplant shareholder primacy.

For instance, an article in *Fiduciary News* asked outright, “Did Business Roundtable Just Break a Fiduciary Oath?”<sup>3</sup> In this article, the author explained:

“The issue of which constituency – or “stakeholder” – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally) possible. That all changed on August 19, 2019.”

While exploring the laudable aspects of commitments to corporate social responsibility, the author of the article returned to the principles put forth by Milton Friedman, in which Friedman noted that;

“the doctrine of ‘social responsibility’ taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book *Capitalism and Freedom*, I have called it a ‘fundamentally subversive doctrine’ in a free society, and have said that in such a society, ‘there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception fraud.’

But the author of the article concluded;

<sup>2</sup> Fisch, Jill E., “Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy” (2006). *Faculty Scholarship*. Paper 1043. [http://scholarship.law.upenn.edu/faculty\\_scholarship/1043](http://scholarship.law.upenn.edu/faculty_scholarship/1043)

<sup>3</sup> Christopher Carosa, “Did Business Roundtable Just Break A Fiduciary Oath?”, *FiduciaryNews.com*. August 27, 2019. <http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/>.

“With this in mind, the next question might be: What potential fiduciary liability might an investment adviser have by knowingly using client assets to purchase shares of companies whose CEOs are on record of subordinating shareholder interest?”

This same concern about subordination of investor interests was also raised by an array of respected voices on corporate governance, from the Council of Institutional Investors to Delaware law expert Charles Elson, in coverage by *Pensions and Investments*:

“In its own statement, the Council of Institutional Investors — whose pension fund, endowment and foundation members hold a collective \$4 trillion in assets — warned the policy shift would diminish shareholder rights and, in the absence of new mechanisms to assure accountability of boards and management, would lead to “accountability to no one.”

Long-term views and strategies are important, CII officials said in the statement, but “if ‘stakeholder governance’ and ‘sustainability’ become hiding places for poor management,” the economy or public equity markets will suffer.

### **‘Very bad results’**

Charles M. Elson, the Edgar S. Woolard Jr. Chair of Corporate Governance and director of the John L. Weinberg Center for Corporate Governance at the University of Delaware, Newark, views the new Business Roundtable policy as “a mistake.”

Before Business Roundtable members adopted the shareholder-first policy in 1997, companies trying to appeal to all stakeholders “led to very bad management and very bad results — for their investors and their employees. The folks who are ultimately hurt are working men and women” whose pension funds invest in the companies, Mr. Elson said.

Returning to that policy “will come back to haunt” company executives, especially if shareholder value drops, Mr. Elson warned. He said he hopes the CEOs will soften their approach as they move to implement the change, and take care to keep shareholders at the front of the line.

“The point is, these people invested in you. What happens the next time you ask for their money?” he said.”<sup>4</sup>

The driving force behind the new Statement appears to be a groundswell of sentiment from the public, and particularly employees, that companies must have a purpose beyond profiteering. As reported in *Fortune Magazine's* coverage of the BRT statement, the driver for this new initiative of BRT was widespread public and employee unrest regarding the purpose of the corporation and the need for a public mission:

“More and more CEOs worry that public support for the system in which they’ve

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<sup>4</sup> Hazel Bradford, “CEOs face pushback over stakeholder refocus”, *Pensions and Investments*, September 02, 2019. <https://www.pionline.com/governance/ceos-face-pushback-over-stakeholder-refocus>.



operated is in danger of disappearing.

“Society gives each of us a license to operate,” [IBM](#) CEO Ginni Rometty told me this August. “It’s a question of whether society trusts you or not. We need society to accept what it is that we do.”

...

*Public interest in corporate responsibility is unusually high:* A July survey of 1,026 adults for Fortune by polling firm New Paradigm Strategy Group found that nearly three-quarters (72%) agree that public companies should be “mission driven” as well as focused on shareholders and customers. *Today, as many Americans (64%) say that a company’s “primary purpose” should include “making the world better” as say it should include “making money for shareholders.”*

*But CEOs invariably say the constituency that’s truly driving their newfound social activism is their employees. Younger workers expect even more from employers on this front. Though, according to the poll, fewer than half of Americans overall (46%) say that CEOs should take a stance on public issues, support for such action is overwhelming among those ages 25 to 44. Millennials, in particular, may be driving the change more than anyone—and, more important, they’re choosing to work at companies that are driving change too. Among those ages 25 to 34 in the Fortune/NP Strategy poll, 80% say they want to work for “engaged companies.”<sup>5</sup> (Emphasis added).*

Those who are longtime observers and participants in the debate on corporate social responsibility, such as Nell Minow of Value Edge Investors, have suggested that the Statement is really more of an attempt to avoid rather than to create accountability:

*“We’ve seen this before.* The last time the BRT deployed stakeholder rhetoric it was during the 1980’s era of hostile takeovers, when a feint to the interests of anyone other than shareholders was the best way to entrench management. The CEOs who signed this statement know that accountability to everyone is accountability to no one. It’s like a shell game where the pea of any kind of obligation is always under the shell you didn’t pick. It’s shoot an arrow at the wall and then draw a bull’s-eye around it goal-setting.

...

There is also a serious credibility problem here. Barry Ritholtz notes dryly, “Scan the list of 181 signatories to the recent memo and it’s a Who’s Who of corporate behavior that has burdened and disadvantaged the very stakeholders they will now champion.” His exhaustive lists include many specific examples of opposition to unions, health, environmental, consumer protection and safety rules, and efforts to reduce shareholder

<sup>5</sup> Alan Murray, “America’s CEOs Seek a New Purpose for the Corporation”, *Fortune*, August 19, 2019. <https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/>

oversight."<sup>6</sup>

Value Edge Investors has compiled responses to the Statement, collecting all manner of sources, from reader responses to top news publication commentary. For instance, it notes *Fortune* reader responses, like this one:

*"Every CEO focuses extensively on the "needs of society" ... until they have a bad quarter."*<sup>7</sup>

Similarly, on *Bloomberg*:

*"It certainly sounds enlightened — and if Dimon's goal is merely to sound enlightened and thereby improve JP Morgan's image, then his move is a smart one. If, however, he genuinely means what he says, then his proposal is misguided. Its implementation will be at best wasteful and at worst harmful to investors, workers and society... Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril."*<sup>8</sup>

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*"Now, you might be tempted to think that, by issuing a feel good PR statement about how corporations really have society's best interests at heart, and aren't just cold-blooded profit machines, America's CEOs are trying to put a warm face on U.S. capitalism and beat back demands for more fundamental reforms, such as Warren's, that might actually give workers a voice in corporate decision-making. But that would be cynical, wouldn't it?"*<sup>9</sup>

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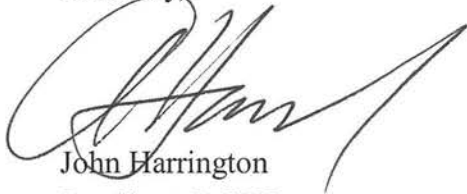
"The Business Roundtable's statement was a significant step in the right direction. But for those who signed—and, by extension, for all American corporations—now comes the hard part: turning this vision into something measurably meaningful."<sup>11</sup>

The debate portrayed in the examples above — which offer only a small slice of the total research, writing and commentary on this current, high profile controversy— demonstrates that the Proposal in fact addresses a significant policy issue that transcends ordinary business. Thus, the Proposal is not excludable for purposes of Rule 14a-8(i)(7).

### CONCLUSION

In conclusion, the Company has failed to demonstrate that the Proposal is excludable on the basis of Rule 14a-8(i)(3) or 14a-8(i)(7). Accordingly, we request that the Company's petition for no-action on the basis of Rule 14a-8 be declined.

Sincerely,



John Harrington

President & CEO

Harrington Investments Inc.

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December 20, 2019

**VIA E-MAIL**

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

Re: *Bank of America Corporation*  
*Stockholder Proposal of John C. Harrington*  
*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 2020 Annual Meeting of Stockholders (collectively, the “2020 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof (the “Supporting Statement”) received from John C. Harrington (the “Proponent”).

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

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2020 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that 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 Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

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## THE PROPOSAL

The Proposal states:

**Resolved**, that shareholders request our Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company's governance documents, policies or practices.

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

## BASES FOR EXCLUSION

For the reasons discussed below, we believe the Proposal properly may be excluded from the 2020 Proxy Materials pursuant to:

- Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite so as to be inherently misleading; and
- Rule 14a-8(i)(7) because the Proposal addresses the Company's general business practices and policies, and therefore deals with matters relating 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 this 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. The Company's Responsible Growth must be sustainable, which the Company addresses across three areas:

- sharing its success, including through its focus on environmental, social and governance ("ESG") leadership,
- being a great place to work, and

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- driving operational excellence so the Company can continue to invest in its employees and its capabilities.<sup>1</sup>

ESG principles help define how the Company delivers Responsible Growth and contributes to the Company's work to help drive the global economy. The Company's ESG leadership enables the Company to pursue growing business opportunities and manage risk associated with addressing the world's biggest environmental and social challenges. It sets parameters on how the Company deploys its capital and resources, informs its business practices, and helps determine how and when the Company uses its voice in support of the Company's values. The Company's focus on ESG principles is integrated across its eight lines of business, reflects how the Company holds itself accountable and allows the Company to create shared success with its clients and communities.<sup>2</sup>

The Company's management-level Global ESG Committee, which is led by Vice Chairman Anne Finucane, is comprised of senior executives from each business line and control function across the Company. The committee members are actively engaged in managing the Company's ESG programs and strengthening the Company's ESG practices. The committee engages in dialogue and debate on social and environmental issues that are significant to the Company's business, including, but not limited to, human capital management practices, assessing environmental and societal implications of product and service offerings, and investments with the goal of creating a sustainable economy. The committee convenes six times a year and regularly reports to the Corporate Governance Committee of the Company's Board of Directors (the "Board") and also provides updates to the Board's Enterprise Risk Committee.<sup>3</sup>

In addition, Vice Chairman Anne Finucane and her team regularly engage with the Company's stockholders and other stakeholders, including consumer advocates and community advisors, for advice and guidance in shaping the Company's ESG policies and practices. In 2005, the Company founded its National Community Advisory Council, a forum for senior leaders from social justice,

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<sup>1</sup> See Bank of America Corporation, Our strategy: Learn how Bank of America is driving responsible growth, available at <https://about.bankofamerica.com/en-us/who-we-are/our-strategy.html>.

<sup>2</sup> See Bank of America Corporation, Environmental and Social Risk Policy Framework (the "ESRP Framework"), available at <https://about.bankofamerica.com/assets/pdf/Environmental-and-Social-Risk-Policy-Framework.pdf>.

<sup>3</sup> See Bank of America Corporation, Our business practices: Governance, available at <https://about.bankofamerica.com/en-us/what-guides-us/governance.html>.

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consumer advocacy, community development, environmental, research, and advocacy organizations. Senior executives meet with the council at least twice annually for external perspectives on the Company's business policies, practices and products.<sup>4</sup>

ESG principles complement how the Company seeks growth within its risk framework. These principles are foundational to how the Company engages external stakeholders and provides strong oversight of environmental and social risks that present themselves through the Company's business activities. Moreover, ESG principles inform the responsible products and services delivered to clients; how the Company evaluates business opportunities; and how the Company helps enable social progress and economic mobility in local communities around the world. Ultimately, through its well-established commitment to ESG principles the Company intends to build trust and credibility as a company people want to work for, invest in and do business with.

The Board and its committees play a key role in oversight of the Company's culture by setting the "tone at the top" and holding Company management accountable for its maintenance of high ethical standards and effective policies and practices to protect the Company's reputation, assets and business. The role of the Board and its committees are described and defined through the Company's Corporate Governance Guidelines<sup>5</sup> and the charter of each standing committee, as well as the Company's Code of Conduct<sup>6</sup> and related governance documents. Among the ways the Board and its committees discharge their responsibilities are overseeing management's identification, measurement, monitoring and control of material risks;<sup>7</sup> regularly requesting and receiving briefings from senior management on matters relating to compliance and business conduct risk; and holding Company management accountable for the timely escalation of issues for review with the Board and its committees. Moreover, members of the Board regularly meet with both stockholders and outside key stakeholders to obtain their input and to discuss their views on, among other topics, the Board's independent oversight of management and the Board's oversight of strategic planning, risk management, human capital management and environmental and social initiatives, as well as other

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<sup>4</sup> *Id.*

<sup>5</sup> The Corporate Governance Guidelines are available at <http://investor.bankofamerica.com/static-files/652e9258-edfd-45b4-ae45-62fc54e4d2fc>.

<sup>6</sup> The 2019 Code of Conduct is available at <http://investor.bankofamerica.com/static-files/a359ed51-ef9b-4746-be90-bfbc892b3b02>.

<sup>7</sup> See Bank of America Corporation, 2019 Proxy Statement at 23-24, available at [http://media.corporate-ir.net/media\\_files/IROL/71/71595/BOAML\\_2019\\_Proxy.pdf](http://media.corporate-ir.net/media_files/IROL/71/71595/BOAML_2019_Proxy.pdf).

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issues important to the Company's stockholders and stakeholders. These views are shared with the Board and its committees for their consideration.<sup>8</sup>

## ANALYSIS

### **I. The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because It Is Impermissibly Vague And Indefinite So As To Be Inherently Misleading.**

Rule 14a-8(i)(3) permits the exclusion of a stockholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules or regulations, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff consistently has taken the position that vague and indefinite stockholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (Sept. 15, 2004). *See also Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) ("[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail."); *Capital One Financial Corp.* (avail. Feb. 7, 2003) (concurring with the exclusion of a stockholder proposal where the company argued that its stockholders "would not know with any certainty what they are voting either for or against"). As further described below, the Proposal is so vague and indefinite that neither the Company's Board nor the Company's stockholders can comprehend precisely what the Proposal would entail and, therefore, is excludable under Rule 14a-8(i)(3).

Under this standard, the Staff has routinely concurred with exclusion of proposals that fail to define key terms or otherwise fail to provide sufficient clarity or guidance to enable either stockholders or the company to understand how the proposal would be implemented. For example, the Staff recently concurred that a company could exclude, as vague and indefinite, a proposal requesting that a company "reform the company's executive compensation committee." *eBay Inc.* (avail. April 10, 2019). The supporting statement for the proposal did not request any specific reforms, but instead made observations about various elements of executive compensation. These statements did not indicate whether those elements of the company's executive compensation program needed reform or how they should or could be affected by reform of the compensation committee. In its response, the Staff noted that "neither shareholders nor the Company would be able to determine with any reasonable certainty the nature of the 'reform' the [p]roposal is requesting. Thus, the [p]roposal, taken as a whole, is so vague and indefinite that it is rendered materially misleading." More recently, in

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<sup>8</sup> *Id.* at 28.



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*Apple Inc. (Zhao)* (avail. Dec. 6, 2019), the company sought exclusion of a proposal could be excluded under Rule 14a-8(i)(3) because the proposal recommended the company “improve guiding principles of executive compensation” but failed to define or explain what improvements the proponent sought to the “guiding principles.” The Staff noted that the proposal “lack[ed] sufficient description about the changes, actions or ideas for the [c]ompany and its shareholders to consider that would potentially improve the guiding principles” and concurred with exclusion of the proposal as “vague and indefinite.”

Here as well, the Proposal refers to a broad and multifaceted issue – a corporation’s purpose – with a request for a review on how “any incongruities may be reconciled.” While the Supporting Statement indicates the Proponent’s view that “there is a disconnect between the [Statement] and other actions of the Company,” the Proposal does not define or explain the nature or topics of the supposed incongruities the Proponent wants to be evaluated. In this regard, as with the proposal in *eBay*, the Supporting Statement does not identify any incongruities but instead makes various assertions regarding a narrow aspect of the Company’s lending portfolio.<sup>9</sup> These statements do not add clarity to the Proposal and only serve to obfuscate the scope of what the Proposal requests, since (as discussed below) the Statement of the Purpose of a Corporation covers a wide range of issues that encompass virtually every aspect of a corporation’s operations. As such, the Proposal lacks sufficient specificity to indicate to the Company and to its stockholders the nature and scope of review and report requested by the Proposal.

Moreover, the Staff has concurred with exclusion of stockholder proposals pursuant to Rule 14a-8(i)(3) that, like the Proposal, refer to external guidelines or an external source for a critical and

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<sup>9</sup> For example, the Supporting Statement states that in the three year period 2016 through 2018, the “Company financed the fossil fuel industry with over \$106 billion in loans.” Regardless of the source of that information or whether that statistic is accurate, as one of the world’s largest commercial banks, the Company is a large lender across many industries. For example, as reported in the Company’s most recent quarterly report on Form 10-Q, utilized credit exposure to the Energy industry (\$15.6 billion) and to Utilities (\$11.9 billion) combined represented less than 5% of total commercial utilized credit exposure (\$637.2 billion) as of the September 30, 2019 quarter end, and an even smaller percentage (less than 3%) of the Company’s total loans and leases at September 30, 2019 (\$972.9 billion). See Table 36, “Commercial Credit Exposure by Industry” on page 37 of the Company’s Form 10-Q for the quarter ended Sept. 30, 2019, and “Consolidated Balance Sheet” on page 47 of the same Form 10-Q, available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/70858/000007085819000057/bac-930201910xq.htm>. Many of the utilized credit exposures to the Energy and Utilities industries cited above would have nothing to do with the Proposal’s “fossil fuel industry.”

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complex concept that is central to understanding a proposal, but fail to sufficiently describe the substantive provisions of the external guidelines or source. For example, in *Moody's Corp.* (avail. Feb. 10, 2014), the Staff concurred that the company could exclude a proposal requesting a report on the feasibility and relevance of incorporating "ESG risk assessments" qualitatively and quantitatively into all credit rating methodologies conducted by the company. The term "ESG" was not defined anywhere in the proposal, nor was the concept of an "ESG risk assessment" explained. The Staff concurred that the company could exclude the proposal under Rule 14a-8(i)(3), as vague and indefinite, noting that, "in applying this particular proposal to Moody's, neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." See also *Dell Inc.* (avail. Mar. 30, 2012) (permitting exclusion of a proposal to include certain stockholder-named director nominees in company proxy statements, including any nominee named by "shareholders of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements"); *MEMC Elec. Materials, Inc.* (avail. Mar. 7, 2012) (same); *Chiquita Brands Int'l, Inc.* (avail. Mar. 7, 2012) (same); *Sprint Nextel Corp.* (avail. Mar. 7, 2012) (same). See also *Exxon Mobil Corp. (Naylor)* (avail. Mar. 21, 2011) (concurring with the exclusion of a proposal requesting the use of, but failing to sufficiently explain, "guidelines from the Global Reporting Initiative"); *AT&T Inc.* (avail. Feb. 16, 2010, *recon. denied* Mar. 2, 2010) (concurring with the exclusion of a proposal that sought a report on, among other things, "grassroots lobbying communications as defined in 26 C.F.R. § 56,4911-2"); *Johnson & Johnson (Gen. Bd. of Pension and Health Benefits of the United Methodist Church et al.)* (avail. Feb. 7, 2003) (concurring with the exclusion of a proposal requesting the adoption of the "Glass Ceiling Commission's business recommendations" without describing the recommendations). Similarly, in Staff Legal Bulletin 14G (Oct. 16, 2012) ("SLB 14G"), the Staff stated:

If a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would raise concerns under Rule 14a-9 and would be subject to exclusion under Rule 14a-8(i)(3) as vague and indefinite.

In the current instance, the Proposal requests that the Board "review the Statement of the Purpose of a Corporation" and indicates that the Proponent believes that there is a "disconnect" and "incongruities" between the statement referenced in the Proposal and the Company's "current governance documents, policies, long term plans, metrics and sustainability practices." By requesting that the Board review the "Statement of the Purpose of a Corporation" in order to "determine if such statement is reflected in [the] Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices" and reconcile "incongruities," the Proposal makes the "Statement of the Purpose of a Corporation" a central aspect of the Proposal. Therefore it is necessary

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for stockholders to understand what is contained in the “Statement of the Purpose of a Corporation” in order to reasonably determine what actions or measure the Proposal requires.

Based on the limited explanation in the Proposal and Supporting Statement, the context appears to suggest that the Proponent is referring to the Statement of the Purpose of a Corporation issued by the Business Roundtable in August 2019, which was signed by 181 corporate chief executive officers, including the Company’s Chief Executive Officer. The statement is available through Business Roundtable’s website<sup>10</sup> and sets forth five broad commitments by the signatory companies ranging from “[d]elivering value to our customers” to “[s]upporting the communities in which we work.” However, the Proposal fails to define, explain or give any context around the term “Statement on the Purpose of a Corporation.” Instead the Proposal merely makes cursory references to “such statement” and its contents without providing any explanation or point of reference for what the standard or standards set forth in the referenced statement would require the Company to do. Thus, each stockholder would be left to individually determine what the statement’s standard requires and, therefore, how that individually determined standard would apply to the Company and to the requested report. Accordingly, if stockholders were to approve the Proposal, the Company would have no basis on which to determine or understand what standard or standards set forth in the statement (assuming this statement is what the Proponent is referring to) should be evaluated and considered.

As with the precedent cited above, stockholders cannot determine with any reasonable certainty from the information contained in the Proposal and the Supporting Statement what the Company’s review and report should address. Specifically, while the Proposal refers to the “Statement of the Purpose of a Corporation,” it wholly fails to explain to stockholders what this central aspect of the Proposal entails or even what standards it addresses. Merely referring to, and describing a portion of, the statement is misleading to stockholders because it is not clear as to the exact statement the Proposal refers. Assuming that the Proposal intends to reference the Business Roundtable statement, because that statement sets forth five broad and distinct commitments, it is not clear what specific standard or standards the Board is being requested to consider. As in *Moody’s Corp.* and the other precedent cited above, the external standards referenced by the Proposal (the “Statement of the Purpose of a Corporation”) is a central aspect of the Proposal, yet the Proposal does not provide adequate information about what this standard means. Because of this ambiguity and vagueness, neither stockholders nor the Company would be able to determine with reasonable certainty exactly what actions or measures the Proposal requires. Therefore the Proposal may properly be excluded under Rule 14a-8(i)(3) as vague and indefinite.

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<sup>10</sup> See <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

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**II. The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Involves Matters Related To The Company's Ordinary Business Operations.**

The Proposal relates to the policies and procedures that the Company has implemented to govern its relations with employees, customers, suppliers and the communities in which the Company operates. While the Proposal refers to the Board's role overseeing the Company's corporate governance and risk management, it does so solely by addressing matters related to the Company's business strategies, policies and programs. As such, the Proposal implicates many core day-to-day aspects of the Company's operations and does not raise a significant policy that transcends the Company's ordinary business operations. Accordingly, the Proposal may properly be excluded under Rule 14a-8(i)(7) as involving the Company's ordinary business operations.

*A. Background*

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a stockholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept [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 stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. As relevant here, one of these considerations was 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." Examples of the tasks cited by the Commission include "management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers." 1998 Release.

The 1998 Release further distinguishes proposals pertaining to ordinary business matters from those involving "significant social policy issues." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While "proposals . . . focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered excludable," the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not "transcend the day-to-day business matters" discussed in the proposals. 1998 Release. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers "both the proposal and the supporting statement



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as a whole.” See Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005) (“In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole.”)

Note 4 of Staff Legal Bulletin 14E (Oct. 27, 2009) states that “[i]n those cases in which a proposal’s underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company.” Accordingly, even if a proposal touches upon a significant policy issue, the proposal may be excludable on ordinary business grounds if the proposal does not transcend a company’s ordinary business. In Staff Legal Bulletin No. 14K (Oct. 16, 2019) (“SLB 14K”), the Staff clarified that when it evaluates whether a proposal raises a policy issue that transcends a particular company’s ordinary business operations, it takes a “company-specific approach . . . rather than recognizing particular issues or categories of issues as universally ‘significant.’” SLB 14K.

A stockholder proposal being framed 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). In addition, the Staff has indicated that “[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under [R]ule 14a-8(i)(7).” *Johnson Controls, Inc.* (avail. Oct. 26, 1999). Similarly, the Staff has concurred that a proposal requesting adoption of a policy is excludable if the underlying subject matter pertains to ordinary business and does not implicate a significant social policy issue. See, e.g., *The TJX Companies, Inc.* (avail. Apr. 16, 2018) (concurring in the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company adopt “a new universal and comprehensive animal welfare policy applying to all of the [c]ompany’s stores, merchandise and suppliers” because the proposal related to ordinary business operations); *Time Warner Inc. (Ridenour)* (avail. Mar. 13, 2018) (concurring in the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company “adopt a policy requiring that the Company’s news operations tell the truth, and issue an annual report to shareholders explaining instances where the Company failed to meet this basic journalistic obligation” because the proposal related to ordinary business operations); *The Walt Disney Co.* (avail. Dec. 12, 2017) (same).

*B. The Proposal Focuses On the Company’s General Business Practices and Policies*

The “Resolved” clause of the Proposal seeks two things: (i) the Board’s review of the “Statement of the Purpose of a Corporation” to determine if such statement is reflected in the Company’s “current governance documents, policies, long term plans, goals, metrics and sustainability practices” and (ii) a report on the Board’s recommendations on how any “incongruities” between the

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enumerated Company policies and practices and the statement may be reconciled “by changes to our Company’s governance documents, policies or practices.”

The Proposal references the “Statement of the Purpose of a Corporation.” Although not explained in the Proposal or Supporting Statement, the context suggests that the Proponent is referring to the Statement of the Purpose of a Corporation (the “Statement”) issued by Business Roundtable in August 2019, which was signed by 181 corporate chief executive officers, including the Company’s Chief Executive Officer, who commit to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and stockholders.<sup>11</sup> A copy of the full Statement is attached as Exhibit B.<sup>12</sup> Among other things, the Statement embodies a corporation’s commitment to operate for the benefit of all stakeholders, specifically:

- Delivering value to customers,
- Investing in employees,
- Dealing fairly and ethically with suppliers,
- Supporting the communities in which the companies work, and
- Generating long-term value for stockholders.

The Company believes that its operations, business strategies, policies and programs are well-aligned with the Statement. As discussed above in “Background,” the Company is committed to Responsible Growth, which entails growing in a sustainable manner, sharing the Company’s success with the communities it serves, being a great place to work for the Company’s employees and driving operational excellence. In this respect, however, the Proposal generally addresses the Company’s business strategies, policies and programs, and does not focus on any particular issue that transcends the Company’s ordinary business. The Staff previously has concurred that proposals focusing on a company’s business strategies, policies and programs may be properly excluded under Rule 14a-8(i)(7). In *CVS Corp. (Central Laborers’ Pension Fund)* (avail. Feb. 1, 2000) (“CVS”), the proposal requested that the company prepare an annual strategic plan report describing “the [c]ompany’s goals, the strategic initiatives . . . and the accompanying range of corporate policies and programs,” detailing “the roles of the corporate constituents, such as shareholders, employees, customers, suppliers, and the community,” and describing how such company programs and policies are “designed to ensure the contribution of important corporate constituents to the long-term success of the [c]ompany.” The Staff

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<sup>11</sup> See <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

<sup>12</sup> A copy is also available at <https://opportunity.businessroundtable.org/ourcommitment/>.

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agreed that the proposal could be excluded, stating “there appears to be some basis for your view that CVS may exclude the proposal under rule 14a-8(i)(7) as relating to its ordinary business operations (i.e., business practices and policies).” The parallels between CVS and the instant Proposal are striking and we believe the Proposal warrants similar treatment.

As in CVS, the Company here is being asked to review its governance documents, policies, long term plans, goals, metrics and sustainability practices. The Proposal seeks a review of the general principles outlined in the Statement and further information from the Company “on how any incongruities [with the Statement] may be reconciled by changes to our Company’s governance documents, policies or practices.” Similar to the Proposal’s request, which requires consideration of the Company’s relations with employees, customers, suppliers, stockholders and the communities in which the Company operates, all of which focus on ordinary business operations, the CVS proposal asked the company to address ordinary business matters such as “growth strategies, research and development initiatives, expansion plans, workplace practices, community involvement initiatives, [and] capital expenditure programs” and specifically requested that the strategic plan report include “[c]onstituent [r]eports related to shareholders, employees, the communities where the [c]ompany operates, customers, and key suppliers.” As was the case in CVS, the instant Proposal broadly addresses the Company’s corporate practices and policies and requires that the Company consider the same five corporate constituencies, such that it is properly excludable under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations.

More recently, in *Amazon.com, Inc.* (avail. Mar. 16, 2018) (“*Amazon 2018*”), the Staff concurred with exclusion under Rule 14a-8(i)(7) of a proposal that similarly sought a broad report on risks arising from the public debate over the company’s growth and societal impact and how the company is managing or mitigating those risks. In *Amazon 2018*, the requested report would have required the company to review company-wide risks as a function of its growth, including the company’s “role in providing physical and digital infrastructure, use of and control over data about customers and competitors, increasing reliance on automation and influence on the quality and diversity of content.” In short, the *Amazon 2018* proposal addressed the company’s day-to-day ordinary business operations, and all manner of general and ordinary risks attendant thereto. Likewise, here the Proposal requests a broad review of the Company’s relations with broad categories of stakeholders and a comprehensive review of its governance documents, policies, long term plans, goals, metrics and sustainability practices with a view to considering whether there are any “incongruities” between them and the Company’s commitment to stakeholders in furtherance of the Statement. As in *Amazon 2018*, this kind of broad request is excludable under Rule 14a-8(i)(7). The foregoing letters reflect decades of precedent that proposals addressing generally a company’s business strategies and policies are excludable. See, e.g., *Westinghouse Electric Corp.* (avail. Jan. 27, 1993) (concurring in the exclusion of a proposal requesting the company issue a comprehensive and detailed report of the company’s business practices and operations, noting that the proposal addressed “the

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conduct of the ordinary business operations of the [c]ompany (i.e., business practices and operations)"); *Mobil Corp.* (avail. Feb. 13, 1989) (concurring with the exclusion of a proposal requesting the formation of a stockholder committee to review corporate objectives and their implementation under Rule 14a-8[(i)](7), noting that the proposal "appears to deal with a matter relating to the ordinary business operations of the [c]ompany (i.e., questions of corporate objectives and goals)").

Moreover, and as discussed below, the Proposal does not focus on an issue that transcends the Company's ordinary business operations. Instead, each of the five commitments of the Statement that the Proposal requests the Company address implicates the Company's ordinary business operations.

1. The Company's Customer Relations Are Ordinary Business.

The first commitment set forth in the Statement provides that in "[d]elivering value to [its] customers" a company must "lead[] the way in meeting or exceeding customer expectations." Thus, the Proposal would require the Board to evaluate the Company's customer relations policies and practices in order to determine whether they are consistent with the standards set forth in the first commitment. The Proposal further requires the Board to publish its recommendations as to how the Company's customer relations policies and practices should be changed to bring them in line with the standard set forth in the Statement.

The Staff has routinely concurred that stockholder proposals dealing with customer relations, including customer service and satisfaction, relate to ordinary business matters and, accordingly, are excludable under Rule 14a-8(i)(7). Recent precedent makes clear that the Staff views a wide spectrum of issues as customer relations matters, including the creation of reports evaluating customer relations policies. For example, in *Wells Fargo & Co. (Harrington Investments, Inc.)* (avail Feb. 27, 2019) ("*Wells Fargo*"), the proposal requested that the board commission an independent study and then report to stockholders on "options for the board[] to amend [the] [c]ompany's governance documents to enhance fiduciary oversight of "matters relating to customer service and satisfaction." The *Wells Fargo* proposal went on to address a number of events concerning the company's customer relations, services and satisfaction. The Staff concurred that the company could exclude the proposal under Rule 14a-8(i)(7) and noted that the proposal "relate[d] to decisions concerning the [c]ompany's customer relations." Similarly, in *The Coca-Cola Co.* (avail. Jan. 21, 2009, *recon. denied* Apr. 21, 2009), the proposal, concerned about the "company's reputation with consumers" and stating that "[g]ranted consumers access to better information about [the company's] products can boost consumer confidence," requested that the company prepare a report evaluating new or expanded policy options to further enhance transparency of information to consumers of bottled beverages produced by the company. The Staff concurred that the company could "exclude the proposal under Rule 14a-8(i)(7), as relating to Coca-Cola's ordinary business operations (i.e., marketing and consumer relations)." See also *Bank of America Corp.* (avail. Mar. 3, 2005) (proposal requesting that the company take action



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and adopt a “Customer Bill of Rights” and create the position of “Customer Advocate” was excludable because it concerned customer relations); *Consolidated Edison, Inc.* (avail. Mar. 10, 2003) (proposal relating to the management of employees, interaction with customers and customer relations was excludable because it concerned customer relations); *BellSouth Corp.* (avail. Jan. 9, 2003) (proposal to correct personnel and computer errors relating to customers was excludable because it concerned management of employees and customer relations).

The Statement’s first commitment is about delivering value to customers. Therefore the review requested in the Proposal necessarily means the Proposal relates to the Company’s relations with its customers, as it concerns “matters relating to customer service and satisfaction.” Under the Company’s Responsible Growth, the Company is focused on maintaining its customer-focused strategy in order to develop products and services that fit its customers’ financial profiles and help customers achieve their financial goals.<sup>13</sup> As the Staff has consistently recognized in the precedent above, general decisions related to the Company’s customer relations, including customer service and satisfaction and Company practices and policies attendant thereto, are a core aspect of management’s ability to run the Company and are not an appropriate matter for stockholder oversight. Therefore, as in *Wells Fargo & Co.* and *The Coca-Cola Co.*, the Proposal is excludable under Rule 14a-8(i)(7).

## 2. How The Company Manages Its Workforce Is An Ordinary Business Matter.

The second commitment set forth in the Statement is focused on “[i]nvestments in [a company’s] employees” and addresses the compensation, training, recruitment and diversity of employees. Thus, the Proposal would require the Board to evaluate how the Company manages its workforce, including its compensation policies and practices, in order to determine whether they are consistent with the standards articulated in the Statement’s second policy commitment. The Proposal further requires the Board to publish its recommendations as to how the Company’s employee relations policies and practices should be changed to bring the Company’s policies and practices in line with the standard set forth in the Statement.

The Commission and Staff have long held that a stockholder proposal may be excluded under Rule 14a-8(i)(7) if it, like the Proposal, relates to a company’s management of its workforce, including its relationship with employees. The Commission recognized in the 1998 Release that “management of the workforce” is “fundamental to management’s ability to run a company on a day-to-day basis.” Consistent with the 1998 Release, the Staff has recognized that proposals pertaining to the management of a company’s workforce are excludable under Rule 14a-8(i)(7). For example, in *Bank*

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<sup>13</sup> See Bank of America Corporation, Our strategy: Learn how Bank of America is driving responsible growth, available at <https://about.bankofamerica.com/en-us/who-we-are/our-strategy.html>.

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of America Corp. (avail. Feb. 14, 2012) (“*Bank of America 2012*”), the Staff concurred with the exclusion of a proposal requesting that a company policy be amended to include “protection to engage in free speech outside the job context, and to participate freely in the political process without fear of discrimination or other repercussions on the job” because the proposal related to the Company’s policies concerning its employees. See also *Yum! Brands, Inc.* (avail. Mar. 6, 2019) (concurring with the exclusion of a proposal relating to adopting a policy not to engage in any inequitable employment practice, as relating “generally to the [c]ompany’s policies concerning its employees and does not focus on an issue that transcends ordinary business matters”); *Donaldson Company, Inc.* (avail. Sept. 13, 2006) (concurring with the exclusion of a proposal requesting the establishment of “appropriate ethical standards related to employee relations”); *Wal-Mart Stores, Inc.* (avail. Mar. 16, 2006) (concurring with the exclusion of a proposal requesting an amendment to a company policy barring intimidation of company employees exercising their right to freedom of association). Further, the Staff has specifically concurred that proposals addressing a company’s policies concerning its employees are ordinary business matters and, thus, such proposals are excludable under Rule 14a-8(i)(7). For example, in *Deere & Co.* (avail. Nov. 14, 2014, *recon. denied* Jan. 5, 2015), the Staff concurred with the exclusion of a proposal requesting that the company adopt an employee code of conduct that included an anti-discrimination policy “that protects employees’ human right[s] to engage in the political process, civic activities and public policy of his or her country without retaliation.” In its response the Staff explained that the proposal related to the company’s “policies concerning its employees” and thus implicated the company’s ordinary business operations. Similarly, in *The Walt Disney Co.* (avail. Nov. 24, 2014, *recon. denied* Jan. 5, 2015), the Staff permitted exclusion of a proposal requesting that the company “consider the possibility of adopting anti-discrimination principles that protect employees’ human right[s]” relating to engaging in political and civic expression without retaliation in the workplace. There, the company argued that the adoption of anti-discrimination principles involved “decisions with respect to, and modifications of the way the company manages its workforce and employee relations” that were “multi-faceted, complex and based on a range of factors beyond the knowledge and expertise of the shareholders.” In allowing exclusion, the Staff again affirmed that “policies concerning [the companies’] employees” relate to companies’ ordinary business operations covered by Rule 14a-8(i)(7) and are thus excludable on that basis.

The Statement’s second commitment is about how a corporation invests in its own employees. Therefore the review requested in the Proposal necessarily means the Proposal addresses the Company’s management of its workforce and policies concerning its employees. The Company’s 2019 Human Capital Management Report details the actions the Company has taken for its more than 200,000 teammates and their families across the globe, providing transparency and clarity about that

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work.<sup>14</sup> As the Staff has consistently recognized in the precedent above, decisions related to the Company's management of its workforce, including its employee relations, are fundamental to management's ability to run the Company and are not an appropriate matter for stockholder oversight. Therefore, as in *Bank of America 2012*, *Deere & Co.* and the other established precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).

3. The Company's Relationship With Its Suppliers Is An Ordinary Business Matter.

The third commitment set forth in the Statement is focused on company and supplier relationships, stating that companies should "deal fairly and ethically" with suppliers. Thus, the Proposal would require the Board to evaluate how the Company manages its relationships with its suppliers, as well as the Company's general ethics policies, in order to determine whether the Company's supplier and ethics policies are consistent with the standards set forth in the Statement's third policy commitment. The Proposal further requires the Board to publish its recommendations as to how the Company's supplier and ethics policies and practices should be changed to bring the Company's policies and practices in line with the standard set forth in the Statement.

In the 1998 Release, the Commission specifically included supplier relationships as a type of ordinary business matter excludable under Rule 14a-8(i)(7). Further, the Staff has concurred with the exclusion of proposals under Rule 14a-8(i)(7) in numerous instances on the basis that they concerned decisions relating to supplier or vendor relationships. *See, e.g., Walmart, Inc.* (avail. Mar. 8, 2018) (concurring in the exclusion of a proposal seeking a report outlining the requirements suppliers must follow regarding engineering ownership and liability as relating to the company's ordinary business matter); *Foot Locker, Inc.* (avail. Mar. 3, 2017) (concurring in the exclusion of a proposal seeking a report on steps taken by the company to monitor overseas apparel suppliers' use of subcontractors as relating "broadly to the manner in which the company monitors the conduct of its suppliers and their subcontractors"); *Kraft Foods Inc.* (avail. Feb. 23, 2012) (concurring in the exclusion of a proposal that sought a report detailing the ways the company "is assessing water risk to its agricultural supply chain and action it intends to take to mitigate the impact on long-term shareholder value," noting that the "proposal relates to decisions relating to supplier relationships").

Similarly, the Staff also has consistently concurred in the exclusion of stockholder proposals related to a company's adherence to ethical business practices and policies. For example, in *Verizon Communications, Inc.* (avail. Jan. 10, 2011), the company sought exclusion of a proposal directing the board to form a Corporate Responsibility Committee charged with monitoring the company's commitment to integrity, trustworthiness, and reliability—and the extent to which it lived up to its

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<sup>14</sup> The 2019 Human Capital Management Report is available at <http://investor.bankofamerica.com/static-files/22c64304-00dc-4706-9836-28f4bcfab311>.

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Code of Business Conduct. The Staff concurred that it would not recommend enforcement action if Verizon omitted the proposal because “[p]roposals that concern general adherence to ethical business practices” are generally excludable. *See also The Walt Disney Co.* (avail. Dec. 12, 2011) (concurring with the exclusion of the proposal asking the board to report on board compliance with Disney’s Code of Business Conduct and Ethics for directors); *International Business Machines Corp.* (avail. Jan. 7, 2010, *recon. denied* Feb. 22, 2010) (proposal directing officers to restate and enforce certain standards of ethical behavior was excludable because it related to general adherence to ethical business practices).

The Statement’s third commitment is about a corporation’s relations with suppliers, including ethical and fair dealings with suppliers. Therefore the review requested in the Proposal necessarily means the Proposal addresses ordinary business decisions relating to the Company’s supplier relationships and general adherence to ethical business practices. The Company’s strategies contemplate mutually beneficial relationships with the Company’s suppliers,<sup>15</sup> and the Company’s Code of Conduct sets forth specific expectations as to the Company’s ethical business practices, including with respect to the Company’s suppliers.<sup>16</sup> As the Staff has recognized in the precedent above, decisions related to the Company’s supplier relations and the Company’s general adherence to ethical business practices are fundamental to management’s ability to run the Company and are not an appropriate matter for stockholder oversight. Therefore, as in *Walmart Inc.* and *Verizon Communications, Inc.*, the Proposal is excludable under Rule 14a-8(i)(7).

4. The Company’s Community Relations And Community Impact Is An Ordinary Business Matter.

The fourth commitment set forth in the Statement is focused on “[s]upporting the communities in which [a company] work[s]” and provides that a company must “respect the people in [its] communities.” Thus, the Proposal would require the Board to evaluate and report on the societal impacts of the Company’s operations. The Proposal also requires the Board to publish its recommendations as to how the Company’s policies and practices should be changed to further support the communities in which it works, in line with the standard set forth in the Statement.

The Staff has consistently held that proposals focused on the community impacts of a company’s operations, like the Proposal, implicate a company’s ordinary business considerations and,

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<sup>15</sup> See Bank of America Corporation, Our supplier relations: Vendor management, *available at* <https://about.bankofamerica.com/en-us/what-guides-us/vendor-management.html>.

<sup>16</sup> See Bank of America Corporation, 2019 Code of Conduct at 6, *available at* <http://investor.bankofamerica.com/static-files/a359ed51-ef9b-4746-be90-bfbc892b3b02>.



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thus, are excludable under Rule 14a-8(i)(7). For example, in *Amazon.com, Inc. (Domini Impact Equity Fund and the New York State Common Retirement Fund)* (avail. Mar. 28, 2019) (“Amazon 2019”), the Staff concurred with the exclusion of a proposal that requested the board annually report to stockholders its analysis of the community impacts of the company’s operations, “considering near- and long-term economic and social outcomes, including risks . . . and opportunities arising from its presence in communities.” Although the Amazon 2019 proposal touched upon social inequality in the communities where the company operates as well as raising concerns tenuously related to the topic of sustainability (implications for “green space”), the Staff concurred with the proposal’s exclusion under Rule 14a-8(i)(7), noting that the proposal related “generally to ‘the community impacts’ of the [c]ompany’s operations and [did] not appear to focus on an issue that transcends ordinary business matters.” Similarly, in *Amazon.com, Inc.* (avail. Mar. 16, 2018), the Staff concurred in the exclusion of a proposal requesting that the company report on the risks arising from the public debate over the company’s growth and societal impacts and how it was managing or mitigating those risks. Relatedly, recognizing that decisions regarding the location of company operations involve numerous detailed operational considerations that implicate management’s ability to run the company on a day-to-day basis, the Staff has consistently held that proposals that address considerations related to the location of a company’s facilities are excludable under Rule 14a-8(i)(7). For example, in *The Boeing Company (Gladstein)* (avail. Jan 9, 2018, *recon. denied* Mar. 9, 2018), the Staff concurred in the exclusion, under Rule 14a-8(i)(7), of a proposal requesting that the board “include certain criteria in the [c]ompany’s process for selecting new or expanding existing sites for the [c]ompany’s new models of aircraft production locations.” Just as in the Statement’s fourth commitment, in *The Boeing Company* the proponent was focused on how the company’s operations would impact local communities. In its proposal, the proponent listed several “important factors” it believed the company should consider, including the “[s]upporting infrastructure of the locality,” “[t]he qualities of life for the region,” and the “[t]ax structures and economic incentives offered in a specific region.”

The Statement’s fourth commitment is about how a corporation supports the communities in which the corporation operates. Therefore the review requested in the Proposal necessarily means the Proposal addresses ordinary business decisions relating to impacts of the Company’s operations in the communities where it works. As discussed above in “Background,” to be sustainable the Company’s Responsible Growth focuses on three key areas, one of which is sharing success with the communities it serves.<sup>17</sup> The Company has adopted thoughtful policies and procedures to “align [its] work to serve shareholder interests and address the priorities of [the] communities [in which it works] at the same

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<sup>17</sup> See Bank of America Corporation, Our strategy: Learn how Bank of America is driving responsible growth, available at <https://about.bankofamerica.com/en-us/who-we-are/our-strategy.html>.

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time so that [the Company's] progress can be sustainable.”<sup>18</sup> As such, as part of its overall ordinary operations, the Company invests considerable time and expense in considering and determining where its business operations should be located and how the Company can impact those communities through “sharing success.” As the Staff has recognized in the precedent above, decisions relating to the “community impacts” of the Company’s ordinary business operations, as well as decisions regarding the related issue of determining in which communities the Company operates, are fundamental to management’s ability to run the Company and are not an appropriate matter for stockholder oversight. Therefore, as in *Amazon 2019* and *The Boeing Company* the Proposal is excludable under Rule 14a-8(i)(7).

5. The Company’s Strategies For Enhancing Stockholder Value Are Ordinary Business Matters.

The fifth commitment set forth in the Statement commits companies to the standard of “[g]enerating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate.” Thus, the Proposal would require the Board to evaluate whether the Company’s policies and practices are consistent with the goal of generating stockholder value, and publish its recommendations as to how the Company’s policies and practices should be changed to bring the Company’s policies and practices in line with this commitment.

As noted above, the Staff has previously indicated that proposals broadly directed at a company’s business strategies, policies, and programs may be properly excluded under Rule 14a-8(i)(7). *See CVS Corp.* Similarly, the Staff has held that proposals relating to the determination and implementation of a company’s strategies for enhancing stockholder value are matters relating to the conduct of the company’s ordinary business operations and are therefore excludable under Rule 14a-8(i)(7). For example, in *Ford Motor Co.* (avail. Feb. 27, 2007), the stockholder’s proposal requested that the company’s chairman “honor his commitments to shareholders to increase stock performance.” In concurring with the proposal’s exclusion of the proposal, the Staff noted that the proposal appeared to relate to the company’s “ordinary business operations (i.e., strategies for enhancing shareholder value).” *See also Ford Motor Co.* (avail. Mar. 8, 2006) (concurring with the exclusion of a proposal requesting the company’s chairman and board of directors “honor their commitment to enhance shareholder value” as relating to the company’s “strategies for enhancing shareholder value”). Similar to each of the foregoing precedents, the Proposal seeks consideration of how the Company’s existing policies and practices are generating long-term value for stockholders and is properly excludable under ordinary business as relating to strategies for enhancing stockholder value.

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<sup>18</sup> *Id.*

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The Statement's fifth commitment is about delivering long-term value to stockholders. Therefore the review requested in the Proposal necessarily means the Proposal addresses ordinary business decisions relating to the Company's policies and strategies for generating long-term value and thereby enhancing stockholder value. As discussed above in "Background," the Company has committed considerable time and expense to implementing policies and procedures designed to facilitate sustainable growth and deliver long-term value to the Company's stockholders as part of the Company's overall business strategies. In order to execute these policies and the Company's broader business strategy, the Board and Company management review various complex criteria. As the Staff has recognized in the precedent above, decisions related to the Company's strategies for enhancing stockholder value are fundamental to management's ability to run the Company and are not an appropriate matter for stockholder oversight. Therefore, by addressing how the Company generates stockholder value, the Proposal is excludable under Rule 14a-8(i)(7).

*C. The Proposal Does Not Transcend The Company's Ordinary Business Operations*

The well-established precedent set forth above demonstrates that the Proposal addresses ordinary business matters and, therefore, is excludable under Rule 14a-8(i)(7). Importantly, the 1998 Release provides that proposals "focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable." Similarly, most recently, the Staff noted that it "believe[s] the focus of an argument for exclusion under Rule 14a-8(i)(7) should be on whether the proposal deals with a matter relating to that company's ordinary business operations or raises a policy issue that transcends that company's ordinary business operations." See SLB 14K. The Staff further noted that "[w]hen a proposal raises a policy issue that appears to be significant, a company's no-action request should focus on the significance of the issue to that company."

Here, the Proposal refers to "sustainability practices" in the context of the Company's "current governance documents, policies, long term plans, goals, metrics and sustainability practices" but does not focus on any policy issue, let alone a significant policy issue that transcends the Company's ordinary business operations. Instead, as discussed above, the Proposal's principal focus is on the Company's implementation of principles and policies covering a wide range of ordinary business matters, including the Company's relationship with its customers, employees, stockholders, suppliers and communities. Therefore, because the Proposal encompasses ordinary business matters, the Proposal properly can be excluded under Rule 14-8(i)(7).

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This is not changed by the few assertions in the Supporting Statement regarding how the Company implements its sustainability standards in its lending portfolio.<sup>19</sup> For example, in *Dominion Resources, Inc.* (avail. Feb. 22, 2011), a proposal requested that the company offer its electric power customers the option of directly purchasing electricity generated from 100% renewable energy. The company sought exclusion of the proposal under Rule 14a-8(i)(7) as dealing with a decision of whether to provide a particular service offering to its customers. Although the proponent argued that the proposal related to the significant policy issue of greenhouse gas emissions, the Staff concurred with the exclusion of the proposal, noting that “the proposal relates to the products and services that the company offers” and that “[p]roposals concerning the sale of particular products and services are generally excludable under [R]ule 14a-8(i)(7).” See also *Deere & Co.* (avail. Nov. 14, 2014) (concurring with the exclusion of a proposal requesting the implementation and enforcement of a company-wide employee code of conduct that included an anti-discrimination policy where the proposal also related to the company’s “policies concerning its employees,” an ordinary business matter).

Consistent with long-established Staff precedent, merely referencing topics in passing that might raise significant policy issues, but which do not define the scope of actions addressed in a proposal and which have only tangential implications for the issues that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business. See, e.g., *Wells Fargo* (concurring that proposal addressing customer service was excludable under Rule 14a-8(i)(7) even though the supporting statements raised multiple issues that may have appeared to be significant to the company).

Similarly, even where a proposal touches upon a policy issue that is significant to a company, the proposal may be excluded when it does not raise an issue that transcends the company’s ordinary business operations. For example, in *Bank of America Corp.* (avail. Feb. 19, 2014, *recon. denied* Mar. 10, 2014, Comm. review denied May 22, 2014) (“*Bank of America 2014*”), the Staff concurred with exclusion of a proposal under Rule 14a-8(i)(7) that addressed compensation arrangements raising a significant policy issue because the proposal also encompassed non-incentive-based compensation arrangements that implicated the Company.

Here, the Proposal presents an even stronger case for exclusion than *Wells Fargo* and *Bank of America 2014*. The Proposal is fatally over-broad because it seeks information from the Board on reconciling the Company’s existing governance documents, policies, long term plans, goals, metrics

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<sup>19</sup> As noted above, the manner in which the Company aligns its lending activities to its commitment to sustainability is addressed in the ESRP Framework, *available at* <https://about.bankofamerica.com/assets/pdf/Environmental-and-Social-Risk-Policy-Framework.pdf>.



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and sustainability practices with the Statement, which relates primarily to ordinary business matters (relationships with employees, customers, suppliers, stockholders and communities and core management decisions regarding how to run the business in order to create value for shareholders). In that context, merely referencing sustainability-related topics in the Proposal and in the Supporting Statement does not transform an otherwise ordinary business proposal into one that transcends this Company's ordinary business.

Likewise, in *Amazon 2019*, as discussed above, although the proposal might have touched on sustainability concerns, the proposal was broadly worded and the Staff concurred that the proposal did not focus on any single issue that transcended the company's ordinary business. In its no-action request, the company successfully argued that "[e]ven if some of [the] issues that would be addressed in the report requested by the [p]roposal could touch upon significant policy issues within the meaning of the Staff's interpretation, the [p]roposal is not focused on those issues, but instead encompasses a wide range of issues implicating the [c]ompany's ordinary business operations within the meaning of Rule 14a-8(i)(7), and therefore may properly be excluded under Rule 14a-8(i)(7)." The Staff concurred and granted no-action relief under Rule 14a-8(i)(7) noting that "the [p]roposal relates generally to 'the community impacts' of the [c]ompany's operations and does not appear to focus on an issue that transcends ordinary business matters" (emphasis added). Similar to *Amazon 2019*, here the Proposal merely touches upon sustainability practices, instead focusing on the comprehensive, Company-wide steps that may be required in order to alter the Company's "current governance documents, policies, long term plans, goals, metrics and sustainability practices," generally, in order to give effect to the broad corporate principles articulated in the Statement. Thus, similar to *Wells Fargo* and *Amazon 2019*, the Proposal fails to focus on any one issue that might rise to the level of significance that would preclude exclusion here.

In *PetSmart, Inc.* (avail. Mar. 24, 2011), the proposal requested that the board require its suppliers to certify they had not violated "the Animal Welfare Act, the Lacey Act, or any state law equivalents," the principal purpose of which related to preventing animal cruelty. The Staff granted no-action relief under Rule 14a-8(i)(7) and stated, "[a]lthough the humane treatment of animals is a significant policy issue, we note your view that the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.'" See also *JPMorgan Chase & Co.* (avail. Mar. 9, 2015) (concurring with the exclusion of a proposal requesting the company amend its human rights-related policies "to address the right to take part in one's own government free from retribution" because the proposal related to "[the company's] policies concerning its employees"); *Mattel, Inc.* (avail. Feb. 10, 2012) (concurring with the exclusion of a proposal that requested the company require its suppliers to publish a report detailing their compliance with the International Council of Toy Industries Code of Business Practices, noting that the ICTI encompasses "several topics that relate to . . . ordinary business operations and are not significant policy issues"); *JPMorgan Chase & Co.* (avail. Mar. 12, 2010) (concurring with the

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exclusion of a proposal that requested the adoption of a policy banning future financing of companies engaged in a particular practice that impacted the environment because the proposal addressed “matters beyond the environmental impact of JPMorgan Chase’s project finance decisions”); *Apache Corp.* (avail. Mar. 5, 2008) (concurring with the exclusion of a proposal requesting the implementation of equal employment opportunity policies based on certain principles and noting that “some of the principles relate to Apache’s ordinary business operations”); *General Electric Co.* (avail. Feb. 10, 2000) (concurring with the exclusion of a proposal relating to the accounting and use of funds for the company’s executive compensation program because it both touched upon the significant policy issue of senior executive compensation, and involved the ordinary business matter of choice of accounting method).

Although the Proposal references the Company’s sustainability practices and the Statement’s fourth commitment includes “embracing sustainable practices,” the Proposal does not focus on the issue of sustainability and seeks only a report on whether there may be “inconsistencies” between the Company’s policy statements and how it implements its policies. Thus, to the extent that the Proposal touches upon a sustainability issue, it does so in the context of addressing much broader topics that focus on many aspects of the Company’s ordinary business activities. Such references are insufficient to preclude exclusion under Rule 14a-8(i)(7) because, as in *Bank of America 2014* and *Apache Corp.*, they do not cause the focus of the Proposal to transcend the Company’s ordinary business operations.

The Proposal relates most broadly to the company’s business strategies, policies and programs. Moreover, because of the scope of the Statement, the Proposal relates primarily to ordinary business matters: the Company’s customer relations; how the Company manages its workforce; the Company’s relations with its suppliers and general adherence to ethical business practices; the community impacts of the Company’s operations; and the Company’s strategies for enhancing stockholder value. There is nothing more quintessentially ordinary business than asking the Company to review its purpose as a corporation and corporate citizen, broadly and generally, across a wide range of policies, plans, goals, and practices. As in *CVS*, *PetSmart, Inc.*, *Mattel, Inc.* and *JPMorgan Chase & Co.*, and the other extensive precedent cited above, the Proposal therefore may be properly excluded under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations.

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**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 2020 Proxy Materials.

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](mailto: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

Enclosures

cc: Ross E. Jeffries Jr., Bank of America Corporation  
John C. Harrington

**EXHIBIT A**





November 5, 2019

Corporate Secretary  
Bank of America Corporation  
Hearst Tower  
214 North Tryon Street  
NC1-027-18-05  
Charlotte, North Carolina 28255

**RE: Shareholder Proposal**

Dear General Counsel and Secretary,

As a shareholder in the Bank of America Corporation, I am filing the enclosed shareholder resolution pursuant to Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934 for inclusion in the Bank of America Corporation Proxy Statement for the 2020 annual meeting of shareholders.

I am the beneficial owner of at least \$2,000 worth of the Bank of America Corporation stock. I have held the requisite number of shares for over one year, and plan to hold sufficient shares in the Bank of America Corporation through the date of the annual shareholders' meeting. In accordance with Rule 14a-8 of the Securities Exchange Act of 1934, verification of ownership is included. I or a representative will attend the stockholders' meeting to move the resolution as required by SEC rules.

If you have any questions, I can be contacted at (707) 252-6166.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Harrington", is written over a circular stamp. The signature is fluid and cursive.

John C. Harrington  
President and C.E.O.  
Harrington Investments, Inc.

## **Bank of America – 2020**

**Whereas,** Our Company's management has pledged our Company to policies that may be inconsistent with our governance documents. There needs to be congruity between corporate management policies and our Board's fiduciary duties reflected in our Company's bylaws, Articles of Incorporation and Committee Charters.

**Whereas,** in 2016 through 2018, our Company financed the fossil fuel industry with over \$106 billion in loans; and

**Whereas,** according to *Banking on Climate Change: Fossil Fuel Report Card 2019*, our bank was among the top banks funding one hundred key oil, gas and coal companies expanding fossil fuels; and

**Whereas,** our Company financed tar sands production companies, Arctic and ultra-deep-water oil and gas companies, fracked oil and gas producers and transporters and liquefied natural gas companies, mining companies and coal power companies;

**Whereas,** our Company's Chairman and Chief Executive Officer, in August 2019, signed a 'Statement on the Purpose of a Corporation', committing our Company to **all** stakeholders, supporting "... the communities in which we work... respect[ing] the people in our communities and protect[ing] the environment by embracing sustainability practices across our businesses"; and

**Whereas,** however, there is no indication of how that public statement will be implemented in policy, or even if such commitment was considered by our Board of Directors, as a policy to be implemented by amending our Company's governance documents;

**Resolved**, that shareholders request our Board of Directors, acting as responsible fiduciaries, review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company's governance documents, policies or practices.

**Supporting Statement**

In the proponent's opinion, there is a disconnect between the public statement endorsed by our Chairman and Chief Executive Officer, and other actions of the Company, including the lack of a necessary framework to advance this commitment through our Company's governance documents. Our Board of Directors, as responsible fiduciaries, need to reconcile these incongruities.



November 5, 2019

John Harrington  
1001 2nd Street Suite 325  
Napa, CA 94559

Account number ending in:

\*\*\*

Questions: Contact your advisor or  
call Schwab Alliance at  
1-800-515-2157.

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**Important information regarding shares in your account.**

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Dear John Harrington,

We're writing to confirm information about the account listed above, which Charles Schwab & Co., Inc. holds as custodian. This account holds in trust 600 shares of Bank of America Corp BAC common stock. These shares have been held in the account continuously for at least one year prior to and including November 5, 2019.

These shares are held at Depository Trust Company under the nominee name of Charles Schwab & Co., Inc., which serves as custodian for the registration listed above.

**Thank you for choosing Schwab.** If you have questions, please contact your advisor or Schwab Alliance at 1-800-515-2157. We appreciate your business and look forward to serving you in the future.

Sincerely,

*Mikaela Jamka*

Mikaela Jamka  
Associate, Institutional  
MID-MARKET PHOENIX SERVICE  
2423 E Lincoln Dr  
PHOENIX, AZ 85016-1215

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**EXHIBIT B**

### **Statement on the Purpose of a Corporation**

Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.

Businesses play a vital role in the economy by creating jobs, fostering innovation and providing essential goods and services. Businesses make and sell consumer products; manufacture equipment and vehicles; support the national defense; grow and produce food; provide health care; generate and deliver energy; and offer financial, communications and other services that underpin economic growth.

While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:

- Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
- Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
- Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
- Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.
- Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.

Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.

August 2019