January 17, 2020

Scott Shepard  
National Center for Public Policy Research  
sshepard@nationalcenter.org

Re: Apple Inc.  
Incoming letter dated January 8, 2020

Dear Mr. Shepard:

This letter is in response to your correspondence dated January 8, 2020 concerning the shareholder proposal (the “Proposal”) submitted to Apple Inc. (the “Company”) by the National Center for Public Policy Research (the “Proponent”). We also have received correspondence from the Company dated January 15, 2020. On December 20, 2019, we issued a no-action response expressing our informal view that the Company could exclude the Proposal from its proxy materials for its upcoming annual meeting. You have asked us to present the matter to the Commission, or, in the alternative, reconsider our position.

The Division “endeavors to act upon a request for reconsideration within a reasonable time, giving due consideration to the demands of the management’s schedule for printing its proxy materials” and to process requests for Commission review “provided they are received sufficiently far in advance of the scheduled printing date for the management’s definitive proxy materials to avoid a delay in the printing process.” See Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12599 (July 7, 1976).

The Company’s January 15, 2020 letter states that when it received your request for reconsideration, the Company had already filed with the Commission the definitive version of its proxy statement, begun mailing notices to shareholders pursuant to the “notice and access” process, and the printing of its 2020 proxy materials was substantially complete. The Company also states that mailing supplemental proxy materials and/or soliciting revised proxies for the 2020 annual meeting would require substantial effort and expense, and that there may not be enough time to do so if required before the annual meeting. In light of these timing considerations, we deny the requests for reconsideration and Commission review.
Sincerely,

William Hinman
Director
Division of
Corporation Finance

cc: Sam Whittington
Apple Inc.
sam_whittington@apple.com
January 15, 2020

VIA E-MAIL (shareholderproposals@sec.gov)

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

Re: Apple Inc.
Shareholder Proposal of the National Center for Public Policy Research

Dear Ladies and Gentlemen:

By letter dated January 8, 2020 (the “Request for Reconsideration”), the National Center for Public Policy Research has requested that the staff of the Division of Corporation Finance reconsider its letter dated December 20, 2019 (the “No-Action Letter”) concurring that the Company could omit the Proponent’s shareholder proposal from the Company’s 2020 Proxy Materials under Rule 14a-8(i)(7). The Proponent also requests that the Commission either reverse the position expressed in the No-Action Letter or direct the staff to reconsider or “explain” it. As discussed further below, the Company believes the Proponent’s challenge to the staff’s position is without merit and that the Request for Reconsideration should be denied.

Capitalized terms used in this letter and not otherwise defined have the meanings ascribed to them in the Company’s letter to the staff dated October 22, 2019 (the “No-Action Request Letter”).

Procedural History

The Proponent delivered the Proposal to the Company on September 9, 2019. The Company submitted the No-Action Request Letter to the staff on October 22, 2019, with a copy to the Proponent, and the Proponent submitted to the staff a letter dated November 25 (the “Proponent’s Response Letter”) objecting to the Company’s exclusion of the Proposal from its 2020 Proxy Materials and making many of the same arguments the Proponent now makes in the Request for Reconsideration. The staff delivered the No-Action Letter to the Proponent and the Company on December 20, 2019, concurring that the Company could exclude the Proposal under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations. Thereafter, on January 3, 2020, the Company filed with the Commission its definitive proxy statement and related 2020 Proxy Materials, which did not include the Proposal. On the same date, the Company began mailing the notice of the 2020 Annual Meeting to its shareholders (using the “notice and access” form of proxy solicitation). The Company began printing the 2020 Proxy
Materials (for those shareholders who requested full sets) on January 6, 2020, and began mailing them on January 9, 2020. Therefore, by the time the Proponent submitted the Request for Reconsideration, the 2020 Proxy Materials had been on file with the Commission for five days, mailing of the notices had already commenced, and printing of the full sets of the 2020 Proxy Materials was substantially complete. In accordance with a previously established schedule and process, mailing of the full set of the 2020 Proxy Materials began the day after the Proponent submitted the Request for Reconsideration. Shareholders have already begun voting on the proposals set forth in the 2020 Proxy Materials. The 2020 Annual Meeting is scheduled to be held on February 26, 2020.

Accordingly, the Company has already incurred substantial time and expense in preparing, printing and mailing the 2020 Proxy Materials to shareholders. Should the Commission grant the Proponent’s request to reconsider its position in the Staff Response Letter, it would subject the Company and its shareholders to substantial uncertainty about whether the 2020 Proxy Materials, as filed and distributed to shareholders, are complete. Given that the 2020 Annual Meeting is scheduled for February 26, 2020, there may not be enough time for the Company to mail supplemental proxy materials, if required, and/or solicit revised proxies for the 2020 Annual Meeting. These scenarios would also require substantial effort and expense on behalf of the Company.

Given the current timing, as well as the uncertainty and expense potentially involved, it would be unfair and unduly burdensome for the Commission to reopen the staff’s decision regarding the excludability of the Proposal at this time.

**The Staff was Correct to Permit Exclusion of the Proposal under Rule 14a-8(i)(7)**

In its No-Action Request Letter, the Company explained in detail why the Proposal is properly excludable under Rule 14a-8(i)(7) and described the factors the Nominating and Corporate Governance Committee (the “Nominating Committee”) of the Company’s board of directors considered in reaching the conclusion that the Proposal does not present an issue that transcends the Company’s ordinary business. The Request for Reconsideration offers nothing new to address the facts or supporting arguments set forth in the No-Action Request Letter, which the Company reaffirms but will not repeat here. While the Request for Reconsideration largely repeats the arguments made in the Proponent’s Response Letter, the Proponent appears to be making a new argument (among others) that the factors the staff considered in concluding that the Proposal is excludable under Rule 14a-8(i)(7) were either inappropriate or insufficiently articulated, or both. Specifically, the Proponent asserts that the staff’s stated reasons for agreeing that the Proposal could be excluded are “aggregated, indistinct, and explicated,” “wholly changes the character of staff no-action determinations,” and are “related in no way to the appropriate Rule 14a-8(i)(7) question.” These assertions are incorrect.

The No-Action Letter includes the following statement by the staff:

> In reaching our position, we considered the board’s Nominating and Corporate Governance Committee’s analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses
the difference – or delta – between the Proposal and the Company’s current policies and practices. In addition, the committee’s analysis noted that a shareholder proposal submitted to the Company’s shareholders last year regarding a related issue received 1.7% of the vote.

As the foregoing statement demonstrates, the factors considered by the staff in reaching its no-action position are clearly articulated, separate and distinct. Moreover, while the factors themselves are articulated plainly and require no explanation, the staff has described the relevance of each of the factors, and the staff’s consideration of them, in prior well-publicized staff interpretations. These prior staff interpretations assisted the Nominating Committee’s consideration of the significance of the Proposal to the Company for purposes of Rule 14a-8(i)(7).

In Staff Legal Bulletin No. 14I (November 1, 2017), the staff observed that, in determining the significance of a policy issue presented by a proposal to an individual company, the board of directors is in the best position to make the initial determination, based on its knowledge of the company’s business and the implications of the proposal. Accordingly, the staff said, “going forward, we would expect a company’s no-action request to include a discussion that reflects the board’s analysis of the particular policy issue raised and its significance. . . . We believe that a well-developed discussion of the board’s analysis of these matters will greatly assist the staff with its review of no-action requests.” The following year, in Staff Legal Bulletin No. 14J (October 23, 2018) ("SLB No. 14J"), the staff published a nonexclusive list of factors that a board might consider in assessing the significance of a policy issue to the company, including “whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal’s specific request and the actions the company has already taken” and “whether the company’s shareholders have previously voted on the matter and the board’s views as to the related voting results.” In a subsequent Staff Legal Bulletin, No. 14K (October 16, 2019), the staff singled out these two factors for further explanation of the extent to which they bear on the staff’s analysis under Rule 14a-8(i)(7) and the manner in which companies and proponents should approach their analysis of those factors.

There is, therefore, nothing new or unexplained about the factors the Company and the staff relied on in reaching the conclusion that the Proposal could be excluded under Rule 14a-8(i)(7). For that reason, the staff’s consideration and application of these factors, in the manner clearly described in the staff’s published guidance, does not “undermine the objectivity and interpretive value of the Rule 14a-8 review process” as asserted by the Proponent.

In addition, the Proponent appears to believe that the staff’s position in the No-Action Letter is inconsistent with the staff’s denial of a no-action request in CorVel Corp. (June 5, 2019); however, the proposal in CorVel Corp. addressed a different social policy issue than does the Proposal (see, e.g., CVS Health Corporation (February 27, 2015), for an example of a staff letter addressing the same policy issue addressed by the Proposal), and the fact that the policy issue raised by a proposal may be significant to one company does not mean that the policy is necessarily significant to another company. As the staff noted in SLB No. 14J, “a proposal that the staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another.”
CONCLUSION

For the reasons set forth above and in the No-Action Request Letter, the Company believes that the Request for Reconsideration should be denied, and that the staff’s position as expressed in the No-Action Letter should be affirmed.

If you have any questions or need additional information, please feel free to contact me at (408) 996-1010 or by e-mail at sam_whittington@apple.com.

Sincerely,

Sam Whittington
Assistant Secretary

Attachments

cc: Scott Shepard, National Center for Public Policy Research
    Alan L. Dye, Hogan Lovells
January 8, 2020

Via email: shareholderproposals@sec.gov

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


Dear Sir or Madam,

We at the National Center for Public Policy Research respectfully request review and reconsideration by the staff of the Division of Corporation Finance (“the Staff”) and the U.S. Securities and Exchange Commission (the “Commission”) of the Staff’s December 20, 2019 response (“the Staff Response Letter”) to the no-action request of Apple, Inc. (“the Company”) dated October 22, 2019 (the “Request Letter”) regarding our Proposal that the Company study the risks associated with its ongoing failure to add viewpoint non-discrimination to its Equal Employment Opportunity (“EEO”) policy.

In its Response Letter, the Staff agreed with the Company that our Proposal could be excluded from its 2020 proxy materials for its 2020 annual shareholder meeting. In reaching this decision, the Staff concluded that the Proposal “does not transcend the Company’s ordinary business operations.” Staff Response Letter. In so concluding, it relied on the Company’s assertion that the difference between the Company’s current practices and the proposal is relatively small, while nevertheless failing to accept the Company’s claim that it has already substantially implemented the proposal, thus justifying exclusion under Rule 14a-8(i)(10). Id. It further relied on the fact that “a shareholder proposal submitted to the Company’s shareholders last year regarding a related issue received 1.7% of the vote,” while nevertheless declining to endorse the Company’s assertion that our Proposal is excludable under Rule 14a-8(i)(12)(i) as being substantially similar to that earlier proposal. Id.
We think that the Staff’s decision is in error in this specific instance, because it diverges from exactly relevant precedent that sought to study the risks of discrimination against other potentially at-risk groups on irrelevant or unsubstantiated grounds.

Moreover, and perhaps more importantly, we believe that this decision, if permitted to stand, will significantly undermine the proposal-review process in the future. The Staff made its determination here ostensibly under Rule 14a-8(i)(7), but on grounds that neither the Staff nor the Company connected to the issue properly under consideration under Rule 14a-8(i)(7) – whether or not the issue raised by our Proposal has effectively been addressed or rendered insignificant by the ordinary business operations of the Company. Allowing this decision to stand on the aggregated, indistinct, and unexplicated mélange of grounds stipulated by the Staff would effectively convert a system of unique grounds for exclusion (as Rule 14a-8 has until now provided) into a multi-factor test that would allow the Staff to aggregate grounds, none of which themselves justify exclusion, into a “lump-sum” exclusion decision. This sub silentio shift to a multi-factor test, if unaccompanied by a concomitant new commitment to providing additional detail about how the various factors apply and the role they play in supporting the aggregate decision, would undermine the objectivity and interpretive value of the Rule 14a-8 review process while potentially creating significantly more work for the Staff to no good purpose. We therefore request that the Commission and the Staff reconsider and reverse the December 20 decision of the Staff.

Because we think the Staff’s decision is both novel and potentially deeply procedurally problematic as precedent, we think it to be one of the “certain instances” in which “an informal statement of the views of the Commission may be obtained.”1 We therefore seek reconsideration by the Commission.

**Summary of Proceedings**

Our Proposal asks the Board of Directors to issue a public report detailing the potential risks arising from omitting “viewpoint” and “ideology” from its written EEO policy. We indicated that the report should be available within a reasonable timeframe, be prepared at reasonable expense, and omit any proprietary information.

The Company sought to exclude this proposal on three broad grounds. First, it claimed that the Proposal’s subject matter concerned only the Company’s ordinary business operations, while failing to implicate any significant policy issues, thus permitting exclusion under Rule 14a-8(i)(7). Next, the Company asserted that the Proposal relates to substantially the same subject

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1 17 CFR § 202.1(d) (“The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.”).
matter as a recently submitted proposal that failed of shareholder support, allowing exclusion under Rule 14a-8(i)(12)(i). Finally, it averred that it has already substantially implemented this Proposal, invoking Rule 14a-8(i)(10).

We objected to each of these claims. In our response to the Company we pointed out that the Staff, in CorVel Corp. (avail. June 5, 2019), had ruled that a proposal that was *exactly the same* as the one we had submitted – except that the category of discrimination it wished to avoid was *sexuality* instead of *viewpoint* – did not fall within the ordinary business exception, and thus that ours could not reasonably and objectively so fall either, especially given the similarity of the long history and modern urgency of the two types of discrimination in American life. We further argued that our Proposal differed in focus, subject, result and purpose from the earlier proposal, particularly in that the earlier proposal sought private information about Board of Director candidates, while our Proposal seeks to protect the civil liberties of all of the Company’s employees. Finally, we explained that while the Company had prohibited discrimination on a wide variety of bases, it had made no demonstration whatever that it has done *anything at all* to prohibit discrimination on the basis of viewpoint, and thus could not be considered to have “substantially implemented” the proposal.

The Staff issued its Response Letter on December 20. In that letter, it asserted that our Proposal fell within the ambit of the Company’s ordinary business activities, and was thus excludable under 14a-8(i)(7). As is its normal procedure, the Staff failed to explain how our Proposal fell within the ordinary business exception while the proposal implicated in *CorVel Corp.*, which, again, was exactly the same as our Proposal except that it sought to review and deter discrimination on a wide variety of bases, it had made no demonstration whatever that it has done *anything at all* to prohibit discrimination on the basis of viewpoint, and thus could not be considered to have “substantially implemented” the proposal.

The Staff did assert that its decision was based in part on its conclusions that “we considered the board’s Nominating and Corporate Governance Committee’s analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company’s current policies and practices.” Staff Response Letter. It failed, however, to explain how it had taken this analysis and conclusion into account, or how providing *no* protection against discrimination on the basis of viewpoint is not very different from actually providing protection against discrimination on the basis of viewpoint – far less how whatever the Company had done went to the question. It also failed to concur with the Company’s position that the Company had established that its current practices justified exclusion of our Proposal under the relevant Rule 14a-8(i)(10). Finally, it failed to explain how any prior performance by the Company could place our Proposal more completely in the ambit of “ordinary business operations” than the proposal implicated in *CorVel Corp.*

Similarly, the Staff Response Letter stated that it had, in reaching its Rule 14a-8(i)(7) conclusion, considered “the committee’s analysis,” which “noted that a shareholder proposal submitted to the Company’s shareholders last year regarding a related issue received 1.7% of the vote.” Staff Response Letter. Again, though, the Staff failed to describe how it considered the proposals related. It failed to endorse the Company’s claim that the proposals were sufficiently related to
allow for exclusion of our Proposal under 14a-8(i)(12). And it failed to explain how the relationship, however it might arise or however strong it might be, might render our Proposal to be more within the ambit of ordinary business activity than the CorVel Corp. proposal and thus excludable under Rule 14-8(i)(7).

**Analysis**

As we argued in our response to the Company’s No-Action Request Letter, and as summarized above, we believe that our Proposal is essentially the same – except for the grounds on which protection against discrimination is sought – as the proposal in CorVel Corp., and that no Rule 14(a) provision permits its exclusion. We seek reconsideration not on those grounds *per se*, but specifically because of the means by which the Staff reached its no-action determination.

It appears from the Staff’s decision that it did not understand the Company to have demonstrated that it could exclude our Proposal on any single ground alone. If it had so concurred, it would simply have made such a declaration, as is its wont, and settled the issue. Instead, it issued a conclusion based in the “ordinary business operations” exception of Rule 14a-8(i)(7), and indicated that the decision was bolstered by the additional observations of the Company – observations related by the Company as part of its board’s analysis of our Proposal – that it noted. Upon review, though, it becomes clear that the additional board analysis relied upon is related in no way to the appropriate Rule 14a-8(i)(7) question.

We think that this mode of analysis wholly changes the character of staff no-action determinations in ways that simply do not suit the staff’s method of expressing those determinations, and in ways that undermine this decision specifically, all future decisions decided this way, and the integrity of the no-action decision process generally.

The key problem arises because the actual additional assertions made by the Company have nothing to do with whether the proposal is addressed or rendered insignificant by the Company’s ordinary business operations or not. This need not have been so. The Company might – in theory – have provided evidence, but did not, that in its ordinary business operations it had considered and protected against the problems of viewpoint discrimination in ways that had made our Proposal superfluous. It could have shown that despite evidence to the contrary, viewpoint discrimination and perceptions among employees of viewpoint discrimination were demonstrably not occurring. But it did not provide that evidence. Similarly, it could theoretically have shown that our Proposal was linked to the previous proposal referenced in some manner not simply rhetorical, but genuinely relevant to ordinary business operation analysis.

That the Company provided no evidence that the content of the board’s analysis and conclusions related in any way to the question of whether our Proposal implicated issues treated effectively by the company in its normal course of business suggests that there was no such evidence to provide. But it also renders the Staff’s reliance on the board’s analysis here incoherent and potentially deeply disruptive. The Company board’s analysis does not go to the question of ordinary business operations at all. By allowing that analysis, without explanation
or obvious connection, to bolster an otherwise insufficient claim under Rule 14a-8(i)(7), the Staff has effectively turned the Rule 14a-8 grounds as aggregated under Rule 14a-8(i)(7) from a list of unique grounds – any one of which must be independently satisfied for exclusion to be justified – into a list of factors, which may be aggregated to justify exclusion even if no specific ground is itself satisfied.

This latter move may constitute plain error under the Commission’s own published guidance, as discussed further below. Even if it is not plain error to treat the Rule 14a-8 grounds as factors rather than unique rules, though, it is a mistake to do so given the Staff’s standard method of replying to no-action requests, as modified in the instant case. While courts of law often employ multi-factor tests in a variety of settings, they are careful when they do so to explain how each factor was relevant, how it weighed into the determination, and related considerations. In short, multi-factor tests require detailed and extensive analysis. But the Staff provides no such detailed analysis – rather, it offers just a series of unsupported assertions that that board analysis, which on its face has nothing in particular to do with the coverage that our Proposal already receives under the Company’s ordinary business operations, nevertheless substantiates an otherwise insufficient Rule 14a-8(i)(7) claim.

To use the Rule 14a-8 grounds as factors in this way without also providing detailed and precedent-based analysis of those factors’ application would result in the no-action guidance process losing all coherence, predictive value, and perception of objectivity. This will result not in a decrease in work for the Staff, but an increase as the precedential value of its decisions effectively disappears and proponents thus lose any meaningful way to judge whether a new proposal to a new company may survive review – and so submit them all. It is therefore an innovation that would hurt all parties, and that should be rejected by the Commission.

Each of these arguments is elaborated below.

**Part I. Our Proposal is functionally indistinguishable – except with regard to the type of discrimination to be studied – from a proposal approved by the Staff just last year, making exclusion of our Proposal inappropriate absent additional relevant considerations.**

As an initial matter, our Proposal is effectively the same as a proposal for which the Staff refused a no-action request just last year in CorVel Corp. (avail. June 5, 2019) – except for the category of employee the discrimination against whom we sought study. The “resolved” section of the proposal at issue in that no-action determination contest stated:

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2 See Staff Legal Bulletin No. 14: Shareholder Proposals (July 13, 2001) at B.1. (“The rule generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the 13 substantive bases for exclusion described in the table below.” (emphasis added)).
RESOLVED Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting “sexual orientation” and “gender identity” from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.

Likewise, our Proposal to the Company states:

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

The only distinction to be made between these two proposals is the category of employee discrimination to be studied. As we discussed in our November 25, 2019 Response to the Request Letter (“Proponent Response”), at 3-4, and as had gone uncontradicted throughout these proceedings, discrimination on the basis of viewpoint has – like discrimination on the basis of sexual orientation – presented a grave and serious threat for at least a century, one that had lain dormant for many decades but which is growing again in recent years.

No effective distinction exists between the CorVel, Corp. proposal and our Proposal except the type of employees the discrimination against whom (along with its effects) is sought to be studied. The Commission and its Staff have long and clearly expressed their intention not to discriminate against similarly situated – far less effectively identical – proposals on the basis of the subject matter or merits of otherwise indistinguishable propositions alone. See Staff Legal Bulletin No. 14 at B.6-7. As a baseline proposition, therefore, the Staff should have rejected the Company’s no-action request.

Part II. The “board’s Nominating and Corporate Governance Committee’s analysis” of our Proposal upon which the Staff relies speaks in no way to the issue raised by our Proposal.

In order to defeat this baseline proposition, the Staff cited two other factors that entered into its decision-making process. The first of these was the Company’s “board’s Nominating and Corporate Governance Committee’s analysis and conclusion that the Proposal did not present a significant policy issue for the Company.” Staff Response Letter. That analysis not only failed to demonstrate any way in which discrimination vel non by the Company on the basis of viewpoint was being actively studied. It went even further, by its demonstration of other ways in which discrimination has been prohibited, to demonstrate that nothing whatever was being done to study – far less to prohibit – discrimination on the basis of viewpoint. In fact, the Company’s asserted confusion between discrimination on the basis of viewpoint and discrimination on the basis of totally unrelated characteristics underscored the complete failure of the Company to grapple with viewpoint discrimination – the issue raised by our Proposal – in any way at all.
The Commission has made significant efforts recently to explain how companies may usefully provide details of their boards’ analysis in helping the Staff to determine whether a particular proposal falls within or beyond the ambit of ordinary business operations. See *Staff Legal Bulletin 14K* (October 16, 2019); *Staff Legal Bulletin 14J* (October 23, 2018). Most recently, it advised that companies that sought to exclude proposals would be well advised to demonstrate “that the policy issue raised by the proposal is not significant to the company.” *Staff Legal Bulletin 14K*. In particular, it indicates 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. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7).

*Id.* We understand that this guidance is very new, and as yet little applied. We respectfully submit, however, that in reaching its conclusion in this instance, the Staff misapplied this guidance in ways that will, if followed here and in future, significantly undermine – if not essentially hollow out – the shareholder-proposal review process.

Our concern arises because the Company’s report on its board’s analysis simply failed to provide the information required by *Staff Legal Bulletin 14K*, and failed in ways that should have been dispositive. The Company reported on activities that it undertakes that are irrelevant to our Proposal (i.e., how it prohibits discrimination against groups and on grounds other than those implicated by our Proposal), but failed even to make an effort to suggest that these other sorts of discrimination prohibition effectively achieved the sort of anti-discrimination analysis we sought. With regard to prohibition of discrimination on the basis of viewpoint, in fact, the Company’s only relevant statement was that “the Company’s Equal Employment Opportunity Policy … does not explicitly include ‘ideology’ or ‘viewpoint’ discrimination.” Request Letter, at 5. It then indicated that on one page of its extensive website, it has included the sentence “We welcome all voices and all beliefs.” *Id.* at 6.

The distance between an extensive non-discrimination policy that nevertheless fails to include a prohibition against viewpoint discrimination and a stand-alone, generalized sentence on the website is itself a very significant one. And the distance is made greater by the very fact of Apple’s fierce fight against even studying whether it should include viewpoint discrimination in its otherwise fulsome protections. Additionally, the Company carefully fails in any way in its Response Letter, a public document, to suggest that its current policy plus the cited sentence *already does* prohibit against viewpoint discrimination, as such an admission might conceivably provide a basis on which an employee might in future stand.

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

Likewise, the Company does not indicate that it has any plans to study the problem of potential viewpoint discrimination on its own, despite direct and public communication of a problem of viewpoint discrimination at the Company from employees to the CEO himself. Nor did it, despite this direct evidence about problems at the Company as well as increasing problems with and perceptions of viewpoint discrimination in Silicon Valley and nationally, provide any contradictory evidence that viewpoint discrimination presented no real, legitimate problem at the Company.

The second consideration that the Staff relied on was that “a shareholder proposal submitted to the Company’s shareholders last year regarding a related issue received 1.7% of the vote.” Staff Response Letter. But the Company provided nothing about the board’s analysis of the comparison between the previous proposal and our Proposal except the bare, unsupported assertion that the board had concluded that the prior proposal had a “substantially identical policy focus,” Request Letter, at 6, while our response letter explained the differences between the two proposals in great detail. See Proponent Response, at 5-7. Because the Company board’s analysis was no more than conclusory, and could have added nothing to the Staff’s analysis under Rule 14a-8(i)(7), it should have played no role whatever in the Staff’s analysis.

All of these failures render the Staff’s decision in the instant matter erroneous. As importantly, however, they create a precedent that, if followed, would open Rule 14a-8(i)(7) analysis open to serious abuse. Here the Company provided no evidence that it does, or plans to do, or plans even to study, anything related to the subject matter of the proposal. Nor did it provide evidence that the issue raised is not – despite evidence to the contrary – a real, living issue at the

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5 See Staff Legal Bulletin 14K (October 16, 2019); Staff Legal Bulletin 14J (October 23, 2018) (“The discussions we found most helpful focused on the board’s analysis and the specific substantive factors the board considered in arriving at its conclusion. Less helpful were those that described the board’s conclusions or process without discussing the specific factors considered.”).
Company. Rather, it simply showed that it does other things tangentially related to the subject matter of the proposal, while straightforwardly admitting that it does not do – and implicitly admitted that it does not intend to do – anything like what the proposal seeks.

By this standard, every company that provides analysis of its board’s thinking will be entitled to a no-action determination so long as that analysis can point to something rhetorically similar – even if wholly functionally irrelevant – to the subject matter of the proposal. Further, as will be discussed more fully below, because of the summary nature of Staff no-action letters, decisions under this precedent will be liable to both the possibility and the perception of unappealable subject-matter bias.

Because this decision misunderstands and misapplies the Commission’s own guidance with regard to company board analysis in ways that result in both reaching the wrong conclusion in this instance and setting up incoherent and dangerous precedent for future cases, we urge the Commission to reverse it.

**Part III. Because the Staff’s Use of the Board Analysis Supplied in This Case Effectively Turns Rule 14a-8(i)(7) into a Sub Silento and Unexplicated Multi-Factor Test, it Must be Rejected Absent a Wholesale Change in the Staff’s Method of Analyzing and Explaining its No-Action Decisions.**

As we established in Part I, the decision in *CorVel, Corp.* should – unless other relevant factors intervened – have dictated the result in this case on the grounds of Rule 14a-8(i)(7), a result in favor of our Proposal, and against the Company’s no-action request. On its face, there is nothing that renders significantly different a report on the potential risks and ill effects arising from discrimination on the grounds of sexual orientation, the result requested in the *CorVel, Corp.* decision, from a report on the potential risks and ill effects arising from discrimination on the grounds of viewpoint, the result requested in our Proposal. The Company, having failed to address *CorVel, Corp.* at all, certainly failed to develop any such distinction.

As the Staff’s analysis illustrates, it found those other relevant factors in the Company board’s analysis. But as we have discussed above, there is nothing in the board’s analysis that connects it to the specific question at issue under Rule 14a-8(i)(7) – the question of whether the board is already addressing the issue raised by the Proposal in the course of its ordinary business operations.

The staff’s analysis also illustrates that it did not think that the Company had shown, via its retailing of its board’s analysis or otherwise, that the Company had shown that our Proposal was excludable under Rule 14a-8(i)(10) or Rule 14a-8(i)(12)(i), the Rules to which the information (or bare assertions) in the board’s analysis were arguably relevant. We know this because the board did not conclude that the our Proposal was independently excludable under these Rules, despite the Company’s explicit requests that the Staff so conclude.

Finally, then, we were left, after the Staff’s decision, with this knowledge:
(1) The staff agreed that our Proposal would not have been excludable under Rule 14a-8(i)(7) absent the Company’s discussion of the Company board’s analysis.

(2) That analysis did not demonstrate anything additional about the Company’s having dealt with our Proposal in the ordinary course of its business.

(3) Rule 14a-8(i)(7) has therefore in effect been turned into a sort of catch-all provision under which factors unrelated to the question of ordinary business operations can nevertheless be aggregated together to allow a generalized decision of exclusion.

(4) The Company board’s analysis did not demonstrate that our Proposal was substantially similar to a previous proposal (else the Staff would have excluded the proposal under Rule 14a-8(i)(12)(i)), but did demonstrate that our Proposal is to some completely indeterminate amount related to that previous proposal in such a way so that the indeterminate resemblance contributes in some unspecified degree to reaching a general determination of excludability under the new catch-all version of Rule 14a-8(i)(7).

(5) The Company board’s analysis did not demonstrate that our Proposal had already been substantially implemented by the Company, but did demonstrate that matters factually irrelevant to our Proposal but linguistically connected to it had been addressed in detail by the Company, so that the Company is for some undefined reason excused in some degree from addressing the actual subject matter of our Proposal in any way.

This is an incoherent mode of decision that leads to an incoherent result, one that will if allowed to stand result in significant problems well beyond the instant matter. Under the framework of decision that has existed heretofore, each Rule was addressed individually, as a unique ground for inclusion or exclusion of a proposal. Matters irrelevant to a specific ground could not change the Staff’s decision on that ground. And the Staff could – and, we suggest, should – continue to proceed on that basis in future in complete consistency with Staff Legal Bulletins No. 14J and 14K. Under this mode of analysis, the Staff could consider Company discussions of board analysis under Rule 14a-8(i)(7), but only with regard to how those analyses reflect the Company’s demonstration that it, in its ordinary business operations, has rendered the proposal nugatory – as by showing that the Proposal is being addressed by other means in the ordinary course, has been shown not to be a problem at the company, or otherwise.

Where the board’s analysis has revealed such information directly relevant to Rule 14(a)-8(i)(7), the Staff’s cursory summary of that analysis as part of its Rule 14(a)-8(i)(7) would provide the Proponent with coherent information about how to proceed.

Where the board’s analysis has, as here, provided no information about the relationship between the Company’s ordinary business operations and the Proposal in question, the Staff’s reliance on this information, which is relevant to other grounds on which the Staff did not make a no-action determination but not to Rule 14(a)-8(i)(7), converts the process into a multi-factor analysis.

There are two problems with this sub silentio conversion. The first is that it appears to be prohibited by the Staff’s own previous interpretations of Rule 14a-8. As Staff Legal Bulletin No.
14 explains, “rule [14a-8] generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the 13 substantive bases for exclusion described in the table below.”\textsuperscript{6} Turning Rule 14a-8(i)(7) into a catch-all aggregation of factors, none of which would satisfy one of the 13 substantive Rule 14a-8 grounds, appears straightforwardly to violate this stipulation.

The second problem, as we have seen just above, is that the conversion – executed as it has been in this instance, and presumably would be in the future - leaves proponents in a blind fog as to how to proceed. There is nothing wrong with multi-factor analyses \textit{per se}; they are often applied in a variety of settings in federal and state courts. Where they are adopted, however, the courts are careful to provide detailed descriptions of which factors were relevant, why, how each factor weighed into the decision, and so on.

To adopt a multi-factor test, as the Staff has effectively done by its use of the Company’s report of its board’s analysis in this case, without also adopting the detailed analysis and exposition that the courts undertake when employing such rubrics, drains the Staff review process of any informational or precedential content. If the Commission allows the decision in this case to stand, we will – as we have demonstrated – have no idea what to make of the decision, and no idea how to proceed. We won’t know how to craft better proposals in the future, or otherwise how to chart a path more likely to result in success. Neither will any other proponents faced with such opaque decisions.

Confusion will reign. The result will be not less work, fewer decisions and more efficiency for the Staff in this proposal-review process, but significantly more, as proponents fumble increasingly blindly in their efforts to achieve their policy purposes. The confusion and indeterminacy will additionally result in increasing perceptions of bias and other forms of unfairness, as proponents find it more and more difficult to figure out how the Staff makes its decisions, and easier and easier to conclude that untoward motivations play a role.

The Commission should instruct the Staff to allow company boards’ analysis to influence Rule 14a-8(i)(7) exclusion decisions only if that analysis provides direct evidence that the proposal under consideration is rendered unnecessary \textit{by ongoing ordinary business activities}. This will avoid the problem of converting a list of independent grounds into an ill-defined and unexplained set of indeterminately weighted factors. In the alternative, though, if the Commission disagrees and wishes to allow the Staff to turn Rule 14a-8(i)(7) into an effective catch-all aggregate provision, it should at least instruct the Staff, both in this instance and in future cases, to provide significant details about the Board-provided facts it found relevant, and its method of weighing the implicated factors to reach its decision, so that proponents will still find instructive and precedential value in its determinations.

\textsuperscript{6} \textit{Staff Legal Bulletin} No. 14: Shareholder Proposals (July 13, 2001) at B.1. (“The rule generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the 13 substantive bases for exclusion described in the table below.” (emphasis added)).
Conclusion

The Staff, in affirming the Company’s no-action request in this case, undertook a novel method of analysis that so significantly shifts the meaning and effect of Rule 14a-8 that may well have violated long-standing Staff-issued rules, and that cannot legitimately be applied here and in the future without the development of an entirely different, and much more detailed, form of review and decision by the Staff. We therefore ask the Commission to reverse the decision of the Staff, and to deny the Company’s no-action request. In the alternative, we ask that the current Staff decision be withdrawn, and the matter returned to the Staff with the options of either denying the no-action request or fully explaining its reinterpretation of the Rule 14a-8 grounds and the implications of that reinterpretation, its detailed analysis in this case, and the means by which proponents who would wish to follow the CorVel Corp. precedent about the non-ordinary nature of discrimination-prohibition studies in the future might reliably do so.

Thanks to the Staff and the Commission for its time and consideration.

A copy of this correspondence has been timely provided to the Company. If I can provide additional materials to address any queries the Staff may have with respect to this letter, please do not hesitate to call me at 202-507-6398 or email me at sshepard@nationalcenter.org.

Sincerely,

Scott Shepard

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