



November 12, 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

**RE: Stockholder Proposal of the National Center for Public Policy Research,
Securities Exchange Act of 1934 - Rule 14a-8**

Ladies and Gentlemen,

This correspondence is in response to the letter of Elizabeth A. Ising on behalf of Walgreens Boots Alliance, Inc. (the "Company") dated October 30, 2020, supplementing its September 18, 2020 letter requesting that your office (the "Commission" or "Staff") take no action if the Company omits our Shareholder Proposal (the "Proposal") from its 2021 proxy materials for its 2021 annual shareholder meeting.

Background & Summary

Our Proposal asks the Board of Directors to issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity ("EEO") policy. We indicated that the report should be available within a reasonable timeframe, be prepared at reasonable expense, and omit any proprietary information.

Walgreens first sought from the SEC Staff a no-action declaration on the basis of Rule 14a-8(i)(7), claiming that our Proposal falls within the Company's ordinary business operations. The Company relied in particular on cases from last shareholder-meeting season in which the Staff held that the proposal currently under consideration could appropriately be omitted.

In a letter brief submitted on October 8 (the "Reply Letter"), we objected to the Company's request. We pointed out that our proposal is identical to the proposal in the *CorVel Corp.* (avail. June 5, 2019) proceeding, except with regard to the *type* of discrimination to be studied. The proponents in that instance sought a study to determine the risks arising from discrimination on the basis of sexual orientation and sexual identity, while our proposal seeks a study of the same risks arising from viewpoint discrimination. We recognized that the Staff had permitted exclusion of our Proposal in proceedings earlier in 2020. We noted that the only possible distinction upon which the Staff's decision could legitimately have rested in those earlier proceedings was that in those proceedings the companies were able to point to previous proposals on facially related topics within the last five years. While we had disagreed, and still do, that this facial relationship was dispositive, we acknowledged that it could provide a ground to explain and justify the Staff's earlier decisions. Finally, we noted that that ground – the previous proposal – is not present in this instance, allowing, so far as we can see, for no conclusion but that our proposal is not omissible, per the clear *CorVel Corp.* precedent.

On October 30 the Company submitted a supplemental no-action letter (the "Supplemental Letter"). This letter fails to respond in any way to our Response Letter. It does not address *CorVel Corp.*, much less try to distinguish it. It does not address the fact that in this proceeding, unlike the proceedings earlier in the year, there is no facially related previous proposal here (except obliquely, to raise the astonishing proposition that the *lack* of a previous, facially related proposal can *also* justify omission). It simply seeks to add some additional support for omission as though this proceeding were just beginning. Because these additional arguments have been added nearly three months after the proposal was initially submitted to the Company, and because they take no account of our subsequent submission in this proceeding, they are extremely untimely and should be rejected on that ground.

Should the Supplemental Letter not be so rejected, then the Staff should join us in concluding that the letter's arguments do nothing to bolster the Company's position, and in fact undermine it. Because it in no way responds to our Reply Letter, it does nothing to address our arguments there. And its attempt to demonstrate that the Company's current posture with regard to viewpoint discrimination is substantially similar to our Proposal instead demonstrates the opposite. If the congeries of statements spread throughout the Company's publications actually added up to a legal protection against viewpoint discrimination for employees, the Company would both (a) say so expressly to the Commission, and (b) not object to adding a few words to its EEO policy to make this fact clear. It carefully avoided doing either of these things. This reveals that the Company wants to preserve the ability to claim in later litigation that it does *not* protect employees from viewpoint discrimination, while pretending now to the Staff that it does. And the Company's claim that viewpoint discrimination is not a serious problem has already been belied by evidence we have provided in the Attachment to our Reply Letter and by developments of just the past few days.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden, in either its initial or its

supplemental attempt. We again urge the Commission to reject the Company's no-action request.

Analysis

Part I. The Company's Supplemental Letter Should Be Rejected as Untimely.

The Company's Supplemental Letter is untimely, and should be rejected on that ground.

We submitted our Proposal to the Company on August 7. The Company sent its initial no action letter on September 18. We replied to that letter on October 8. The Company then waited more than three weeks to submit its Supplemental Letter. As we illustrated above, the Supplemental Letter is in no way responsive to our Reply Letter. There is nothing in it that depended upon anything from us other than our Proposal. The clock for timeliness for the information contained in the Supplemental Letter therefore began ticking on August 7, and by any plausible measure had long since run out by the time that letter was finally submitted, nearly three months later, on October 30.

Timeliness is important to both parties in these proceedings, not merely to companies. In a decision in January, the Staff rejected a request for reconsideration from us in the *Apple, Inc.* (reconsideration available January 17, 2020) proceeding as untimely, though it was submitted only 19 days (which included the Christmas and New Year's holidays) after the decision had been rendered by the Staff, because it had been submitted a day after Apple had begun printing its shareholder meeting materials. Thus, reconsideration would occasion additional effort and expense for that company. Likewise, receiving, nearly three months after submitting our Proposal, materials that could and should have been included in the initial no-action request occasions significant additional effort and expense for our organization. We are a leanly staffed shop that schedules its shareholder interactions with an eye toward creating a calendar that we can manage given our staffing levels. If some printing and mailing expenses represented sufficient grounds to find a submission untimely for the benefit of a trillion dollar company, surely the expenses and additional effort created by a company's submission to a shareholder proponent that arrives nearly 90 days after the Company received the Proposal, and that is not responsive to subsequent filings in the proceeding, also provide sufficient grounds.

Part II. The Company's Supplemental Letter Undermines its Claims for Exclusion.

Even if the Supplemental Letter is not rejected as untimely, it still does not help the Company's case. In fact, it undermines it.

The Company argues that it "has extensive equal employment opportunity and anti-discrimination policies and practices, so there is not a significant difference between the

objective of the Proposal and what the Company has already done.”¹ It then lists a series of Company assertions in various documents that it implies are directly relevant to the issue at hand, viewpoint discrimination, but are not (e.g., “valu[ing] *diverse backgrounds*”² – which is entirely different from valuing, much less barring discrimination on the basis of, diverse *viewpoints*) or that speak of goals rather than actionable protections (e.g., a “commitment to ... ‘recruiting, retaining, engaging and developing’ a “workforce with *diverse backgrounds, abilities, perspectives and beliefs*”³ is very different from an outright ban in an EEO policy, the equivalent of a contractual obligation, against viewpoint discrimination). And the Company never anywhere says, rather than implying by misdirection, that it actually does prohibit discrimination on the basis of viewpoint.

Now, maybe this was simply a matter of inartful drafting by the Company’s counsel. Perhaps the Company meant to state, flat-out, that it bans discrimination against employees on the basis of viewpoint, and can point to some explicit language somewhere in the Company’s documentation that states this. If the Company can provide that language and its location, and will state directly that the stated language both is and is meant to be an actionable protection against viewpoint discrimination, then we will happily withdraw our proposal. But if it is unwilling to clearly state and demonstrate what it has tried very hard to imply while rigorously *not* stating or demonstrating, then the Staff has no choice but to conclude that its Supplemental Letter constituted an intricate effort to mislead both us, representatives of its shareholders, and the Securities & Exchange Commission.

The remainder of the Company’s arguments are meritless makeweights. As we have established already in this proceeding,⁴ and as *CorVel Corp.* establishes⁵ (if the Company had but read and acknowledged it), issues of discrimination and the prohibition of discrimination transcend company-specific considerations under Commission precedent, so the Company’s Compensation Committee’s conclusions that the issue does not transcend ordinary business⁶ and would not have a significant financial impact on the company⁷ are immaterial. And there can be no doubt that viewpoint discrimination specifically presents a serious, present and transcendent social problem. We included significant amounts of such evidence in the

¹ Letter from Elizabeth A. Ising to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission 4 (Oct. 30, 2020) (“Supplemental No-Action Request”).

² *Id.*

³ *Id.* at 5.

⁴ See Letter from Scott Shepard to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, Attachment at 4-5 (Oct. 8, 2020) (“No-Action Reply”).

⁵ In *CorVel Corp.* the anti-discrimination proposal was found to be non-excludable even though the evidence that the sort of discrimination raised there pointed not to specific and ongoing discrimination by CorVel, but to general societal discrimination concerns.

⁶ See Supplemental No-Action Request, at 3.

⁷ See *id.*, at 7.

Attachment to our Reply Letter⁸ and in submissions in other proceedings before the Staff,⁹ and elsewhere,¹⁰ and additional evidence of viewpoint discrimination piles up every day. Consider, for instance, the call last week by a sitting member of Congress to blacklist American citizens, and to destroy their lives and their ability to earn a living, for the sin of supporting policy positions with which she personally disagrees.¹¹ This call joins others by current and former congresspeople and administration officials seeking, if anything, even more ominous revenge for daring to participate in our democracy in ways that displease them.¹² And in recent days the Staff itself has received requests from Disney¹³ and Starbucks¹⁴ seeking a decision from the Staff that the Commission will take no action against them if they omit a neutrally drawn proposal from us in material part on the grounds that members of our organization have dared to take public-policy positions that those two companies consider unappealing; they are asking the Staff to strip from us civil and economic rights protected by federal statute because of our viewpoint. Viewpoint discrimination could hardly constitute a more pressing concern.

The fact that the Company has not been asked to present similar shareholder proposals in the past¹⁵ cannot matter. As we have explained already in this proceeding, the Staff has permitted omission of previous attempts to present our Proposal at different companies because a facially related proposal had been presented there within the past five years. If the Staff were to allow companies to omit proposals because somewhat similar proposals *had* been raised recently, and also to omit proposals because somewhat similar proposals *had not* been raised recently, then all

⁸ See No-Action Reply at Attachment A to Attachment, at 8-9 (evidence of viewpoint discrimination at Salesforce).

⁹ See, e.g., *Alphabet, Inc.* (avail. April 9, 2020) (evidence of viewpoint discrimination at Google); *Apple, Inc.* (avail. Dec. 20, 2019) (evidence of viewpoint discrimination at Apple).

¹⁰ See, e.g., Free Enterprise Project, INVESTOR VALUE VOTER GUIDE 21-26 (April 2020), available at <https://nationalcenter.org/IVVG/>.

¹¹ See, e.g., Mary Margaret Olohan, *Alexandria Ocasio-Cortez Suggests 'Trump Sycophants' Should Be Held Accountable 'In The Future,'* DAILY CALLER (Nov. 6, 2020), available at <https://dailycaller.com/2020/11/06/alexandria-ocasio-cortez-aoc-trump-supporters-held-accountable/> (last accessed Nov. 10, 2020); Hana Levi Julian, *AOC Wants an 'Enemies List' of Trump Supporters,* JEWISH PRESS (Nov. 8, 2020), available at <https://www.jewishpress.com/news/us-news/aoc-calls-for-archiving-trump-sycophants-before-tweets-are-deleted/2020/11/08/> (last accessed Nov. 10, 2020).

¹² *Canceling Trump Alumni,* WALL ST. J. (Nov. 9, 2020), available at https://www.wsj.com/articles/canceling-trump-alumni-11604962923?mod=opinion_lead_pos3.

¹³ See Letter from Lillian Brown to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission (Oct. 31, 2020) <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/ncpprwaltdisney103120-14a8-incoming.pdf>.

¹⁴ See Letter from David Lopez to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission (Nov. 3, 2020) available at <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/ncpprstarbucks110320-14a8-incoming.pdf>.

¹⁵ See Supplemental No-Action Request, at 8.

companies could omit all proposals all of the time merely by noting which of these two alternate states apply. This is not, and cannot be, the law.

Likewise, it cannot matter that the Company's biggest shareholders have not raised the issue that we raise in our Proposal. The Commission establishes the ownership thresholds that shareholders must meet in order to submit proposals. In fact, it has raised them for meetings held in and after 2022.¹⁶ It has certainly not raised them so high as to permit only the largest shareholders to submit proposals. But this is exactly what the Company's proffered standard would in effect do. Our organization has demonstrated to the Company that it has met the ownership threshold required to present proposals. The Company has not asserted or demonstrated the contrary. Our right to submit proposals without omission is not contingent upon larger shareholders expressing prior assent to or independent interest in that proposal.

* * *

For these reasons as well as those urged in our Reply Letter and its Attachment, we urge the Staff to find that our Proposal may not be omitted under Rule 14a-8(i)(7).

The Company has failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject Walgreen's request for a no-action letter concerning our Proposal.

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

cc: Elizabeth A. Ising, Gibson Dunn (shareholderproposals@gibsondunn.com)
Justin Danhof

¹⁶ U.S. Securities & Exchange Commission – Press Release, *SEC Adopts Amendments to Modernize Shareholder Proposal Rule* (Sept. 23, 2020), available at <https://www.sec.gov/news/press-release/2020-220> (last accessed Nov. 10, 2020).

October 30, 2020

VIA E-MAIL

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

Re: *Walgreens Boots Alliance, Inc.*
Supplemental Letter Regarding Stockholder Proposal of the National Center
for Public Policy Research
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

On September 18, 2020, we submitted a letter (the “No-Action Request”) on behalf of Walgreens Boots Alliance, Inc. (the “Company”) notifying the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) that the Company intends to omit from its proxy statement and form of proxy for its 2021 Annual Meeting of Stockholders (collectively, the “2021 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof (the “Supporting Statement”) received from the National Center for Public Policy Research (the “Proponent”).

The Proposal states:

RESOLVED: Shareholders request that Walgreens Boots Alliance, Inc. (Walgreens) 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.

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BASIS FOR SUPPLEMENTAL LETTER

Consistent with the No-Action Request, we hereby respectfully request that the Staff concur in our view that the Proposal may properly be excluded from the 2021 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business operations and does not focus on a significant policy issue that transcends the Company's ordinary business operations, as determined by the Compensation and Leadership Performance Committee (the "Compensation Committee") of the Company's Board of Directors (the "Board").

ANALYSIS

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

A. Background And Staff Guidance On Analyzing Significance Under The Ordinary Business Standard

As demonstrated in the No-Action Request, the Proposal, which focuses on the Company's equal employment opportunity policy and whether the absence of specific wording covering "viewpoint" and "ideology" adversely affects employee welfare and performance, the Company's competitive position, hiring, retention and related litigation risks, focuses squarely on routine aspects of the Company's management of its workforce. Consistent with the precedent cited in the No-Action Request, the Staff has consistently concurred that proposals focusing on management of a company's workforce, including those relating to a wide variety of workplace discrimination matters, concern ordinary business matters and thus are properly excludable pursuant to Rule 14a-8(i)(7). Additionally, the Staff recently concurred with the exclusion of several identical proposals from the same Proponent under Rule 14a-8(i)(7). *See Apple Inc.* (avail. Dec. 20, 2019, *recon. denied* Jan. 17, 2020) ("Apple") (concurring with the exclusion of the proposal and noting it "does not transcend the [c]ompany's ordinary business operations"); *Alphabet Inc.* (avail. Apr. 9, 2020, *recon. denied* Apr. 22, 2020) ("Alphabet") (same); and *salesforce.com, inc.* (avail. Apr. 9, 2020, *recon. denied* Apr. 22, 2020) ("Salesforce") (same).

However, the Commission has stated that proposals relating to a company's ordinary business operations but focusing on a significant policy issue are not excludable since they transcend ordinary business matters. Exchange Act Release No. 40018 (May 21, 1998). In Staff Legal Bulletin No. 14I (Nov. 1, 2017) ("SLB 14I"), the Staff explained that the applicability of the significant policy exception "depends, in part, on the connection between the significant policy issue and the company's business operations." The Staff also noted that determining whether a policy issue is of sufficient significance to a particular company involves a "difficult judgment call," which the company's board of directors (or a committee

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thereof) “is generally in a better position to determine.” In this regard, the Staff stated in SLB 14I that a “board acting . . . with the knowledge of the company’s business and the implications for a particular proposal on that company’s business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.” Moreover, in Staff Legal Bulletin No. 14J (Oct. 23, 2018), the Staff indicated, and in Staff Legal Bulletin No. 14K (Oct. 16, 2019) (“SLB 14K”) confirmed, that a well-developed discussion of the board’s analysis that focuses on specific substantive factors can assist the Staff in evaluating a company’s no-action request. Two substantive factors focused on by the Staff in SLB 14K were the delta (*i.e.*, the difference between the proposal’s specific request and the actions the company has already taken) and prior voting results..

B. The Proposal Does Not Focus On A Significant Policy Issue That Transcends The Company’s Ordinary Business Operations

1. Compensation Committee Process

In light of the Staff’s guidance in SLB 14K, and as previewed in the No-Action Request, the Compensation Committee of the Company’s Board recently convened to carefully review and consider the Proposal and a number of factors, detailed below, relating to the Proposal and the Company’s existing equal employment opportunity, anti-discrimination and inclusion policies, practices and disclosures. The Compensation Committee is composed of independent directors who oversee the Company’s compensation and benefit policies and programs designed to attract, motivate and retain personnel to enable the Company to achieve its business objectives. The Compensation Committee’s charter specifically provides that the Compensation Committee is responsible for reviewing and discussing with management the Company’s diversity and inclusion initiatives, objectives and progress. Based on the Compensation Committee’s review, and taking into consideration its own substantial knowledge of the Company and its operations, as well as input from management, the Compensation Committee concluded that, in light of the Company’s existing policies, practices and disclosures and the substantive factors discussed below, the actions requested by the Proposal do not present a significant policy issue for the Company and, therefore, the Proposal is not appropriate for a stockholder vote.

2. Compensation Committee Analysis And Factors Considered

The Proposal does not focus on a significant policy issue that transcends the Company’s ordinary business operations. In reaching its determination, consistent with the Staff’s guidance in SLB 14J and SLB 14K, the Compensation Committee considered the factors summarized below.

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- **The Company has extensive equal employment opportunity and anti-discrimination policies and practices, so there is not a significant difference between the objective of the Proposal and what the Company already has done.** The Compensation Committee considered that the Company’s policies, initiatives and public disclosures reflect that the Company is strongly committed to maintaining an equal opportunity, non-discriminatory workplace environment that promotes inclusion and diversity:
 - The Company’s Equal Employment Opportunity Policy, which applies to the Company’s more than 220,000 U.S. employees and applicants for employment and is available at <https://www.walgreens.com/topic/sr/eoo-policy.jsp> (the “EEO Policy”), states that the Company “values the *diverse backgrounds*, experiences, knowledge and skills of all employees, and is committed to equal employment opportunity and *fair treatment of all individuals*” (emphasis added). The EEO Policy further expresses the Company’s belief that “all employees should work in an environment that is free from discrimination, intimidation or harassment based on race, color, religion, national origin, citizenship status, sex, sexual orientation, gender identity, age, disability, personal characteristic, veteran status, or genetic information” and its zero-tolerance for “harassment of employees by anyone, including co-workers, supervisors, customers or vendors.” Further, the EEO Policy, pursuant to its terms, “applies to all aspects of the employment relationship, including hiring, job assignment, training, transfer, promotion, rate of pay, discipline, and termination.”
 - The Company released a public letter in support of the EEO Policy titled “Diversity & Inclusion – Equal Employment Opportunity – Affirmative Action Commitment Statement,” which is available at https://www.walgreens.com/images/adaptive/si/sr/Commitment-Statement_2015.pdf (the “Diversity Statement”), in which then-President Alex Gourley highlighted “principles of diversity and inclusion, equal employment opportunity, and affirmative action” as being “key to [the Company’s] culture and business.” Gourley continued by stating the Company’s belief that employees have “a right to work in an environment free of verbal or physical harassment on account of... *any personal characteristic*” (emphasis added). The letter states that Company policy “expressly prohibits any harassing conduct that affects an individual’s employment, interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive working environment.”
 - The Company issued its first global diversity and inclusion report on September 17, 2020 (the “D&I Report”), which is available at https://www.walgreensbootsalliance.com/sites/www/files/2020-09/Walgreens-Boots-Alliance_Diversity-and-Inclusion-Report_2019.pdf. The D&I Report highlights the Company’s multi-year efforts to improve diversity and includes a commitment from

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the Company to the “broadest definition of diversity.” In a letter introducing the D&I Report, the Company’s Chief Executive Officer reiterates that “[t]o [the Company], diversity encompasses the broadest range of cultures, backgrounds, perspectives and experiences.” The D&I Report describes the Company’s efforts as “expansive and expanding,” noting that “each [Company employee] can be [their] authentic selves while treating everyone with dignity and respect and generating diverse perspectives in [the Company’s] work.” Additionally, the Company announced a performance goal in the D&I Report of holding leaders at the vice president level and above accountable for “driving diverse representation and a more inclusive culture.” Further, in the D&I Report, the Company’s Global Chief Diversity Officer announced the Company’s leadership accountability program, with measurable diversity targets, in order to drive diversity in leadership positions and a more inclusive culture.

- The Company’s Diversity and Inclusion Policy Statement, which is attached to this letter as Exhibit A (the “D&I Policy”) and applies to Company employees around the world, affirms the Company’s commitment to diversity and inclusion by, among other things, “recruiting, retaining, engaging and developing a high performing and engaged workforce with *diverse backgrounds, abilities, perspectives and beliefs*” (emphasis added). The D&I Policy notes that the Company’s employees, customers, patients and partners reflect many *diverse* cultures and *values*.
- The Company’s Code of Conduct & Business Ethics, which applies to all employees and is *available at* https://s1.q4cdn.com/343380161/files/doc_downloads/code_of_conduct/WBA_US_Global-Code_v38.pdf (the “Code of Conduct”), includes a section dedicated to the Company’s commitment to fostering diversity and inclusion in the workplace and its zero-tolerance for harassment. Specifically, the Code of Conduct reiterates that all hiring decisions “are based solely on merit,” and it affirms that the Company “will not stand for any threatening behavior...” In seeking to protect Company employees against discrimination, the Code of Conduct prohibits harassment as well as behavior that could potentially be considered or perceived as harassment. In this regard, harassment is broadly defined to include “physical actions, spoken or written remarks and pictures or videos,” and may include any unwelcome conduct, offensive jokes, bullying, humiliation, intimidation or other behavior that causes discomfort, and any conduct that “unreasonably interferes with an employee’s work performance or creates an intimidating, hostile or offensive working environment.” The Code of Conduct, together with the Company’s human resources policies, also provide mechanisms for anonymously reporting concerns when Company employees experience or observe discrimination or harassment and protects them from retaliation for making a report in good faith.

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- In addition to the policies described above, the Company maintains extensive efforts to promote inclusion and diversity in the workplace.
 - In 2019, the Company established a Global Inclusion Council (the “Council”) to actively drive diversity at all levels and build a culture of inclusivity. The Council identified “defining and fostering an inclusive culture” as one of four core areas on which to focus its efforts.
 - The Company also has a dedicated Office of Diversity, Equity and Inclusion, which is responsible for development, implementation and monitoring of Company equal employment opportunity, affirmative action and diversity programs and compliance to foster an inclusive and equitable workplace. The Company also appointed a Global Chief Diversity Officer who oversees the Company’s diversity and inclusion practices.
 - In its publicly available Corporate Social Responsibility Report for 2019, which is *available at* https://www.walgreensbootsalliance.com/sites/www/files/asset/Walgreens-Boots-Alliance-2019-Corporate-Social-Responsibility-Report_2.pdf (the “CSR Report”), the Company states its recognition that leaders must be held accountable for driving an inclusive culture. In furtherance of the foregoing, the Company appointed 21 global senior leaders to the Council, which is led by the Company’s Global Chief Diversity Officer. Further, the CSR Report details the Company’s efforts in developing a program named Strengthening Care in Our Communities, which is designed to provide unconscious bias training to pharmacy retail operations store management teams meant to curtail all forms of discrimination. Strengthening Care in Our Communities has provided training to over 57,000 Company employees as of the end of fiscal year 2019. The Company has also implemented diversity and inclusion initiatives abroad, providing micro-inequities training with the senior leadership of Boots UK.
 - The Company has affirmed a public, data-driven commitment to valuing diversity and fostering inclusion, as documented on the Diversity & Inclusion page of the Company’s website (the “Diversity Page”) *available at* https://www.walgreens.com/topic/sr/believes_diversity.jsp. The Diversity Page highlights additional Company inclusion efforts and accolades, including numerous awards received by the Company for diversity and press coverage of Company diversity efforts.

While the Proposal focuses narrowly on the Company’s EEO Policy, which is substantially similar to the written equal employment opportunity policy that was the subject of each of

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Alphabet, Salesforce, and Apple, the Compensation Committee considered and took into account the full scope of the EEO Policy, Diversity Statement, the D&I Policy, the Code of Conduct, and the actions reflected in each of the D&I Report and CSR Report, as well as all of the other activities that the Company undertakes to maintain and publicize the Company's broad commitment to equality and diversity, including diversity of opinion. Although the Company's EEO Policy does not explicitly reference "viewpoint" or "ideology" among the examples of protected personal characteristics, the Compensation Committee considered that the Company's policies, initiatives and public disclosures collectively demonstrate that all employees are to receive equal and fair treatment and be protected from discrimination on the basis of a broad scope of characteristics. In contrast to the assertions in the Supporting Statement, employees, potential employees, and stockholders are able to learn about the Company's views on promoting diversity and activities to prevent discrimination against employees based on their opinions, ideologies, perspectives or viewpoints. Accordingly, the Compensation Committee determined that the differences—or the delta—between the Proposal's specific request and the actions the Company has already taken are minor and, accordingly, consistent with the framework in SLB 14K, that the Company's existing policies and practices have "diminished the significance of the [Proposal's] policy issue to such an extent that the [P]roposal does not present a policy issue that is significant to the [C]ompany."

- ***The Proposal is not quantitatively significant to the Company.*** Any potential impact of explicitly addressing political ideology or viewpoint in the EEO Policy would have a speculative and, given the policies and disclosures that the Company already has made, likely immaterial impact on the Company's financial position and operating results. In this regard, the Company has not experienced any significant financial or operational impact as a result of political ideology or viewpoint considerations in the Company's workforce as contemplated by the Proposal.
- ***The Company's stockholders generally have not expressed concerns related to the issue raised by the Proposal.*** The Company maintains proactive and ongoing engagement with its institutional investors, regularly meeting with larger stockholders. For example, during fiscal year 2019, the Company reached out to 30 of its largest stockholders representing 44% of the Company's outstanding stock.¹ During these meetings and the Company's other stockholder engagement activities, no stockholders other than the Proponent have raised issues related to the application of the Company's anti-discrimination and equal employment opportunity policies to political ideologies and viewpoints. The Company also is not aware of any other stockholders or other

¹ See the Company 2020 Proxy Statement and Notice of Annual Meeting of Stockholders at 7, available at https://s1.q4cdn.com/343380161/files/doc_financials/2019/annual/2020-Annual-Meeting-of-Stockholders-and-Proxy-Statement.pdf.

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stakeholders who have requested the type of report sought by the Proposal or submitted a stockholder proposal to the Company regarding a similar topic. This lack of interest expressed by other stockholders and stakeholders indicates that the issue raised by the Proposal is not one widely viewed as significant to the Company's business.

- ***The Company's stockholders have not previously requested a vote on or voted on a similar proposal or issue.*** The Company's stockholders have not submitted any stockholder proposals regarding this issue in prior years. Further, if the Company were to include the Proposal in its 2021 Proxy Materials, the Company expects that it would receive low stockholder support.

3. Identical Proposals Based On Substantially Similar Company Arguments Were Excludable

The Company's equal employment opportunity, anti-discrimination, diversity and inclusion policies, practices, and initiatives, and the Compensation Committee's analysis of the same, align with the circumstances in each of *Apple*, *Alphabet* and *Salesforce*. There, each board committee analyzed the differences between a proposal identical to the instant Proposal and the company's respective policies and practices and concluded that the delta between such policies and practices and the actions sought by the proposal was insignificant, such that none of the proposals were determined by the reviewing board committee to transcend the companies' ordinary business operations. Similar to the focus of the Compensation Committee's analysis here, the policies and practices examined in *Apple*, *Alphabet* and *Salesforce* included reviews of the codes of conduct, the equal employment opportunity policy, website publications highlighting diversity, and other initiatives and steps taken to ensure inclusive workplaces. Each of the board committee analyses in *Apple*, *Alphabet* and *Salesforce* also considered that stockholders have not expressed interest on the topic of "ideological diversity". Moreover, in each case, the Staff concurred that a proposal identical to the Proposal was excludable under Rule 14a-8(i)(7). In particular, in *Apple*, the Staff response noted that in reaching its position, the Staff "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", which "analysis discusses the difference – or delta – between the Proposal and the Company's current policies and practices." Likewise, the Proposal is properly excludable in light of the Compensation Committee's analysis of the Company's relevant policies, procedures and disclosures and the extent to which such Company actions already address the topic and concern raised by the Proposal, such that the difference between the Proposal and such actions fails to present a significant policy issue for the Company.

Based on the foregoing, the Company believes, and the Compensation Committee has concluded, that the actions requested by the Proposal do not raise an issue that transcends the

Office of Chief Counsel
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Company's ordinary business operations, and, therefore, the Proposal is not appropriate for a stockholder vote.

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2021 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8. In accordance with Rule 14a-8(j), a copy of this supplemental letter and its attachments is being sent on this date to the Proponent.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287.

Sincerely,



Elizabeth A. Ising

cc: Joseph B. Amsbary, Jr., Vice President, Corporate Secretary, Walgreens Boots Alliance, Inc.
Mark L. Dosier, Senior Director, Securities Law, Walgreens Boots Alliance, Inc.
Kelsey Chin, Assistant Corporate Secretary, Walgreens Boots Alliance, Inc.
Justin Danhof, Esq., General Counsel, National Center for Public Policy Research

EXHIBIT A



Diversity and Inclusion Policy Statement

Walgreens Boots Alliance regards diversity and inclusion as key drivers in our vision to be the first choice for pharmacy, wellbeing and beauty for people and communities around the world. We recognize the significant impact diversity and inclusion have on our overall global business strategy. We leverage the diverse experiences and perspectives of our workforce to serve our customers and patients around the globe and to drive superior business performance. We keep diversity and inclusion at the center of everything we do, by:

- promoting and maintaining a culture of integrity, dignity and mutual respect;
- recruiting, retaining, engaging and developing a high performing and engaged workforce with diverse backgrounds, abilities, perspectives and beliefs;
- building a culture of innovation through inclusion;
- prioritizing accessible work environments and providing equal opportunities for all;
- building valued partnerships with external organizations to advance our diversity and inclusion efforts; and
- connecting small and diverse-owned businesses with opportunities to partner with Walgreens Boots Alliance.

Walgreens Boots Alliance employees, customers, patients and partners reflect many diverse cultures and values represented across the globe. Fostering an inclusive work environment positions us to leverage different ways of thinking and working to be successful.



October 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

**RE: Stockholder Proposal of the National Center for Public Policy Research,
Securities Exchange Act of 1934 - Rule 14a-8**

Ladies and Gentlemen,

This correspondence is in response to the letter of Elizabeth A. Ising on behalf of Walgreens Boots Alliance, Inc. (the "Company") dated September 18, 2020, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our Shareholder Proposal (the "Proposal") from its 2020 proxy materials for its 2020 annual shareholder meeting.

RESPONSE TO WALGREENS CLAIM

Our Proposal asks the Board of Directors to issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity ("EEO") policy. We indicated that the report should be available within a reasonable timeframe, be prepared at reasonable expense, and omit any proprietary information.

Walgreens objected. It sought from the SEC Staff a no-action declaration, on the basis of Rule 14a-8(i)(7), claiming that our Proposal falls within the Company's ordinary business operations. The Company relied on a series of cases in which the Staff has suggested that issues of discrimination on the basis of viewpoint or political participation fall within the ordinary business exception, and in particular on cases from last shareholder-meeting season in which the Staff held that the proposals currently under consideration could appropriately be omitted.

We of course objected to the Staff's conclusions last year in significant detail, with our objections reaching so far as a request for reconsideration. In all of our communications, one series of which is included as the Attachment, we pointed out that our proposal is identical to the proposal in the *CorVel Corp.* (avail. June 5, 2019) proceeding, except with regard to the *type* of discrimination to be studied. The proponents in that instance sought a study to determine the risks arising from discrimination on the basis of sexual orientation and sexual identity, while our proposal seeks a study of the same risks arising from viewpoint discrimination.

In the previous proceedings in which the SEC Staff permitted our proposal to be omitted, there remained one small procedural distinction between our posture and that of the proponents in *CorVel Corp.*: in each instance, we had in the five previous years submitted a proposal that had raised the issue of viewpoint diversity. Because it dealt with diversity on the Board of Directors of each company and was otherwise distinguishable, we did not think the previous proposals material. It appears, though, that the SEC Staff differed, and so reached the result that it did.

In this proceeding, though, that distinction does not arise. Neither we nor anyone else have put before the shareholders of the Company within the last five years any proposal dealing in any way with the issue of viewpoint discrimination. As a result, absolutely no relevant or permissibly material distinction remains between the facts or posture of this proceeding and those of *CorVel Corp.* The only distinction of any kind that remains is the difference in the *type* of discrimination to be studied. But as we have established many times before, including in the Attachment, and as the SEC Staff well knows, the Staff is not permitted to employ its own personal policy preferences to forbid the omission of some proposals which it personally favors but to permit the omission of other proposals that are materially the same except that they focus on a subject matter which the Staff disfavors.

Despite our serial efforts, we have been unable to get the Staff to provide any explanation of why studies of discrimination on the basis of sexual orientation or gender identity are not excludable, but studies of discrimination on the basis of viewpoint are. Nor have any of the companies that have sought no-action letters in response to the submission of our proposals provided any. We can see none, and in this proceeding no other possible difference of any kind appears to pertain. We can only conclude, therefore, that the grant of a no-action letter and therefore permission to omit in this case would represent substitution by the Staff of its personal policy preferences for its duty under the law, which is a quintessential case of arbitrary and capricious regulatory behavior.

For this fundamental reason, as well as all of the other reasons incorporated by reference in the Attachment, we urge the Staff to find that our Proposal may not be omitted under Rule 14a-8(i)(7).

The Company has failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject Walgreen's request for a no-action letter concerning our Proposal.

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October 7, 2020
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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,

A handwritten signature in black ink, appearing to read "Scott Shepard". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott Shepard

Enclosure (Attachment)

cc: Elizabeth A. Ising, Gibson Dunn (shareholderproposals@gibsondunn.com)
Justin Danhof

Attachment



April 15, 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

**RE: Request for Reconsideration of April 9, 2020 Decision Permitting
Salesforce to Exclude Stockholder Proposal of the National Center for
Public Policy Research, Securities Exchange Act of 1934 - Rule 14a-8**

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 April 9, 2020 response approving the no-action request of *Salesforce.com, Inc.* ("the Company" or "Salesforce") dated February 5, 2020 (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.

The Staff provided no explanation of its decision beyond a statement that it "[c]oncur[red] that Rule 14a-8(i)(7) provides a basis to exclude."¹

We think that the Staff's decision is in error in this specific instance. We based our Proposal on a proposal that was proffered in the *CorVel Corp.* (avail. June 5, 2019) proceedings. As we stated in our response to the Company's no-action request letter, our proposal differed from the proposal in *CorVel* only in that our proposal sought protection from discrimination on the basis of viewpoint, while the proposal in *CorVel* sought that same protection from discrimination on

¹ SEC Staff, 2019-2020 Shareholder Proposal No-Action Responses (last updated April 9, 2020) ("No-Action Responses"), available at <https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf> (last accessed April 13, 2020).

the basis of sexual orientation.² Otherwise, the proposals were identical.³ Some states bar discrimination on the basis of viewpoint in employment, while others – and the federal government – do not.⁴ This situates viewpoint discrimination in the same manner as discrimination on the basis of sexual orientation in employment, which is barred by some states, but not by others nor explicitly by the federal government.⁵

Meanwhile, the proponents in *CorVel* provided no evidence that discrimination on the basis of sexual orientation was actually occurring at CorVel Corporation, while we provided the Staff replete evidence that Salesforce has a serious viewpoint-discrimination problem that emanates from the very top of the company.⁶

The Staff is not supposed to distinguish between similarly situated proposals on the basis of the Staff's exogenous opinions about the subject matter of the proposals.⁷ It is impossible, though, to eliminate the supposition that this is the ground on which the SEC Staff made its decision in this instance, because the only material distinctions to be made between the *CorVel* proceeding and this one other than the subject matter weigh in favor of denying the request to exclude in this case, and because neither the Company nor the Staff even raised the *CorVel* proceeding, much less substantively distinguished it.⁸ Because it therefore appears that the Staff plainly erred in permitting our Proposal to be excluded, we ask the Commission to reconsider and to reverse that decision, on the grounds that we offered in detail in our March 5, 2020 Response to the Company's No-Action Request, and which we incorporate into this request for reconsideration. (The Response Letter is included at Attachment A.)

² See discussion in National Center for Public Policy Research Response to Division of Corporation Finance, Response to Salesforce No-Action Request Letter (March 5, 2020), at 5 ("Response Letter"). The Response Letter appears at Attachment A.

³ See *id.*

⁴ See, e.g., Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. LAW. & POL'Y 295 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174776 (last accessed April 13, 2020).

⁵ See e.g., *Can LGBT People Be Legally Fired*, MOVEMENT ADVANCEMENT PROJECT (July 2019), available at <https://www.lgbtmap.org/file/2019SCOTUSTitle%20VII%20CasesBrief.pdf> (last accessed April 13, 2020); *Federal Civil Rights Law Protects Gay Workers*, U.S. Appeals Court Rules (Feb. 26, 2018), available at <https://www.nbcnews.com/feature/nbc-out/federal-civil-rights-law-protects-gay-works-u-s-appeals-n851231> (last accessed April 13, 2020).

⁶ See Response Letter, *supra* note 2, at 8-9.

⁷ See Staff Legal Bulletin No. 14 at B. 6-7 (July 13, 2001), available at <https://www.sec.gov/interps/legal/cfslb14.htm> (last accessed April 13, 2020).

⁸ The Staff has mentioned *CorVel* neither in this proceeding or in the *Apple, Inc.* proceeding, the request for reconsideration for which appears at Attachment B.

Additionally, we ask that both the Commission and the Staff take this opportunity to reconsider recent changes in both the basis upon which the Staff makes no-action determinations and the manner in which it reports its decisions. Until recently, Rule 14a-8(i)(7) has been invoked only when the issue raised by a proposal has effectively been addressed or rendered insignificant by the ordinary business operations of the Company. Now, however, the Rule is being used – under the guise of determining the substantiality of the issue raised by the proposal – as a multi-factor test that allows the Staff to aggregate grounds, none of which themselves justify exclusion, into a “lump-sum” exclusion decision. Multi-factor tests are often used in the law, but where they are used, they are carefully explained. These explanations allow parties to understand how the various factors have been weighed, and what contrary considerations have been taken into account and why they have been found wanting, so that parties know how to fashion their behavior in the future. But this change in the treatment of Rule 14a-8(i)(7) has come exactly as the Staff has shifted to providing no explanation of any kind for many of its decisions. It provided no explanation in this proceeding.

The result of these changes together, as this proceeding so clearly illustrates, is to eliminate any insight into the Staff’s decision-making, which now under Rule 14a-8(i)(7) can rely on the potentially intricate and subtle interplay of a variety of factors which may have nothing to do with the ostensible purpose of Rule 14a-8(i)(7), but which might also rely, as it might in this instance, on inappropriate or impermissible factors. We ask the Staff and the Commission to consider the potential for misunderstanding and injury that arises from this pair of changes, taken together.

Because we did not fully address our concerns about these Staff policy changes in our Response Letter, we make our argument in favor of reversing these changes below. We also incorporate into this request the arguments we made in a request for reconsideration in the related proceeding (which inculcated the same proposal, and the same concerns, that are raised in this proceeding) of *Apple, Inc.* (avail. Dec. 20, 2019, *reconsid. denied* (as untimely) Jan. 17, 2020). (It is included in this letter as Attachment B.) The substance of those arguments was not considered in that proceeding because the request for reconsideration was rejected as untimely, even though an untimely submission from Apple had been accepted by the Staff earlier in that proceeding.⁹ The arguments made there will throw additional light on the request for reconsideration in this instance because in that proceeding the Staff at least provided a few lines of explanation for its decision, which allowed for at least some review and critique of the basis of that decision. Here it has provided none.

We believe the Staff’s decision in this proceeding was substantively wrong on its face and is indicative of the significant possibility that personal policy preferences are dictating the results of proceedings. We also think that the decision and others like it in recent months are both novel and potentially deeply procedurally problematic as precedent. We therefore believe this

⁹ See *id.* at 2.

to be one of the “certain instances” in which “an informal statement of the views of the Commission may be obtained.”¹⁰ And so we seek reconsideration by the Commission.

DISCUSSION

The Commission Should Reconsider its Recent Changes to its Interpretive Standard Under Rule 14a-8(i)(7) and its Decision-Rendering Procedure.

- A. Rule 14a-8(i)(7) as until recently applied concerned itself only with issues genuinely related to “ordinary businesses operations,” and included a clear exception from exclusion for significant discrimination matters.

The ordinary-business exception appears at Rule at 14a-8(i)(7). It, in its entirety, permits exclusion of a proposal “[i]f the proposal deals with a matter relating to the company’s ordinary business operations.”¹¹

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

[t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. ...[P]roposals that relate to ordinary business matters but that focus on ‘sufficiently significant social policy issues ... would not be considered to be excludable because the proposals would transcend the day-to-day business matters.’¹²

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

The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring,

¹⁰ 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.”).

¹¹ 17 C.F.R. § 240.14a-8(i)(7).

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

promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (*e.g., significant discrimination matters*) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.¹³

There matters stood until 2017.

- B. Rule 14a-8(i)(7) has recently been transformed into a multi-factor test, under which staff is permitted to aggregate as sufficient grounds for exclusion factors not directly relevant to the issue of ordinary business operations.**

In a bulletin issued in November 2017, the Staff recognized that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.¹⁴ It therefore invited corporations, in arguing for an ordinary-business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of the proposals.¹⁵

The Staff expanded this guidance further in October of 2018.¹⁶ It suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff. In particular, the Staff would welcome details about:

¹³ *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 40018 (May 21, 1998) (emphasis added), available at <https://www.sec.gov/rules/final/34-40018.htm> (last accessed April 13, 2020).

¹⁴ See *Staff Legal Bulletin* No. 14I (Nov. 17, 2017), available at <https://www.sec.gov/interps/legal/cfslb14i.htm> (last accessed April 13, 2020) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

¹⁵ See *id.* ("Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

¹⁶ See *Staff Legal Bulletin* No. 14J (Oct. 23, 2018), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals> (last accessed April 13, 2020).

- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.
- Whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.¹⁷

The Staff expressly noted that in seeking this information as part of its review, it was turning its analysis into a very fine-grained, multi-factor test that would likely result in very different results at different companies despite the proposals being very similar in form or content. “[A] proposal that the Staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another.”¹⁸

Additional Staff guidance appeared this past fall.¹⁹ In that bulletin, the Staff relevantly underscored the value of “delta analysis,” which is to say the difference between what the shareholder has proposed and what the company currently does; and of “prior voting results,” or a discussion of the results of previous related shareholder votes. With regard to the latter, the Staff explained that “the board’s analysis may be more helpful if it includes, for example, a robust discussion that explains how the company’s subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company.”²⁰

¹⁷ *Id.* at B.2. (internal citation deleted).

¹⁸ *Id.*

¹⁹ See *Staff Legal Bulletin No. 14K* (Oct. 16, 2019), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals> (last accessed April 13, 2020).

²⁰ *Id.* at B.3.b.

- C. The SEC Staff has also recently stopped requiring that letters be issued providing at least some explanation of its decisions, so that in proceedings such as the present one, parties have no idea what factors raised by the parties swayed the Staff's decision.

The SEC Staff announced in the fall of 2019 that after November 19, 2019, the staff would no longer respond with a decision letter to every no-action request received.²¹ And in fact it produced no decision letter in this proceeding.²² The failure to issue a decision letter in this proceeding demonstrates that the Staff will sometimes fail to issue a decision letter even in instances in which it uses Rule 14a-8(i)(7) not in its traditional manner as a genuine conclusion that the proposal implicates ordinary business operations without presenting an issue of substantial importance, but instead in the novel manner as a conclusion that the proposal in some way failed the Staff's multi-factor analysis, some factors of which are only tangentially – if at all – related to ordinary business operations.

- D. The combination of these two innovations works to ensure that parties will often (as here) have no idea, when cases are decided on the grounds of Rule 14a-8(i)(7), what factors the Staff considered dispositive or relevant to its determination, or how those factors were weighed, opening the door to both the perception of and the opportunity for decisions impermissibly based on the personal policy preferences of the Staff.

Neither of these changes – the change in providing decision letters and the changes to the interpretation of Rule 14a-8(i)(7) – need necessarily have raised any concern. With regard to the first change: not all decisions do require written explanations, as courts have long recognized. Rote decisions that cannot possibly have any precedential value need not necessarily be written (though it is unclear that refusing to write what have historically been very short letter decisions really saves all that much staff time).

Written – and detailed – decisions are vital, however, when a decision-maker undertakes very fact- and entity-specific determinations that can vary significantly from case to case depending upon the details of each case. When such very case-specific decisions are made, but no explanations are provided, parties are left with no idea at all what factors were decisive and which were less or not relevant, and how all of the various factors fit together. This leaves parties with no information about how to proceed in future cases. And while it might seem as though this confusion could lead to fewer filings in the future, the odds are that it will increase filings as shareholder proponents – left without meaningful guidance – try, in essence, everything. This will increase staff workloads. At the same time, it will increase party frustration, as shareholder proponents find it impossible to know how to craft their efforts to increase their chances of success. It will also lead to suspicions of bias if the SEC staff seems

²¹ See SEC Staff, Shareholder Proposal No-Action Responses Issued Under Exchange Act Rule 14a-8 (last modified April 9, 2020), available at <https://www.sec.gov/corpfin/shareholder-proposals-no-action> (last accessed April 13, 2020).

²² See *No-Action Responses*, *supra* note 1.

regularly to reject some shareholder proposal efforts while waving through technically similar proposals by parties with different ideological dispositions. If the results in similar circumstances are consistently different, while no meaningful explanations are forthcoming, concerns about bias will be not only understandable, but fully warranted.

Meanwhile, the staff's revisions to the way it analyzes the ordinary-business exception have introduced exactly the sort of case-specific, multi-factor analysis that renders detailed written explanations so vital. As the review above illustrates, the staff has explicitly invited wide-ranging discussion by companies of their boards' analyses, and has essentially invited them to include any information that they consider relevant – the very epitome of a multi-factored (or even "all-the-factors") test.²³ It has further explicitly declared that this multi-factored analysis will result in conclusions that will differ, potentially significantly, by case.²⁴ These are just the circumstances in which the credibility of a decision-maker requires that it provide detailed, written explanations and analyses of the bases for its decisions.

The problem is compounded here because some of the factors that the staff has explicitly agreed to consider in determining the case-specific substantiality of proposals under the ordinary-business exception are factors that more truly go – and heretofore have gone – to the analysis of some of the 12 grounds under the Rule other than the ordinary-business exception. For instance, "[t]he extent to which the proposal relates to the company's core business activities"²⁵ is already addressed by another of the Rule's provisions. Notably, though, that ground has *specific* triggers, permitting withholding of the proposal only if it relates to operations that account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business.²⁶

Similarly, "[w]hether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken"²⁷ is already addressed, but again more specifically, in a different ground that "[t]he company has "already *substantially implemented the proposal*."²⁸ Note that this is a much sterner standard than what the staff is now considering relevant under the ordinary-business exception, namely that the company has addressed somewhat related issues to some degree. Likewise, "[t]he extent of shareholder engagement on the issue and the level of

²³ See *Staff Legal Bulletin* No. 14J, at B.2.

²⁴ See *id.*

²⁵ See *id.*

²⁶ Rule 14a-8(i)(5), available at <https://www.sec.gov/interps/legal/cfsib14.htm> (last accessed April 14, 2020).

²⁷ See *Staff Legal Bulletin* No. 14J, at B.2.

²⁸ Rule 14a-8(i)(10) (emphasis added).

shareholder interest expressed through that engagement"²⁹ goes directly to this ground: "The proposal deals with *substantially the same* subject matter as another proposal or proposals that previously has or have been included in the company's proxy materials within a specified time frame and did not receive a specified percentage of the vote."³⁰ But once again, the stand-alone ground's standard is much more structured, and much harder to reach, than the newly articulated, purportedly ordinary-business-related standard.

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

This leaves tremendous room for confusion, for the perception of bias, and for actual bias. Because now, facts that on their own would be insufficient to trigger any other ground to permit exclusion can be amalgamated together to somehow result in exclusion under the ordinary-business exception – and the staff will, at its sole determination, refuse to explain just how that alchemy occurred. This will leave room for the inference that the staff is merely excluding proposals with which it disagrees on the basis of substantive policy, even though such subject-matter considerations are, by regulation, supposed to play no part in its analysis.³¹ Where the information submitted by a company appears not to have any particular relevance to the questions rightly at issue under the ordinary-business exception – *i.e.*, the importance of the issue and the interference of the details of the proposal with the fundamental operations of the business – this inference will be warranted. Where the information submitted does nothing to distinguish the circumstances at issue from separate circumstances in which a substantially similar proposal – different only in the substantive content (*i.e.*, the ideological import) of the proposal – was treated differently, the inference is effectively required.

E. The potential for confusion and for the perception and possibility of bias, so patent in these recent changes, has been fully realized in this proceeding.

The Company in this proceeding invoked Rule 14a-8(i)(7), and relied heavily on the fact that a proposal had been raised last year on the issue of ideological diversity on its board of directors as a reason for arguing that our Proposal was insufficiently significant to require that our Proposal be submitted to its shareholders. In staking out this position, the Company merely

²⁹ See *Staff Legal Bulletin* No. 14J, at B.2.

³⁰ Rule 14-a(8)(i)(12).

³¹ See *Staff Legal Bulletin* No. 14 at B, 6-7.

asserted, without evidence or argument, that the previous proposal was sufficiently similar to our Proposal.³²

We noted in response that under the Staff's own recent statements, such a bare assertion of relatedness, without more, should carry no weight in the Staff's determinations.³³ We then demonstrated in significant detail how the previous proposal differed from our Proposal in focus, subject, result and purpose, and really only shared linguistic similarities to the prior proposal.³⁴

As a result, then: we have submitted a proposal that was exactly the same as a previous proposal for which a no-action request was denied, except that ours sought to prohibit discrimination on the basis of political viewpoint instead of sexuality. We have provided significant evidence of ongoing viewpoint discrimination at the Company, while the previous proponent had shown no evidence of ongoing sexual-orientation discrimination. We have made significant and detailed arguments about why a prior proposal is substantially different than our current proposal, and should thus provide no grounds for diminishing the significance of our anti-discrimination proposal. The Staff's rules provide that matters of significant discrimination are to be treated as substantial under Rule 14a-8(i)(7), while bare assertions of a relationship between a current and previous proposal, without more, are not to weigh on the Staff.

Yet, with all of that, the Staff decided that our Proposal could be excluded. And it provided absolutely no explanation of its decision.

This procedure has left us with no idea how to proceed in the future. It also leaves us with a strong basis for concluding that the Staff has acted in contravention of its own published guidance and on the impermissible basis of its own policy preferences. The Staff has given us no basis on which to reject that conclusion.

Conclusion

The Staff's conclusion, affirming the Company's no-action request in this case, is plain error that the Commission should reverse, resulting in a denial of the Company's no-action request. Moreover, in making its determination, the Staff employed a very recently developed method of analysis that so significantly shifts the meaning and effect of Rule 14a-8(i)(7) that it may well

³² Salesforce, Inc. to Division of Corporation Finance, No-Action Request Letter (Feb. 5, 2020), at 8, available at <https://www.sec.gov/divisions/corpfm/cf-noaction/14a-8/2020/nccprsalesforce020520-14a8-incoming.pdf> (last accessed April 14, 2020).

³³ See *Staff Legal Bulletin* No. 14J, at B.2)

³⁴ See *Response Letter*, *supra* note 2, at 10-11.

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have violated long-standing Staff-issued rules, and cannot legitimately be applied here and in the future without detailed explanation of its decisions by the Staff. We ask the Staff and the Commission to reconsider the Staff's recent innovations to Rule 14a-8a(i)(7) and its determination no longer to issue decision letters in some instances, at least with regard to decisions made on the basis of this new, multi-factor application of Rule 14a-8(i)(7).

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,

A handwritten signature in black ink, appearing to read "Scott Shepard", with a long horizontal flourish extending to the right.

Scott Shepard

cc: Ronald O. Mueller (shareholderproposals@gibsondunn.com)
Justin Danhof

Attachment A



March 5, 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

**RE: Stockholder Proposal of the National Center for Public Policy Research,
Securities Exchange Act of 1934 – Rule 14a-8**

Dear Sir or Madam,

This correspondence is in response to the letter of Ronald O. Mueller on behalf of Salesforce.com, Inc. (the "Company" or "Salesforce") dated February 5, 2020, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our Shareholder Proposal (the "Proposal") from its 2020 proxy materials for its 2020 annual shareholder meeting.

RESPONSE TO SALESFORCE'S CLAIMS

Our Proposal asks the Board of Directors to issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity ("EEO") policy. We indicated that the report should be available within a reasonable timeframe, be prepared at reasonable expense, and omit any proprietary information.

Salesforce objected. It sought from the SEC Staff a no-action declaration, on the basis of Rule 14a-8(i)(7), claiming that our Proposal falls within the Company's ordinary business operations. Specifically, the Company relies on a recent decision by the SEC Staff in *Apple, Inc.* (issued Dec. 20, 2019), which, it claims, effectively controls in this case. Moreover, it argues that our Proposal seeks to affect the day-to-day management of the Company and seeks to micromanage the company without presenting a sufficiently significant policy issue to justify our Proposal's avoiding a no-action determination. We of course demur.

As an initial matter, we agree with Salesforce that this matter presents issues essentially the same as those raised in *Apple, Inc.*, though we think that the evidence of actual viewpoint discrimination at Salesforce is stronger even than the very significant evidence of discrimination and the perception of discrimination at Apple. We believe that *Apple, Inc.* was wrongly decided, as we explained at length in our request for reconsideration in that matter. See *Apple, Inc.* (reconsid. denied, issued Jan. 17, 2020), and have further addressed in [this report](#).¹ The Staff denied our request for reconsideration in that case not on substantive grounds, but on the grounds that Apple had asserted that it had begun printing its proxy materials two days before we filed our request, and began mailing those materials *the day after* we submitted our request. We now put all parties on notice that should this matter proceed as *Apple, Inc.* did, and should the Staff grant the Company's no-action request on grounds similar to and as little explained as those in *Apple, Inc.*, we intend to file a request for consideration by the SEC Commission. It would therefore be unwarranted for the Company to rely on such a Staff decision in this case as a basis on which to design, print or mail proxy materials or otherwise expend resources in the expectation that the SEC has conclusively agreed to its no-action request. Rather, the Company must await full resolution of that reconsideration request, should it prove necessary, and cannot be permitted to foreclose the reconsideration process by ignoring this warning and proceeding before the reconsideration process is properly concluded.

I. Background

The ordinary-business exception appears in the Rule at 14a-8(i)(7). It, in its entirety, permits exclusion of a proposal “[i]f the proposal deals with a matter relating to the company's ordinary business operations.”²

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

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

¹ See Scott Shepard, *SEC Decisions Raise Specter of Bias, McCarthyism*, NATIONAL POLICY ANALYSIS #681, NATIONAL CENTER FOR PUBLIC POLICY RESEARCH (Feb. 21, 2020), available at <https://nationalcenter.org/ncppr/2020/02/21/sec-decisions-raise-specter-of-bias-mccarthyism> (last accessed Feb. 24, 2020).

² 17 C.F.R. § 240.14a-8(i)(7).

excludable because the proposals would transcend the day-to-day business matters.³

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

[t]he policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. **However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.**⁴

There matters stood until 2017. In a bulletin issued that November, the Staff recognized that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.⁵ It therefore invited corporations, in arguing for an ordinary-business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of these proposals.⁶

³ Staff Legal Bulletin No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 40018 (May 21, 1998) (emphasis added), available at <https://www.sec.gov/rules/final/34-40018.htm>) (last accessed Feb. 13, 2020).

⁴ *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 40018 (May 21, 1998), available at <https://www.sec.gov/rules/final/34-40018.htm> (last accessed Feb. 20, 2020).

⁵ See Staff Legal Bulletin No. 14I (Nov. 17, 2017), available at <https://www.sec.gov/interps/legal/cfsfb14i.htm> (Feb. 20, 2020) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

⁶ See *id.* ("Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

The Staff expanded this guidance further in October of 2018.⁷ It suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff. In particular, the Staff would welcome details about:

- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.
- Whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.⁸

The Staff expressly noted that in seeking this information as part of its review, it was turning its analysis into a very fine-grained, multi-factor test that would likely result in very different results at different companies despite the proposals being very similar in form or content. "[A] proposal that the Staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another."⁹

Additional Staff guidance appeared this past fall.¹⁰ In that bulletin, the Staff relevantly underscored the value of "delta analysis," which is to say the difference between what the shareholder has proposed and what the company currently does; and of "prior voting results," or a discussion of the results of previous related shareholder votes. With regard to the latter, the Staff explained that "the board's analysis may be more helpful if it includes, for example, a robust discussion that explains how the company's subsequent

⁷ See *Staff Legal Bulletin No. 14J* (Oct. 23, 2018), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals> (last accessed February 13, 2020).

⁸ *Id.* at B.2. (internal citation deleted).

⁹ *Id.*

¹⁰ See *Staff Legal Bulletin No. 14K* (Oct. 16, 2019), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals> (last accessed Feb. 20, 2020).

actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company.”¹¹

II. *Our Proposal is Indistinguishable from CorVel, Corp. – in which the SEC Staff determined that the Proposal Could Not be Excluded – Except with Regard to the Type of Discrimination to be Studied, which is not an Appropriate Ground for SEC Staff Differentiation.*

Our Proposal is substantially similar to the proposal that the Staff allowed in *CorVel Corp.* (avail. June 5, 2019). The “resolved” section of the proposal at issue in that no-action determination contest stated:

RESOLVED Shareholders request that CorVel Corporation (“CorVel”) issue a public report detailing the potential risks associated with omitting “sexual orientation” and “gender identity” from its written equal employment 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 Salesforce.com, Inc. (“Salesforce”) 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.

Just as the Company does now, CorVel argued that it should be able to omit the proposal on grounds that it contravened its ordinary business operations under Rule 14a-8(i)(7). As the operative language of our Proposal is nearly identical to that in *CorVel*, consistency dictates that the Staff reject Salesforce’s no-action request on these grounds. In its no-action request, the Company does not even address the Staff’s *CorVel* decision.

The only difference between our Proposal and the one in *CorVel* is that ours seeks a report on the effect of failing to bar discrimination on the grounds of *viewpoint* rather than sexual orientation or gender identity. This is, for the present analysis, a distinction without a difference.¹²

¹¹ *Id.* at B.3.b.

¹² The precedent cited by the Company cannot overcome the determinative effect of the clear, recent, and directly relevant *CorVel* decision. *Costco Wholesale Corp.* (avail. Nov. 14, 2014, recon. denied Jan. 5, 2015), *CVS Health Corporation* (avail. Feb. 27, 2015) and *The Walt Disney Co.* (avail. Nov. 24, 2014) involved proposals that would have required the relevant organizations to amend their non-discrimination policies in specified ways. Our Proposal, exactly like the successful *CorVel* proposal but in contrast to the

There is no doubt that questions of discrimination, *vel non*, on the grounds of sexual orientation or gender identity have occupied substantial public-policy attention in recent years, an interest perhaps most obviously illustrated at the national level by the arc of Supreme and inferior Court cases beginning with *Bowers v. Hardwick*, 478 U.S. 186 (1986) and culminating at present with *Obergefell v. Hodges*, 576 U.S. ____ (2015). Yet there can similarly be no question that the issue of discrimination on the grounds of viewpoint, particularly political or ideological viewpoint, has represented at least as compelling a national public-policy interest for a significantly longer period.

The debate about whether American government and business may properly discriminate in hiring or retention on the grounds of political viewpoint or philosophy stretches back at least as far as the initial “Red Scare” following World War I.¹³ The argument reached its apogee during the House Unamerican Activities Committee hearings and related events in the 1950s.¹⁴ During what is most commonly known as “the McCarthy Era,” government and private industry “blacklisted” those with minority political viewpoints, costing them their jobs and their livelihoods.¹⁵ Major political, media and literary figures rallied against McCarthyism, with the result that the American people reached a broad consensus that discrimination in employment on the grounds of political viewpoint was beyond the pale. Recently, though, that consensus has weakened, especially in the Company’s own Silicon Valley, where instances of viewpoint discrimination in employment have begun to appear again, along with an increasing sense of the pervasiveness, invasiveness, and deleteriousness of such discrimination.¹⁶

unsuccessful *Costco*, *CVS* and *Disney* proposals, seeks merely a *report* about the effects of the continuing failure to forbid discrimination on certain specified grounds. Similarly, the other precedent on which the Company has relied presents instances in which the proponent asked the relevant companies to “consider” changing their policies. See Salesforce’s No-Action Request Letter at p. 4 (citing *Bristol-Myers Squibb Co.* (Jan. 7, 2015) and *Yum! Brands, Inc.* (Jan. 7, 2015)). Again, like the directly apposite *CorVel* case, our Proposal seeks only a report into the effects of non-inclusion; we do not seek to interfere with the response to be taken by the Company as a result of its report. As a result, our Proposal does not improperly interfere with the ordinary course of Company’s business nor attempt to micro-manage the Company, and so is not excludable.

¹³ See, e.g., Matthew F. Simmons, *Red Scare*, INTERNATIONAL ENCYCLOPEDIA OF THE FIRST WORLD WAR (last updated May 26, 2016), available at https://encyclopedia.1914-1918-online.net/article/red_scare (last accessed Feb. 20, 2020).

¹⁴ See, e.g., HUAC, HISTORY.COM (last updated June 7, 2019), available at <https://www.history.com/topics/cold-war/huac> (last accessed Feb. 20, 2020).

¹⁵ See *id.*

¹⁶ See, e.g., Nitasha Tiku, *Survey Finds Conservatives Feel Out of Place in Silicon Valley: Online poll adds to concerns that political divisions are affecting tech workplaces*, WIRED (Feb. 2, 2018), available at <https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/> (last accessed Feb. 20, 2020); Olivia Solon, ‘There was a witch-hunt’: Silicon Valley conservatives decry Google groupthink, THE GUARDIAN (Aug. 9, 2017), available at <https://www.theguardian.com/technology/2017/aug/09/google-diversity-memo-conservatives-react> (last accessed Feb. 20, 2020); Mark Bergen & Ellen Huet, *Google Fires Author of Divisive Memo on Gender Differences*, BLOOMBERG (Aug. 7, 2017), available at

CorVel stands for the proposition that a proponent may request that a company's board of directors undertake a study to determine the effect of failing to expand anti-discrimination policies to include categories of longstanding public-policy interest. That analysis wholly applies here, and determines this question. As we noted in Section I, the SEC Staff has long held and never abandoned the proposition that while most employment decisions constitute ordinary business matters, significant discrimination matters are sufficiently important to transcend that category and deny a no-action request on Rule 14a-8(i)(7) grounds.¹⁷ The SEC itself, meanwhile, has directed the Staff that its personal policy preferences are not to determine its decisions: The Commission has instructed the Staff not to discriminate against similarly situated – far less otherwise identical – proposals on the basis of the subject matter or merits.¹⁸ As we have just established, discrimination on the basis of viewpoint has been just as substantial a problem throughout American history as discrimination on the basis of sexual orientation – with a much longer consensus about its impropriety and the danger it presents to the American polity, thus creating at least as much legitimate concern about it raising its ugly head once again at this late date.

The only conceivable grounds on which the Staff could reasonably divert from its *CorVel* precedent in this case, then, would be if the Company here has demonstrated that it does not have any problem with discrimination on the basis of viewpoint, so that the problem is simply insubstantial as to it. But as will be considered in detail below, this is certainly not the case. The Company's leaders have taken very public political stances that suggest that they consider common political intellectual stances that have the protection of the United States Constitution to fall beyond the bounds of acceptable discourse. This will of course lead any employee holding those unfavored positions to think themselves endangered at work for the simple "sin" of agreeing with the United States Supreme Court.

Meanwhile, the nominal rhetorical efforts that the Company points to as protections against viewpoint and worldview discrimination are no such thing. Generalized precatory assertions hold no legal weight as against specific, detailed commitments in other areas. What the Company has actually done to protect against viewpoint discrimination is, as a legal matter, nothing. This is a vast distance away from what we seek – a very simple, but specific, amendment to its EEO policy that would provide protection against McCarthy-style viewpoint discrimination.

<https://www.bloomberg.com/news/articles/2017-08-08/google-fires-employee-behind-controversial-diversity-memo> (last accessed Feb. 20, 2020); *Mozilla CEO Resignation Raises Free Speech Issues*, USA TODAY (April 5 2014), available at <https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/> (last accessed Feb. 20, 2020).

¹⁷ See *supra* at p. 3.

¹⁸ See *Staff Legal Bulletin No. 14* at B.6-7 (July 13, 2001), available at <https://www.sec.gov/interps/legal/cfslb14.htm> (last accessed Feb. 20, 2020).

III. Significant Evidence Suggests that the Company has a Serious Viewpoint Discrimination Problem.

Marc Benioff, the CEO of Salesforce, has asserted that those who believe, along with the United States Supreme Court, that an unwillingness to bend one's artistic expression in support of moral positions with which one disagrees is not *per se* unlawful bigotry, and that adherence to long-established religious belief is not "despicable," are themselves bigots worthy of condemnation.¹⁹ Salesforce has banned sellers of some kinds of constitutionally protected firearms from using its software.²⁰ The Company creates products designed to help clients to identify and combat discrimination at the workplace, and while those products include aids to avoid conscious and unconscious discrimination on many grounds, those grounds do not include discrimination on the basis of viewpoint.²¹

Comments by the Company's leaders regarding anti-discrimination protection suggest that these moves are made with the knowledge and intent of having a chastening effect on both expression by those with contrary opinions and even their inclusion at the company. Tony Profit, the Chief Equality Officer, has effectively made this clear in interviews:

the Oklahoma-native places a great emphasis on hiring and believes that creating a sustainable culture of diversity and equality is all about making sure that people feel like they're part of a community – a family even.

"People go where they are invited but stay where they are welcome," he says.²²

Salesforce's leaders and corporate positions are certain to make those who hold political worldviews disfavored by those leaders and in Silicon Valley feel distinctly unwelcome. The aggressive unwillingness of the Company even to study whether these activities are having a

¹⁹ See, e.g., Maya Kosoff, *This Tech Billionaire Is Going to War for Gay Rights*, VANITY FAIR (March 18, 2016) available at <https://www.vanityfair.com/news/2016/03/this-tech-billionaire-is-going-to-war-for-gay-rights> (last accessed March 3, 2020); Claire Zillman, *Salesforce boycotts Indiana over fear of LGBT discrimination*, FORTUNE (March 26, 2015), available at <https://fortune.com/2015/03/26/salesforce-indiana-same-sex-law/> (last accessed March 3, 2020); *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U. S. ____ (2018), slip opinion available at https://cdn.cnn.com/cnn/2018/images/06/04/16-111_j4e1.pdf (last accessed March 3, 2020); Ariane de Vogue, *Supreme Court rules for Colorado baker in same-sex wedding cake case*, CNN.COM (June 4, 2018) (summary of decision).

²⁰ See, e.g., Danny Vena, *Salesforce.com Won't Sell Software to Some Gun-Selling Companies*, THE MOTLEY FOOL (May 30, 2019), available at <https://www.fool.com/investing/2019/05/30/salesforce-wont-sell-software-companies-guns.aspx> (last accessed March 3, 2020).

²¹ See, e.g., Salesforce (for Trailhead), *RECOGNIZE BIAS IN THE WORKPLACE* (bias training exercise created by Salesforce for Trailhead), available at https://trailhead.salesforce.com/en/content/learn/modules/workplace_equality_inclusion_challenges/we_inclusion_challenges_bias_in_the_workplace (last accessed March 3, 2020).

²² Josie Cox, *A View from the Top: How Salesforce's Tony Prophet is championing equality in Silicon Valley*, THE INDEPENDENT (June 14, 2017), available at <https://www.independent.co.uk/news/business/analysis-and-features/a-view-from-the-top-salesforce-tony-prophet-silicon-valley-tech-chief-equality-officer-diversity-a7775831.html> (last accessed March 3, 2020).

negative impact on retention of such people – in direct keeping with its own stated philosophy – can only underscore this sense of discrimination. The problem of discrimination against certain classes of employees and potential hirees at the Company is both real and prominent.

By comparison, the proposal-proponents in *CorVel* made no demonstration of a serious likelihood of discrimination on the basis of sexual orientation in that Company, and yet the Staff still held that discrimination presented a significant matter for the company and so denied a no-action request on the basis of Rule 14a-8(i)(7). It must reach the same conclusion here.

IV. *The Company's Reliance on Generalized Assertions of Equity, along with its Refusal Even to Study the Need to Add Viewpoint to its Non-Discrimination Policy, while Including So Many Other Categories, Further Highlights the Need for Such Protections.*

The Company's non-discrimination policy states that

Salesforce is an equal opportunity employer and maintains a policy of non-discrimination with all employees and applicants for employment.

What does that mean exactly? It means that at Salesforce, we believe in equality for all. And we believe we can lead the path to equality in part by creating a workplace that's diverse, inclusive, and free from discrimination.

Any employee or potential employee will be assessed on the basis of merit, competence and qualifications – without regard to race, religion, color, national origin, sex, sexual orientation, gender expression or identity, transgender status, age, disability, veteran or marital status, or any other classification protected by law.²³

The Company asserts that the generalized statement that “[a]ny employee or potential employee will be assessed on the basis of merit, competence and qualifications,” is sufficient to guard against viewpoint discrimination, so that there is virtually no distance between what we seek and what the Company has already performed. But this argument is belied in two profound ways. First, the Company itself does not believe that that single sentence is enough to bar discrete discrimination on specific grounds; if it did, it would simply stick with that single sentence. Instead, it goes on to list a bevy of specific grounds on which it will not discriminate.

It could include “viewpoint” in that discrete list. It adamantly refuses. In fact, it in this proceeding seeks fervently even to keep from having to ask its shareholders whether it should conduct a study to look into the risks that arise from failing to include viewpoint in this enumerated list.

²³ Salesforce No-Action Request Letter, at Exhibit B.

The second refutation of the Company's claim that its blanket, general abjuration of discrimination is sufficient to stop viewpoint discrimination is the behavior of the Company outside of the context of this proceeding. Again and again the Company provides signals and reassurances that it will not discriminate on the basis of race or sex or sexual orientation – that it is welcoming to those who have been historically disfavored on those grounds. With regard to those with political viewpoints other than those aggressively espoused by the Company's management, on the other hand, the Company is conspicuously, deafeningly silent. Given the vocal position of the management with regard to those matters, one would expect a Company that truly does not discriminate on the grounds of viewpoint and disfavored political inclination to say so clearly and repeatedly. Instead, the Company cannot point to even a single in-terms reassurance to employees and potential employees who have worldviews different from that of Marc Benioff that they will be protected and respected like other employees. Under the circumstances, the implication is impossible to avoid.

The “delta” between what the Company has done – nothing at all to stop viewpoint discrimination, while aggressively signaling which viewpoints it disfavors and what it thinks of those who hold those viewpoints – and what we seek could hardly be starker.

V. *The Prior Proposal Raised by the Company is Not Sufficiently Similar to our Proposal to Permit the Company to Exclude our Proposal because of that Proposal's Failure.*

The Company claims that it should be excused from presenting our Proposal because a previous proposal raised the same general subject matter. Such a bald assertion, without more, should by the SEC Staff's own recent statements not carry weight in its decision-making process.²⁴ Nevertheless, in contrast to the Company, we here explain in significant detail the fundamental differences between the two proposals.

While there is a superficial resemblance between our Proposal and the prior proposal cited by the Company, in that they both broadly implicate issues of political or ideological viewpoint, they are in every substantial and material way different – in their focus, their purpose, their application, and their effect. The Company has here done no more than to assert that the proposals are similar enough to permit exclusion of our Proposal because they both deal in some way with the broad subject matter of ideological viewpoints and because the previous proposal was defeated. On that logic, though, the Staff would be obliged to issue no-action decisions against all future proposals that deal in some way with the environment once a single environment-related proposal had been defeated. Surely this is not the standard.

The previous proposal sought to have the Company reveal the ideological dispositions of its Board member nominees in chart form before shareholders voted on those nominees. Our Proposal seeks a report detailing the potential risks associated with failing to protect employees

²⁴ See *supra* at p 8.

from discrimination on the basis of political or philosophical viewpoint. Thus, the Company is correct in noting that the proposals both – as most proposals will, to one extent or other – traffic in the realm of ideas held by some groups of people. In every material and effective way, however, the proposals are substantially different.

The *focus* and *subject* of each proposal is different. The previous proposal focused on Board nominees, while our Proposal is concerned with employees – but not even employees directly: rather, with the overall risks to the Company of failing to provide long-taken-for-granted protections against blacklisting and career ruination as a result of viewpoint discrimination.

The prospective *result* of each proposal is different. The former proposal would have resulted in nominee disclosure of their public viewpoints, while the latter would result in a report about risks to the Company of failure to protect workers from long-discredited (but now potentially reviving) McCarthyite discrimination. This is more than just a nominal distinction. Our Proposal seeks no personal information from any party, no mandatory reporting from any party. It is not an *active* request for disclosure from anyone. Rather, it is simply an attempt to gauge the dangers that obtain should the Company continue to fail to prohibit viewpoint discrimination.

This difference in requested result underscores the fundamental difference in *purpose* between the two proposals. The previous proposal sought to provide shareholders with additional information about Company board candidates. This information might well have proven useful to shareholders in maximizing Company value and growth opportunity by ensuring that, at the highest levels, the Company did not make grave errors in corporate governance because it was fundamentally unaware of the purchasing and loyalty dispositions of large swathes of its customers. The purpose here is entirely different, except in that it (as it must) attends to the maximization of Company value. The purpose of our Proposal is to place before the Company board a consideration of the potential costs that lie in a continuing failure to offer basic civic *protections to its employees* – the potential costs associated with making the workplace uncomfortable, unsafe, and potentially unavailable to potentially huge numbers of employees.

These are fundamentally, profoundly different proposals. The former proposal was aimed at maximizing shareholder knowledge, so as to in turn potentially maximize the value to the Company of its board. Our Proposal seeks to inform the Company of the potential costs of keeping open a door to debilitating discrimination.

This fundamental difference is perhaps best illustrated by adapting a well-established Rule 14 test from a slightly different context. When trying to decide whether a shareholder-initiated proposal is properly trumped by a company-initiated proposal under Rule 14a-8(i)(9), the Commission has explained that both proposals should be permitted when a shareholder might vote for both of them without logical contradiction.²⁵ Conversely, in a case like this one, in

²⁵ See *Staff Legal Bulletin* No. 14H (Oct. 22, 2015), available at <https://www.sec.gov/interps/legal/cfslb14h.htm> (last accessed Feb. 20, 2020).

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which a Company has claimed that a proposal is too similar to a previous recent proposal to merit submission to shareholders, the test should perhaps be this: could a shareholder logically and without caprice vote for one of the propositions and against the other? If the proposals are so genuinely similar that it would be incoherent for a reasonably, and reasonably representative, shareholder to vote for one of the propositions while voting against the other, then it is proper to exclude the latter proposition.

That is certainly the case here. Shareholders who rejected a proposal to require disclosure of personal information from board of director nominees might very well vote in favor of requiring a report on the effect of Company's continuing - and conspicuous, given the length and breadth of other categories to which its non-discrimination policy applies - refusal to prohibit viewpoint discrimination at the Company. The two proposals are, at heart, so tangentially related that such a position - against required disclosures but also against discrimination - is self-evidently not only consistent but quite pedestrian.

Or, instead, the Staff could just stick to its stated position that in the face of a fulsome argument demonstrating the fundamental difference between two proposals, it will not act on a bare assertion by a company that the proposals are "close enough."

For all of the foregoing reasons, we urge the Staff to find that our Proposal may not be omitted under Rule 14a-8(i)(7).

The Company has clearly failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject Salesforce's request for a no-action letter concerning our Proposal.

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,

A handwritten signature in black ink, appearing to read "Scott Shepard", with a stylized flourish at the end.

Scott Shepard

cc: Ronald O. Mueller (shareholderproposals@gibsondunn.com)
Justin Danhof

Attachment B



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

RE: Request for Reconsideration of December 20, 2019 Decision Permitting Apple, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 - Rule 14a-8

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

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 the basis of sexual orientation rather than viewpoint, did not qualify as an ordinary business decision.

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,² 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:

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.³ 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,⁴ 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.⁵

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

³ See, e.g., Troy Wolverton, *Tim Cook says conservative Apple employees who feel shunned should 'come talk to me,'* BUSINESS INSIDER (Mar. 1, 2019), available at <https://www.businessinsider.com/apple-supports-employees-range-politics-tim-cook-2019-3>.

⁴ See, e.g., Nitasha Tiku, *Survey Finds Conservatives Feel Out of Place in Silicon Valley: Online poll adds to concerns that political divisions are affecting tech workplaces,* WIRED (Feb. 2, 2018), available at <https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/>; Olivia Solon, *'There was a witch-hunt': Silicon Valley conservatives decry Google groupthink,* THE GUARDIAN (Aug. 9, 2017), available at <https://www.theguardian.com/technology/2017/aug/09/google-diversity-memo-conservatives-react>; Mark Bergen & Ellen Huet, *Google Fires Author of Divisive Memo on Gender Differences,* BLOOMBERG (Aug. 7, 2017), available at <https://www.bloomberg.com/news/articles/2017-08-08/google-fires-employee-behind-controversial-diversity-memo>; *Mozilla CEO Resignation Raises Free Speech Issues,* USA TODAY (April 5 2014), available at <https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/>.

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 Silentio 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.”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 *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 *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.

⁶ *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)).

Office of the Chief Counsel
Division of Corporation Finance
January 8, 2020
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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,

A handwritten signature in black ink, appearing to read "Scott Shepard", with a long horizontal flourish extending to the right.

Scott Shepard

cc: Justin Danhof
Sam Whittington, Apple Inc. (sam_whittington@apple.com)
SEC Chairman Jay Clayton (chairmanoffice@sec.gov)
Commissioner Robert J. Jackson Jr. (CommissionerJackson@sec.gov)
Commissioner Allison Herren Lee (CommissionerLee@sec.gov)
Commissioner Hester M. Peirce (CommissionerPeirce@sec.gov)
Commissioner Elad L. Roisman (CommissionerRoisman@sec.gov)

September 18, 2020

VIA E-MAIL

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

Re: *Walgreens Boots Alliance, Inc.*
Stockholder Proposal of the National Center for Public Policy Research
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, Walgreens Boots Alliance, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2021 Annual Meeting of Stockholders (collectively, the “2021 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof (the “Supporting Statement”) received from the National Center for Public Policy Research (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 2021 Proxy Materials with the Commission; and
- concurrently sent a copy 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: Shareholders request that Walgreens Boots Alliance, Inc. (Walgreens) 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.

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

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may properly be excluded from the 2021 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal relates to the Company’s ordinary business operations.

ANALYSIS

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

A. The Ordinary Business Standard.

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 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 consideration is that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not,

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as a practical matter, be subject to direct shareholder oversight.” 1998 Release. Examples of the tasks cited by the Commission include “management of the workforce.” *Id.*

The 1998 Release further distinguishes proposals pertaining to ordinary business matters from those involving “significant social policy issues.” 1998 Release (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. *Id.* In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers the terms of the resolution and its supporting statement 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.”).

In Staff Legal Bulletin 14K (Oct. 16, 2019) (“SLB 14K”), the Staff noted that “a policy issue that is significant to one company may not be significant to another.” In this regard, the Staff stated in Staff Legal Bulletin No. 14I (Nov. 1, 2017) (“SLB 14I”) that a “board acting . . . with the knowledge of the company’s business and the implications for a particular proposal on that company’s business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.” Moreover, in Staff Legal Bulletin No. 14J (Oct. 23, 2018), the Staff indicated, and in SLB 14K confirmed, that a well-developed discussion of the board’s analysis that focuses on specific substantive factors can assist the Staff in evaluating a company’s no-action request.

Further, 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 company. *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).

*B. The Proposal Relates To The Company’s Ordinary Business Operations:
Management Of The Company’s Workforce.*

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. Notably, in *United Technologies Corp.* (avail. Feb. 19, 1993), the Staff provided the

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following examples of excludable ordinary business categories: “employee health benefits, general compensation issues not focused on senior executives, *management of the workplace*, employee supervision, labor-management relations, employee hiring and firing, *conditions of the employment* and employee training and motivation” (emphasis added). Importantly, the Commission subsequently 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.” *See Merck & Co., Inc.* (avail. Feb. 16, 2016) (concurring with the exclusion of a proposal, stating that “[p]roposals concerning a company’s management of its workforce are generally excludable under rule 14a-8(i)(7).”).

Consistent with the 1998 Release, the Staff has recognized that a wide variety of proposals relating to the management of a company’s workforce are excludable under Rule 14a-8(i)(7), including proposals addressing potential or perceived discrimination in the workplace. For example, in *Walmart, Inc.* (avail. Apr. 8, 2019), the Staff concurred in the exclusion under Rule 14a-8(i)(7) of a proposal requesting “that the board prepare a report to evaluate the risk of discrimination that may result from the [c]ompany’s policies and practices for hourly workers taking absences from work for personal or family illness,” noting that “the [p]roposal relates generally to the [c]ompany’s management of its workforce.” Also, in *Yum! Brands, Inc.* (avail. Mar. 6, 2019), the Staff concurred with the exclusion of a proposal relating to adopting a policy not to “engage in any Inequitable Employment Practice”, noting it related “generally to the [c]ompany’s policies concerning its employees and does not focus on an issue that transcends ordinary business matters.” *See also PG&E Corp.* (avail. Mar. 7, 2016) (concurring with the exclusion of a proposal requesting that the board institute a policy banning discrimination based on race, religion, donations, gender or sexual orientation in hiring vendor contracts or customer relations, as relating to the company’s ordinary business operations); and *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”).

Similarly, the Staff has permitted exclusion of proposals requesting that anti-discrimination policies be amended to include the political participation of employees. In fact, several of the following letters demonstrate that the Staff has consistently concurred that proposals focused on company policies relating to employee viewpoint and political ideology do not raise significant policy issues (or in the words of the 1998 Release, do not address “significant discrimination matters”) and instead relate squarely to a company’s ordinary business operations. For example, in *The Walt Disney Co.* (avail. Nov. 24, 2014, *recon. denied* Jan. 5, 2015), the Staff concurred with the 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

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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.” Additionally, in *Costco Wholesale Corp.* (avail. Nov. 14, 2014, *recon. denied* Jan. 5, 2015), the Staff concurred with the exclusion of a proposal requesting adoption of a company-wide code of conduct including an anti-discrimination policy “that protects employees’ human right to engage in the political process, civic activities and public policy of his or her country without retaliation” as “relating to [the company’s] ordinary business operations” and, in particular, “policies concerning [the company’s] employees”. See also *CVS Health Corp.* (avail. Feb. 27, 2015) (concurring with the exclusion of a proposal requesting the company “to amend its equal employment opportunity policy... to explicitly prohibit discrimination based on political ideology, affiliation or activity,” as relating to the company’s “policies concerning its employees”); *Bristol-Myers Squibb Co.* (avail. Jan. 7, 2015) (concurring with the exclusion of a proposal requesting adoption of anti-discrimination principles “that protect employees’ human right to engage, on their personal time, in legal activities relating to the political process... without retaliation in the workplace” as “relating to [the company’s] ordinary business operations” and in particular “policies concerning [the company’s] employees”); *Yum! Brands, Inc.* (avail. Jan. 7, 2015, *recon. denied* Feb. 26, 2015) (same); and *Deere & Co.* (avail. Nov. 14, 2014, *recon. denied* Jan. 5, 2015) (same).

Just as with the above-cited precedent, this Proposal focuses on management of the Company’s workforce, an ordinary business matter. Specifically, the Proposal focuses on the Company’s equal employment opportunity policy, which applies broadly to the Company’s more than 220,000 US employees, and whether the absence of specific wording covering “viewpoint” and “ideology” adversely affects employee welfare and performance, the Company’s competitive position, hiring, retention and litigation risks, each of which are routine aspects of the Company’s management of its employee workforce.¹ As such, and consistent with the above-referenced precedent, the Proposal relates to the Company’s ordinary business operations and does not focus on a significant policy issue that transcends the Company’s ordinary business operations.

C. *In Light Of The Company’s Existing Policies, Practices and Disclosures, The Actions Requested By The Proposal Do Not Transcend The Company’s Ordinary Business Operations.*

In the context of the Company’s existing and robust policies, practices and disclosures relating to equal employment opportunity, anti-discrimination and inclusion, the differences

¹ See Staff Legal Bulletin 14E (Oct. 27, 2009). The Staff clarified that for purposes of Rule 14a-8(i)(7), where a proposal relates to an evaluation of risk, the Staff will “focus on the subject matter to which the risk pertains or that give rise to the risk.”

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between the Proposal's objective and what the Company has already done are not significant in relation to the Company, such that the Proposal does not present a policy issue that transcends the Company's ordinary business. In fact, the Company's policies and practices are substantially similar to those of three other companies that received an identical proposal from the same Proponent and successfully excluded the proposal under Rule 14a-8(i)(7). See *Apple Inc.* (avail. Dec. 20, 2019, *recon. denied* Jan. 17, 2020) (concurring with the exclusion of a proposal and noting it "does not transcend the [c]ompany's ordinary business operations"); *Alphabet Inc.* (avail. Apr. 9, 2020, *recon. denied* Apr. 22, 2020) (same); and *salesforce.com, inc.* (avail. Apr. 9, 2020, *recon. denied* Apr. 22, 2020) (same).

In SLB 14I, the Staff indicated that including a "discussion that reflects the board's analysis of the particular policy issue raised and its significance" will "greatly assist the [S]taff with its review of no-action requests under Rule 14a-8(i)(7)." Accordingly, the Compensation and Leadership Performance Committee (the "Committee") of the Company's Board of Directors, comprised of independent directors who oversee the Company's compensation and benefit policies and programs designed to attract, motivate and retain personnel to enable the Company to achieve its business objectives, is scheduled to review and consider the Proposal's significance to the Company, taking into account factors such as the Company's existing equal employment opportunity, anti-discrimination and inclusion policies, practices and disclosures. Following the Committee's consideration of the Proposal, the Company expects to promptly supplement this letter to report on the Committee's analysis of the Proposal, which we expect to file on or about October 30, 2020.

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2021 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8.

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We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Joseph B. Amsbary, Jr., Vice President, Corporate Secretary, Walgreens Boots Alliance, Inc.
Mark L. Dosier, Senior Director, Securities Law, Walgreens Boots Alliance, Inc.
Kelsey Chin, Assistant Corporate Secretary, Walgreens Boots Alliance, Inc.
Justin Danhof, Esq., General Counsel, National Center for Public Policy Research

EXHIBIT A



Via FedEx

August 7, 2020

Joseph B. Amsbary, Corporate Secretary
Walgreens Boots Alliance, Inc.
108 Wilmot Road
MS #1858
Deerfield, Illinois 60015

Dear Mr. Amsbary,

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the Walgreens Boots Alliance, Inc. (the "Company") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations.

I submit the Proposal as General Counsel of the National Center for Public Policy Research, which has continuously owned Walgreens stock with a value exceeding \$2,000 for a year prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2021 annual meeting of shareholders. A Proof of Ownership letter is forthcoming and will be delivered to the Company.

Copies of correspondence or a request for a "no-action" letter should be forwarded to Justin Danhof, Esq, General Counsel, National Center for Public Policy Research, 20 F Street, NW, Suite 700, Washington, DC 20001 and emailed to JDanhof@nationalcenter.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin Danhof", with a long horizontal flourish extending to the right.

Justin Danhof, Esq.

Enclosure: Shareholder Proposal

EEO Policy Risk Report

RESOLVED

Shareholders request that Walgreens Boots Alliance, Inc. (Walgreens) 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.

SUPPORTING STATEMENT

Walgreens does not explicitly prohibit discrimination based on viewpoint or ideology in its written EEO policy.

Walgreens lack of a company-wide best practice EEO policy sends mixed signals to company employees and prospective employees and calls into question the extent to which individuals are protected due to inconsistent state policies and the absence of federal protection for partisan activities. Approximately half of Americans live and work in a jurisdiction with no legal protections if their employer takes action against them for their political activities.

Companies with inclusive policies are better able to recruit the most talented employees from a broad labor pool, resolve complaints internally to avoid costly litigation or reputational damage, and minimize employee turnover. Moreover, inclusive policies contribute to more efficient human capital management by eliminating the need to maintain different policies in different locations.

There is ample evidence that individuals with conservative viewpoints may face discrimination in corporate America.

Many companies are hostile to right-of-center thought. Companies such as Facebook and Google routinely fire conservative employees when they speak their values. At the 2019 annual meeting of Apple shareholders, an audience member told company CEO Tim Cook about her close friend who works at Apple and lives in fear of retribution every single day because she happens to be a conservative. Companies such as Amazon and Alphabet work with the Southern Poverty Law Center (“SPLC”). The SPLC regularly smears Christian and conservative organizations by labelling them as “hate” groups on par with the KKK.

One former Google employee, who was fired for his conservative views, even noted that right-of-center employees at that company regularly face harassment and abuse simply for their political beliefs.

Presently shareholders are unable to evaluate how Walgreens prevents discrimination towards employees based on their ideology or viewpoint, mitigates employee concerns of potential discrimination, and ensures a respectful and supportive work atmosphere that bolsters employee performance.

Without an inclusive EEO policy, Walgreens may be sacrificing competitive advantages relative to peers while simultaneously increasing company and shareholder exposure to reputational and financial risks.

We recommend that the report evaluate risks including, but not limited to, negative effects on employee hiring and retention, as well as litigation risks from conflicting state and company anti-discrimination policies.

August 13, 2020

VIA OVERNIGHT MAIL AND EMAIL

Justin Danhof, Esq.
General Counsel
National Center for Public Policy Research
20 F Street, NW, Suite 700
Washington, DC 20001

Dear Mr. Danhof:

I am writing on behalf of Walgreens Boots Alliance, Inc. (the “Company”), which received on August 11, 2020, your stockholder proposal entitled “EEO Policy Risk Report” submitted pursuant to Securities and Exchange Commission (“SEC”) Rule 14a-8 for inclusion in the proxy statement for the Company’s 2021 Annual Meeting of Stockholders (the “Proposal”).

The Proposal contains certain procedural deficiencies, which SEC regulations require us to bring to your attention. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that stockholder proponents must submit sufficient proof of their continuous ownership of at least \$2,000 in market value, or 1%, of a company’s shares entitled to vote on the proposal for at least one year as of the date the stockholder proposal was submitted. The Company’s stock records do not indicate that you are the record owner of sufficient shares to satisfy this requirement. In addition, to date we have not received proof that you have satisfied Rule 14a-8’s ownership requirements as of the date that the Proposal was submitted to the Company.

To remedy this defect, you must submit sufficient proof of your continuous ownership of the required number or amount of Company shares for the one-year period preceding and including August 7, 2020, the date the Proposal was submitted to the Company. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of:

- (1) a written statement from the “record” holder of your shares (usually a broker or a bank) verifying that you continuously held the required number or amount of Company shares for the one-year period preceding and including August 7, 2020; or
- (2) if you have filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, reflecting your ownership of the required number or amount of Company shares as of or before the date on which the one-year eligibility period begins, a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level and

Justin Danhof, Esq.
August 13, 2020
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a written statement that you continuously held the required number or amount of Company shares for the one-year period.

If you intend to demonstrate ownership by submitting a written statement from the “record” holder of your shares as set forth in (1) above, please note that most large U.S. brokers and banks deposit their customers’ securities with, and hold those securities through, the Depository Trust Company (“DTC”), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as record holders of securities that are deposited at DTC. You can confirm whether your broker or bank is a DTC participant by asking your broker or bank or by checking DTC’s participant list, which is available at <http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>. In these situations, stockholders need to obtain proof of ownership from the DTC participant through which the securities are held, as follows:

- (1) If your broker or bank is a DTC participant, then you need to submit a written statement from your broker or bank verifying that you continuously held the required number or amount of Company shares for the one-year period preceding and including August 7, 2020.
- (2) If your broker or bank is not a DTC participant, then you need to submit proof of ownership from the DTC participant through which the shares are held verifying that you continuously held the required number or amount of Company shares for the one-year period preceding and including August 7, 2020. You should be able to find out the identity of the DTC participant by asking your broker or bank. If your broker is an introducing broker, you may also be able to learn the identity and telephone number of the DTC participant through your account statements, because the clearing broker identified on your account statements will generally be a DTC participant. If the DTC participant that holds your shares is not able to confirm your individual holdings but is able to confirm the holdings of your broker or bank, then you need to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that, for the one-year period preceding and including August 7, 2020, the required number or amount of Company shares were continuously held: (i) one from your broker or bank confirming your ownership, and (ii) the other from the DTC participant confirming the broker or bank’s ownership.

The SEC’s rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please transmit any response by email to Kelsey Chin at kelsey.chin@wba.com. Alternatively, you may transmit any response by mail to Kelsey Chin, Assistant Corporate Secretary, Walgreens Boots Alliance, Inc., 108 Wilmot Road, MS #1858, Deerfield, IL 60015.

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Justin Danhof, Esq.
August 13, 2020
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If you have any questions with respect to the foregoing, please contact me at (202) 955-8287. For your reference, I enclose a copy of Rule 14a-8 and Staff Legal Bulletin No. 14F.

Sincerely,



Elizabeth A. Ising

cc: Joseph B. Amsbary, Jr., Vice President, Corporate Secretary, Walgreens Boots Alliance, Inc.
Mark L. Dosier, Senior Director, Securities Law, Walgreens Boots Alliance, Inc.
Kelsey Chin, Assistant Corporate Secretary, Walgreens Boots Alliance, Inc.

Enclosures

From: Scott Shepard <sshepard@nationalcenter.org>
Sent: Thursday, August 20, 2020 11:42 AM
To: Chin, Kelsey
Subject: Proof of ownership packet
Attachments: Walgreens 2021 Ownership Pack.pdf

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ms. Chin,

Attached please find a copy of the ownership packet that we sent today by FedEx to the Illinois headquarters.

Thanks,

Scott

--

Scott Shepard
Free Enterprise Project
National Center for Public Policy Research



Via FedEx

August 20, 2020

Joseph B. Amsbary, Corporate Secretary
Walgreens Boots Alliance, Inc.
108 Wilmot Road
MS #1858
Deerfield, Illinois 60015

Dear Mr. Amsbary,

Enclosed please find a Proof of Ownership letter from UBS Financial Services Inc. in connection with the shareholder proposal submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations by the National Center for Public Policy Research to Walgreens Boots Alliance, Inc. on August 7, 2010.

Copies of correspondence or a request for a "no-action" letter should be forwarded to Justin Danhof, Esq, General Counsel, National Center for Public Policy Research, 20 F Street, NW, Suite 700, Washington, DC 20001 and emailed to JDanhof@nationalcenter.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott Shepard", is written over a white background. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Scott Shepard

Cc: Kelsey Chin, Walgreens Boots Alliance, Inc. (via email: kelsey.chin@wba.com)



UBS Financial Services Inc.
1000 Harbor Boulevard
Weehawken, NJ 07086
Tel. 877-827-7870
FAX 877-785-8404

UBS Wealth Advice Center

www.ubs.com

Joseph B. Amsbary, Corporate Secretary
Walgreens Boots Alliance, Inc.
108 Wilmot Road
MS #1858
Deerfield, Illinois 60015

August 19, 2020

Confirmation: Information regarding the account of The National Center for Public Policy Research

Dear Mr. Amsbary,

The following client has requested UBS Financial Services Inc. to provide you with a letter of reference to confirm its banking relationship with our firm.

The National Center for Public Policy Research has been a valued client of ours since October 2002 and as of the close of business on 08/07/2020, the National Center for Public Research held, and has held continuously for at least one year 81 shares of Walgreens Boot Alliance, Inc common stock. UBS continues to hold the said stock.

Please be aware this account is a securities account not a "bank" account. Securities, mutual funds, and other non-deposit investment products are not FDIC-insured or bank guaranteed and are subject to market fluctuation.

Questions

If you have any questions about this information, please contact Lars Soderberg at (844) 964-0333.

UBS Financial Services is a member firm of the Securities Investor Protection Corporation (SIPC).

Sincerely

Lars A Soderberg

Lars A. Soderberg
Financial Advisor
UBS Financial Services Inc.

From: Justin Danhof <jdanhof@nationalcenter.org>
Sent: Thursday, September 17, 2020 6:50 PM
To: Amsbary Jr, Joseph
Cc: Metrick, Kim; Chin, Kelsey
Subject: Re: Walgreens Boots Alliance, Inc. (National Center for Public Policy Research) Correspondence

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Jake,

Do you all have some availability next Wednesday afternoon? I have a meeting with Apple's folks at 1:00pm eastern, but should be free after that. Anytime from 1:45pm-5pm would work for me. I can also block off time on Thursday the 24th.

-Justin

-

On Thu, Sep 17, 2020 at 5:29 PM Amsbary Jr, Joseph <jake.amsbary@wba.com> wrote:

Hi Justin,

I hope you're well. Can you let me know when you have some time to talk about your proposal?

Thanks,

Jake Amsbary

From: Justin Danhof <jdanhof@nationalcenter.org>
Sent: Friday, August 14, 2020 8:18 AM
To: Walter, Geoffrey E. <GWalter@gibsondunn.com>
Cc: Amsbary Jr, Joseph <jake.amsbary@wba.com>; Dosier, Mark <Mark.Dosier@Wba.com>; Chin, Kelsey <kelsey.chin@wba.com>
Subject: Re: Walgreens Boots Alliance, Inc. (National Center for Public Policy Research) Correspondence

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Got it. Thanks, Geoffrey. Our ownership materials will be on the way soon.

Best,

Justin

On Thu, Aug 13, 2020 at 8:17 PM Walter, Geoffrey E. <GWalter@gibsondunn.com> wrote:

Attached on behalf of our client, Walgreens Boots Alliance, Inc., please find our notice of deficiency with respect to the shareholder proposal you submitted on behalf of the National Center for Public Policy Research. A copy of this letter also was sent to you via UPS overnight delivery.

Sincerely,

Geoffrey Walter

Geoffrey Walter

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
Tel +1 202.887.3749 • Fax +1 202.530.4249
GWalter@gibsondunn.com • www.gibsondunn.com

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Please see our website at <https://www.gibsondunn.com/> for information regarding the firm and/or our privacy policy.

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