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December 18, 2020

International Business Machines Corporation  
Shareholder Proposal of Nia Impact Capital  
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

I am writing on behalf of our client, International Business Machines Corporation, a New York corporation (“IBM” or the “Company”), in accordance with Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended, to respectfully request that the Staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) concur with our view that IBM may exclude a shareholder proposal and supporting statement (the “Proposal”) submitted by Nia Impact Capital (“Nia” or the “Proponent”) from the proxy materials to be distributed by IBM in connection with its 2021 annual meeting of shareholders (the “2021 proxy materials”). A copy of the Proposal is attached to this letter as Exhibit A. IBM has advised us as to the factual matters set forth below.

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

- filed this letter with 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 copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the Staff. Accordingly, the Company is 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 the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company and to Natalie Wilmore, Counsel of the Company.

### THE PROPOSAL

The text of the Proponent's Proposal is set forth in Exhibit A.

### BASES FOR EXCLUSION

On behalf of the Company, we hereby respectfully request that the Staff concur in the Company's view that it may exclude the Proposal from the 2021 proxy materials pursuant to Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal.

#### Background

The Proponent submitted the Proposal to the Company in a letter dated November 9, 2020. On December 15, 2020, the Board of Directors of the Company (the "Board") substantially implemented the Proposal by adopting a policy to publish an annual report on the Company's diversity, equity and inclusion programs that includes the Board's process for assessing such programs' effectiveness, as well as the Board's actual assessment of effectiveness of such programs (the "Policy"). A copy of a Secretary Certificate attesting to the Board's adoption of such a policy is attached as Exhibit B.

#### Analysis

### THE PROPOSAL MAY BE EXCLUDED PURSUANT TO RULE 14a-8(i)(10) BECAUSE THE COMPANY HAS SUBSTANTIALLY IMPLEMENTED THE PROPOSAL.

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if the company has already substantially implemented the proposal. In the Exchange Act Release No. 34-20091 (Aug. 16, 1983) ("1983 Release"), the Commission adopted the "substantially implemented" standard after determining that the "previous formalistic application" of the rule defeated its purpose, which, as stated in Exchange Act Release No. 34-12598 (July 7, 1976), is to "avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." Accordingly, the actions requested by a proposal need not be "fully effected" provided that they have been "substantially implemented" by the company.

Applying this standard, the Staff has consistently permitted the exclusion of a proposal when it has determined that the company's policies, practices and procedures or public disclosures compare favorably with the guidelines of the proposal.<sup>1</sup>

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<sup>1</sup> See, e.g., United Cont'l Holdings, Inc. (Apr. 13, 2018) (permitting exclusion on substantial implementation grounds of a proposal requesting amendments to existing clawback provisions to add a misconduct-related trigger, where the company adopted a revised clawback policy after the date of the original no-action request); eBay Inc. (Mar. 29, 2018) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting an assessment of the "feasibility" of integrating sustainability metrics into compensation where the company already determined it was feasible and incorporated those elements in a more "holistic approach" to compensation); Kewaunee Scientific Corp. (May 31, 2017) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting that non-employee directors no longer be eligible to participate in the company's health and life insurance programs, on the basis that the company's "policies, practices and procedures compare favorably with the guidelines of the proposal," where the board had adopted a policy prohibiting nonemployee directors from participating in the company's health and life insurance programs after December 31, 2017); Wal-Mart Stores, Inc. (Mar. 16, 2017) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company reform its corporate governance guidelines to add guidelines to discontinue and remove disqualified members of the board in accordance with applicable law, on the basis that the company's "policies, practices and procedures compare favorably with the guidelines of the proposal," where the company argued that shareholders already had the right to remove members of the board with or without cause under Delaware law); Dominion Resources, Inc. (Feb. 9, 2016) (permitting exclusion on substantial implementation grounds of a proposal requesting report on measuring, mitigating, disclosing and setting reduction targets for methane emissions, where existing

In addition, the Staff has permitted exclusion under Rule 14a-8(i)(10) where a company already addressed the underlying concerns and satisfied the essential objectives of the proposal, even if the proposal had not been implemented exactly as proposed by the proponent. For example, in PG&E Corp. (Mar. 10, 2010), the Staff permitted exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company provide a report disclosing, among other things, the company's standards for choosing the organizations to which the company makes charitable contributions and the "business rationale and purpose for each of the charitable contributions." In arguing that the proposal had been substantially implemented, the company referred to a website where the company had described its policies and guidelines for determining the types of grants that it makes and the types of requests that the company typically does not fund. Although the proposal appeared to contemplate disclosure of each and every charitable contribution, the Staff concluded that the company had substantially implemented the proposal.<sup>2</sup>

The Proposal requests a report, published annually, assessing IBM's diversity, equity and inclusion efforts, including "the Board's process for assessing the effectiveness of its diversity, equity and inclusion programs, and the Board's assessment of program effectiveness, as reflected in any goals, metrics, and trends related to its promotion, recruitment and retention of protected classes of employees." The Company has committed to publishing such an annual report in the Policy.

By adopting the Policy and committing to publishing an annual report on the Company's diversity, equity and inclusion programs that includes the Board's process for assessing such programs' effectiveness, as well as the Board's actual assessment of effectiveness, the Company has satisfied all elements of the Proposal. Furthermore, the disclosure on the Company's diversity, equity and inclusion programs provided by this report will provide meaningful information to investors on the effectiveness of the Company's workplace diversity programs, thereby satisfying the essential objective of the Proposal. Accordingly, we ask that the Staff concur that the Proposal may be excluded in its entirety pursuant to Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal.

## CONCLUSION

Based on the foregoing analysis, the Company respectfully requests that the Staff confirm that it will take no enforcement action if IBM excludes the Proponent's entire submission from its 2021 proxy materials for the reasons set forth above. We would be pleased to provide the Staff with any additional information, and answer any questions that you may have regarding this letter. I can be reached at (212) 474-1146 or [sburns@cravath.com](mailto:sburns@cravath.com). Please copy Natalie Wilmore, Counsel of the Company, on any related correspondence at [natalie.wilmore@ibm.com](mailto:natalie.wilmore@ibm.com).

We are sending the Proponent a copy of this submission. Rule 14a-8(k) provides that a shareholder proponent is required to send a company a copy of any correspondence that the proponent elects to submit to the Commission or the Staff. As such, the Proponent is respectfully reminded that if he

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company disclosures compared favorably to the guidelines of the proposal, in spite of the proponent's allegation that the company's disclosures did not cover all facilities, address means of measuring methane reduction, or include specific reduction targets).

<sup>2</sup> See also, e.g., The Wendy's Co. (Apr. 10, 2019) (permitting exclusion on substantial implementation grounds of a proposal requesting a report assessing human rights risks of the company's operations, including the principles and methodology used to make the assessment, the frequency of assessment and how the company would use the assessment's results, where the company had a code of ethics, a code of conduct for suppliers and disclosed on its website the frequency and methodology of its human rights risk assessments); MGM Resorts International (Feb. 28, 2012) (permitting exclusion on substantial implementation grounds of a proposal requesting a report on the company's sustainability policies and performance, including multiple objective statistical indicators, where the company published an annual sustainability report).

4

elects to submit additional correspondence to the Staff with respect to this matter, a copy of that correspondence should concurrently be furnished directly to my attention and to the attention of Natalie Wilmore, Counsel of the Company, at the addresses set forth below in accordance with Rule 14a-8(k).

Thank you for your attention to this matter.

Sincerely yours,



Stephen L. Burns

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

VIA EMAIL: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

Encls.

Copies w/encls. to:

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International Business Machines Corporation  
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Oakland, CA 94612

VIA EMAIL: [kristin@niaglobalsolutions.com](mailto:kristin@niaglobalsolutions.com)

Shareholder Proposal of **Nia Impact Capital**

International Business Machines Corporation

2021 Proxy Statement



**November 9th, 2020**

Frank Sedlarcik  
Vice President and Secretary  
Office of the Secretary  
International Business Machines Corporation  
1 New Orchard Road, Mail Drop 301  
Armonk, NY 10504

Dear Mr. Sedlarcik,

I hope this finds you well in these times. Nia Impact Capital is an impact investment management firm, based in Oakland, California. At Nia Impact Capital, our core objective is to generate a competitive rate of return, while creating a positive impact for investors and for our planet. We have sent multiple letters and emails requesting information and conversation related to the attached shareholder resolution. We have not been able to schedule a call with International Business Machines Corporation in order to discuss our concerns.

With this in mind, we submit this shareholder resolution for inclusion in International Business Machines Corporation's proxy statement under Rule 14a-8 of the general rules and regulations of the Securities Exchange Act of 1934. Nia Impact Capital is the primary sponsor of this resolution.

Nia Impact Capital is a long term holder of IBM, has been a continuous shareowner of International Business Machines Corporation for more than one year, holding at least \$2,000 in market value, and will continue to invest in at least the requisite number of shares for proxy resolutions through the annual shareholders' meeting.

Verification of this ownership, provided by our custodian, Schwab, will be sent in a separate letter.

We are available to discuss this resolution. To schedule a conversation, or if you have any questions or concerns about the submission of this resolution, please contact Meredith Benton, Principal, Whistle Stop Capital, LLC, at [benton@whistlestop.capital](mailto:benton@whistlestop.capital). Please copy me on all correspondence with Ms. Benton at [kristin@niaglobalsolutions.com](mailto:kristin@niaglobalsolutions.com).

Sincerely,

A handwritten signature in dark ink that reads "Kristin Hull".

Kristin Hull, PhD  
Founder, CEO

*Nia Impact Capital, 1212 Preservation Parkway, Suite 200, Oakland,  
California 94612  
Investing with Purpose®*

Resolved:

Shareholders request that International Business Machines Corporation (“IBM”) publish annually a report assessing IBM’s diversity, equity and inclusion efforts, at reasonable expense and excluding proprietary information. The report should include:

- the Board’s process for assessing the effectiveness of its diversity, equity and inclusion programs, and
- the Board’s assessment of program effectiveness, as reflected in any goals, metrics, and trends related to its promotion, recruitment and retention of protected classes of employees.

Whereas:

Investors seek quantitative, comparable data to understand the effectiveness of IBM’s diversity, equity and inclusion efforts.

Numerous studies have pointed to the corporate benefits of a diverse workforce. These include:

- Companies with the strongest racial and ethnic diversity are 35% more likely to have financial returns above their industry medians.
- Companies in the top quartile for gender diversity are 21% more likely to outperform on profitability and 27% more likely to have superior value creation.<sup>1</sup>
- The 20 most diverse S&P 500 companies had an average annual five-year stock return that was 5.8% higher than the 20 least-diverse companies.<sup>2</sup>

Yet, significant barriers exist for diverse employees advancing within their careers. Women enter the workforce in almost equal numbers as men (48%). However, they only comprise 22% of the executive suite. Similarly, people of color comprise 33% of entry level workers, yet only 13% of the c-suite.<sup>3</sup>

IBM’s 2019 Corporate Responsibility Report states, “IBM is an innovation company that solves the hardest problems in business and society. This work requires a highly skilled, truly diverse workforce and an inclusive culture that enables people from all backgrounds to thrive.” It also states, “We are committed to continuously and sustainably improving diversity within our global leadership team and at all levels in our organization.” In addition, IBM sells Emb(race) and “Be Equal” merchandise from its website, calling on customers to “proudly promote equality.”

However, IBM’s has not released meaningful information that allows investors to determine the effectiveness of its workplace diversity programs. Stakeholders may become concerned that IBM’s statements are corporate puffery, language described by the United States Federal Trade Commission as marketing exaggerations intended to “puff up” products and not able to be relied upon by consumers and investors.

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<sup>1</sup>McKinsey & Company, “Delivering through Diversity”, January 2018  
([https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20odiversity/delivering-through-diversity\\_full-report.ashx](https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20odiversity/delivering-through-diversity_full-report.ashx))

<sup>2</sup> Holger, Dieter, “The business case for more diversity” Wall Street Journal, October 26, 2019  
(<https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200>)

<sup>3</sup> McKinsey & Company, “Women in the Workplace 2018”, (<https://womenintheworkplace.com/>)

Investor desire for information on this issue is significant. As of October, 2020, \$1.9 trillion in represented assets released an Investor Statement on the importance of increased corporate transparency on workplace equity data. It stated:

*It is essential that investors have access to the most up-to-date and accurate information related to diverse workplace policies, practices, and outcomes.<sup>4</sup>*

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<sup>4</sup> <https://www.asyousow.org/our-work/gender-workplace-equity-disclosure-statement>

Secretary Certificate on Adoption of Policy at IBM Board of Directors Meeting

International Business Machines Corporation

2021 Proxy Statement

**International Business Machines Corporation**  
Office of the Corporate Secretary

I, Frank Sedlarcik, the Secretary of International Business Machines Corporation, do hereby certify, in connection with the meeting of the Board of Directors of International Business Machines Corporation (the "Board") held on December 15, 2020 (the "Meeting"), that the policy attached hereto as Exhibit A, was duly adopted by the Board at the Meeting, and that the Meeting was duly called and held and a quorum was present and acting throughout the meeting, and such policy has not been amended, modified or revoked and is in full force and effect on the date hereof.

IN WITNESS WHEREOF, I have signed this certificate as of the 18<sup>th</sup> day of December 2020.



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Frank Sedlarcik  
Secretary

**Exhibit A**  
**Policy**

International Business Machines Corporation (“IBM”) shall publish annually a report assessing IBM’s diversity, equity and inclusion efforts, at reasonable expense and excluding proprietary information. The report shall include:

- The Board’s process for assessing the effectiveness of IBM’s diversity, equity and inclusion programs, and
- The Board’s assessment of program effectiveness, as reflected in any goals, metrics, and trends related to its promotion, recruitment and retention of protected classes of employees.