



DIVISION OF  
CORPORATION FINANCE

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

October 7, 2022

Peter Kraus  
Microsoft Corporation

Re: Microsoft Corporation (the "Company")  
Incoming letter dated August 3, 2022

Dear Peter Kraus:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by James McRitchie for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that a specified board committee annually report all stock distributed to employees, directors and consultants under compensation plans approved by shareholders, which should include a matrix, sorted by an appropriate classification scheme with five or more categories chosen by the committee, showing aggregate amounts of stock ownership distributed and utilized, including associated voting power, if any.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal relates to, and does not transcend, ordinary business matters. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: John Chevedden

August 3, 2022

**VIA EMAIL**

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

Email Address: *shareholderproposals@sec.gov*

**Re: Shareholder Proposal Submitted by James McRitchie Pursuant to Rule 14a-8 Under the Securities Exchange Act of 1934, as Amended**

Ladies and Gentlemen:

This letter is to inform you that our client, Microsoft Corporation (the “**Company**” or “**Microsoft**”), intends to omit from its proxy statement and form of proxy for its 2022 Annual Shareholders Meeting (collectively, the “**2022 Proxy Materials**”) a shareholder proposal (the “**Proposal**”) and statements in support thereof received from James McRitchie (the “**Proponent**”).

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

- submitted this letter to the Securities and Exchange Commission (the “**Commission**”) no later than eighty (80) calendar days before the Company intends to file its definitive 2022 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Commission Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“**SLB 14D**”), provide that shareholder proponents are required to send companies a copy of any correspondence that the proponent elects to submit to the Commission or the staff of the Division of Corporation Finance (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 pursuant to Rule 14a-8(k) and SLB 14D.

## THE PROPOSAL

The Proposal sets forth the following resolution to be included in Microsoft's 2022 Proxy Materials, to be voted on by shareholders at the 2022 Annual Shareholders Meeting:

**Resolved:** Microsoft Corporation ("Company") shareholders request the Board's Compensation Committee ("Committee") report annually on all stock distributed to employees, directors, and consultants under compensation plans approved by shareholders. The report should include a matrix, sorted by an appropriate classification scheme with five or more categories chosen by the Committee, showing aggregate amounts of stock ownership distributed and utilized, including associated voting power, if any. The Committee should issue the report before or concurrent with the next annual proxy statement.

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

## BASIS FOR EXCLUSION OF THE PROPOSAL

Microsoft respectfully requests that the Staff concur in the view that it may exclude the Proposal from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to Microsoft's ordinary business operations.

## ANALYSIS

### **The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Deals with Matters Relating to Microsoft's Ordinary Business Operations**

#### *A. Rule 14a-8(i)(7) Background*

Pursuant to Rule 14a-8(i)(7), a shareholder proposal may be excluded if it "deals with a matter relating to the company's ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word, but instead the term "is rooted in the corporate law concept [of] providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "**1998 Release**").

In the 1998 Release, the Commission explained that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. The consideration relevant here is that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* Further, in the 1998 Release, the Commission expressly cited

“management of the workforce” as an example of a function that is fundamental to management’s ability to run a company on a day-to-day basis.

When assessing proposals under the “ordinary business” standard, the Commission 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). As relevant here, a shareholder proposal that is framed in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983); *Johnson Controls, Inc.* (Oct. 26, 1999) (“[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).”).

*B. The Proposal is Excludable Because it Relates to General Employee Compensation*

The Proposal is excludable pursuant to Rule 14a-8(i)(7) because it directly relates to the Company’s general employee compensation policies and practices, a core component of the Company’s ordinary business. In analyzing shareholder proposals relating to compensation, the Staff has distinguished between proposals that relate to general employee compensation and proposals that address only executive officer and director compensation, indicating that the former implicate a company’s ordinary business operations and thus are excludable under Rule 14a-8(i)(7). *See* Staff Legal Bulletin No. 14A (July 12, 2002) (“**SLB 14A**”) (indicating that “[s]ince 1992, [the Staff has] applied a bright-line analysis to proposals concerning equity or cash compensation” under which companies “may exclude proposals that relate to general employee compensation matters in reliance on [R]ule 14a-8(i)(7)” except in the case where proposals “concern only senior executive and director compensation”).

The Staff has consistently concurred with the exclusion of shareholder proposals relating to employee stock ownership under Rule 14a-8(i)(7) as focused on general compensation matters, consistent with the “bright line” approach articulated in SLB 14A. For instance, in *Yum! Brands, Inc.* (Feb. 24, 2015), the proposal suggested that as part of a report on the company’s executive compensation policies, the company include a comparison of senior executive compensation and “store employees’ median wage.” The Staff concurred that the company could “exclude the proposal under [R]ule 14a-8(i)(7), as relating to [the company’s] ordinary business operations,” noting “that the proposal relates to compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors.” *See also CytRx Corporation* (Jun. 26, 2018) (permitting exclusion under Rule 14a-8(i)(7) of a proposal recommending that the company’s board limit the annual salary and benefit packages of each employee of the company, noting that the proposal relates to the “compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors”); *Apple, Inc.* (Nov. 16, 2015) (allowing the exclusion of a proposal asking Apple’s compensation committee to adopt new compensation principles responsive to the U.S.’s “general economy, such as unemployment working hour[s] and wage inequality”); *Verizon Communications Inc.* (Feb. 23, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal

requesting a review of the company's executive compensation policies including a comparison of the total compensation package of the top senior executives and the company's employees' median wage, noting that the proposal "relates to compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors"); *ENGlobal Corp.* (Mar. 28, 2012) (concurring with the exclusion of a proposal that sought to amend the company's equity incentive plan, noting that "the proposal relates to compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors"); *International Business Machines Corp.* (Jan. 22, 2009) (concurring with the exclusion of a proposal requesting that no employee above a certain management level receive a salary raise in any year in which at least two-thirds of all company employees did not receive a three percent salary raise).

The Proposal here does not limit itself only to senior executive officers and directors, but is intentionally broad, encompassing stock distributed to "employees, directors, and consultants under compensation plans approved by shareholders." The supporting statement references creating an "ownership culture for all employees and consultants" and the distinction between "incentives to boards and executives" as separate from "all U.S. company employees." The broad focus of the Proposal is precisely focused on employees generally, and therefore relates directly to Microsoft's general employee compensation policies and practices. Decisions regarding compensation and management of each Microsoft employee are critical to day-to-day operations, and are the type of matter that the Staff has recognized should not be subject to shareholder oversight. Accordingly, even with passing references to executive compensation, the Proposal focuses on general employee compensation and employee stock ownership, and therefore focuses on an ordinary business matter.

*C. The Proposal Does Not Focus On A Significant Social Policy Issue That Transcends Microsoft's Ordinary Business*

In Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("**SLB 14L**"), the Staff recently explained that it will "focus on the social policy significance of the issue that is the subject of the shareholder proposal" to "realign its approach for determining whether a proposal relates to 'ordinary business' with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues." As such, the Staff stated that it will focus on the issue that is the subject of the shareholder proposal and determine whether it has "a broad societal impact, such that [it] transcend[s] the ordinary business of the company." See SLB 14L. Moreover, consistent with well-established Staff precedents, mere references to topics in passing that might raise significant policy issues, but that do not define the scope of actions addressed in a proposal and have only peripheral implications for the issues that constitute the central focus of a proposal, do not transform an otherwise ordinary business proposal into one that transcends ordinary business. For example, in *Marriott International, Inc.* (Jan. 13, 2021), the Staff concurred with the exclusion of a shareholder proposal that requested production of a report on the "external social costs" created by the company's compensation policy. The proposal purported to address "social issues of great importance"; however, the Staff concurred with the company's assertion that referencing social policy issues that "have only tangential implications for the issues

that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business.” *See also Dollar General Corp.* (Mar. 6, 2020) (the Staff noted, that “notwithstanding some references in the supporting statement to potentially important social issues, the [p]roposal as a whole deals with a matter relating to the [c]ompany’s ordinary business operations”).

The Proposal here does not focus on a significant social policy issue. Instead, it focuses on the production of an annual report on all stock distributed to all of Microsoft’s employees, directors and consultants. While the supporting statement makes passing reference to “wealth inequality,” “political polarization” and “racial and wealth gaps” as social policy issues, it is unclear how the report requested by the Proposal would address these issues. The mere inclusion of references to a range of social policy matters does not change the focus of the Proposal from being on Microsoft’s ordinary business operations. *See Amazon.com, Inc.* (Mar. 1, 2017) (concurring with the exclusion of a proposal requesting adoption and publication of principles for minimum wage reform, noting that “the proposal relates to general compensation matters, and does not otherwise transcend day-to-day business matters,” despite the proponent’s assertion that minimum wage was a significant social policy issue). The Proposal focuses on the ordinary business issue of general employee compensation and, similar to the precedents cited above, the passing references to various societal injustices do not implicate, much less focus on, a significant social policy issue.

Two nearly identical shareholder proposals relating to the production of a report on aggregate amounts of stock ownership of each respective company’s workforce were recently submitted to other companies. In both instances, the Staff concurred that each similar proposal “relates to, and does not transcend, ordinary business matters,” and as such, that Rule 14a-8(i)(7) provided a basis to exclude such proposals. *See Repligen Corporation* (Apr. 1, 2022) and *Amazon.com, Inc.* (Apr. 8, 2022). The difference between the Proposal and those in *Amazon* and *Repligen* – that the Proposal refers to stock distributed under compensation plans “approved by the shareholders” – fails to distinguish it in any meaningful way with respect to the ordinary business standard. All stock issued to Microsoft employees is pursuant to shareholder-approved plans, and as a result the Proposal covers the same subject matter – general employee, non-executive officer equity compensation – as the excluded *Amazon* and *Repligen* proposals.

Accordingly, the Proposal’s focus on the stock compensation of all of its employees, directors and consultants is directly related to ordinary business matters and does not otherwise transcend such matters by focusing on a significant social policy issue. Therefore, we ask that the Staff concur that Microsoft may exclude the Proposal under Rule 14a-8(i)(7).

## CONCLUSION

Based upon the foregoing analysis, Microsoft respectfully requests that the Staff concur that it will take no action if Microsoft excludes the Proposal from its 2022 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to

Office of Chief Counsel  
August 3, 2022  
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AHandy@perkinscoie.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (206) 359-3295.

Sincerely,

A handwritten signature in black ink, appearing to read "Allison C. Handy". The signature is fluid and cursive, with a long, sweeping underline.

Allison C. Handy  
Partner  
Perkins Coie LLP

Enclosures

cc: Peter Kraus, Assistant General Counsel and Assistant Secretary  
Microsoft Corporation

James McRitchie, Proponent  
John Chevedden, agent of the Proponent

**Exhibit A**

**Proposal and Related Correspondence**

# Corporate Governance

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MSC 123/9999, Office of the Corporate Secretary, Microsoft Corporation One Microsoft Way, Redmond, Washington 98052-6399

Via: askboard@microsoft.com

Dear Corporate Secretary,

I am submitting the attached shareholder proposal, "**create and ownership culture**," for a vote at the next annual shareholder meeting. I intend to hold the requisite number of shares required by Rule 14a-8 through the annual meeting.

My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. I am available to meet with the Company's representative via phone on June 17, 2022, at 12:00 noon or 12:30 pm Pacific or at a time that is mutually convenient.

This letter confirms that I am delegating John Chevedden to act as my agent regarding this Rule 14a-8 proposal, including presentation at the forthcoming shareholder meeting but not with regard to submission, negotiations or modification, which require my approval. Please include Mr. Chevedden (PH: [REDACTED]) at:

[REDACTED] in future regarding this proposal. I am open to negotiations.

Per SEC SLB 14L <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>, Section F, Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested." Please honor my request to promptly acknowledge receipt of this email and attachment. That will also prompt me to request the required letter from my broker and to submit it to you, avoiding the time and cost of a deficiency letter.

Sincerely,

A handwritten signature in black ink that reads "J. McRitcie".

James McRitcie

June 1, 2022

Date

[MSFT: Rule 14a-8 Proposal, JUNE 1, 2022]  
[This line and any line above it – *Not* for publication.]



### Proposal 4\* - **Create an Ownership Culture**

**Resolved:** Microsoft Corporation ("Company") shareholders request the Board's Compensation Committee ("Committee") report annually on all stock distributed to employees, directors, and consultants under compensation plans approved by shareholders. The report should include a matrix, sorted by an appropriate classification scheme with five or more categories chosen by the Committee, showing aggregate amounts of stock ownership distributed and utilized, including associated voting power, if any. The Committee should issue the report before or concurrent with the next annual proxy statement.

#### **Supporting Statement:**

In 2003 the Securities and Exchange Commission approved an NYSE mandate that shareholder approval must be obtained for specified equity compensation plans before they can be awarded.<sup>1</sup> Our Company recognizes stock ownership as an incentive for directors and named executives, reporting annually on utilization. We ask our Company to track and disclose similar information and associated voting power using meaningful classifications to create an ownership culture for all employees and consultants.

Widespread employee ownership is correlated with better firm performance, fewer layoffs, better employee compensation and benefits, higher median household wealth, longer median job tenure, and reduced racial and gender wealth gaps.<sup>2</sup> It also has a long history of bipartisan support.<sup>3</sup> Our Company should educate and promote ownership plans and progress towards an engaged employee ownership culture.<sup>4</sup>

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<sup>1</sup> Frequently Asked Questions on Equity Compensation Plans, NYSE (last revised Dec. 1, 2021), <https://www.nyse.com/publicdocs/nyse/regulation/nyse/equitycompfaqs.pdf>

<sup>2</sup> <https://secureservercdn.net/192.169.220.85/111.986.myftpupload.com/wp-content/uploads/2021/10/WhitePaper-TurningEmployeesIntoOwners.pdf> and <https://www.nceo.org/article/research-employee-ownership>

<sup>3</sup> <https://www.thirdway.org/report/having-a-stake-evidence-and-implications-for-broad-based-employee-stock-ownership-and-profit-sharing>

<sup>4</sup> <https://smlr.rutgers.edu/faculty-research-engagement/institute-study-employee-ownership-and-profit-sharing>



Wealth inequality in the United States has increased dramatically,<sup>5</sup> is widely recognized as a *significant social policy issue*,<sup>6</sup> and brings many problems, such as political polarization.<sup>7</sup> Employee ownership is key to addressing this social policy in a bipartisan manner.<sup>8</sup>

Providing stock ownership incentives to boards and executives but not to all U.S. company employees has led to glaring inequality. Our Company's last reported "pay ratio" was 333:1. A similar ratio comparing stock ownership and/or the voting power of named executives with those of typical employees would probably be much higher.

From 1973 to 2018, inflation-adjusted wages for nonsupervisory American workers were flat. Meanwhile, a dollar's worth of stock grew (in real terms) to \$14.09. Hourly wages stagnated. Income from capital ownership accelerated. The top 10% of American households earned 97% of capital gains. Typical White families own nearly 10x the average Black family. Single women own only 36% of what typical men own. That gap is greater for women of color.<sup>9</sup> Strengthening employee ownership would help address these inequities,<sup>10</sup> while generating higher value for all shareholders.

Employee engagement and trust are crucial to success. Expanding the Committee's perspective beyond executive compensation would give them "a better grasp on how human talent matters for the company's business strategy and operations."<sup>11</sup> Our Company could benefit shareholders, employees, and the economy by leading on this issue.

Increase Long-Term Shareholder Value  
Vote to **Create an Ownership Culture** – Proposal [4\*]  
[This line and any below, *except for footnotes*, are *not* for publication.]  
Number 4\* to be assigned by Company

The graphic included above is intended to be published with the rule 14a-8 proposal. It would be the same size as the largest management graphic (or highlighted management text) used in conjunction with a management proposal or opposition to a Rule 14a-8 shareholder proposal in the 2022 proxy.

The proponent is willing to discuss mutual elimination of both shareholder graphic and any management graphic in the proxy in regard to this specific proposal. Reference SEC Staff Legal Bulletin No. 14I (CF) [16].

Companies should not minimize or otherwise diminish the appearance of a shareholder's graphic. For example, if the Company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics. If a company's proxy statement appears in black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.

<sup>5</sup> <https://inequality.org/facts/wealth-inequality/>

<sup>6</sup> <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>

<sup>7</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2649215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649215)

<sup>8</sup> <https://thehill.com/blogs/congress-blog/politics/512413-employee-ownership-the-wealth-gap-and-the-current-crisis>

<sup>9</sup> <https://ownershipamerica.org/the-problem/>

<sup>10</sup> [https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Institute\\_Employee\\_Ownership/rutgerskelloggreport\\_april2019.pdf](https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Institute_Employee_Ownership/rutgerskelloggreport_april2019.pdf)

<sup>11</sup> <https://www.edelman.com/trust/2021-trust-barometer/belief-driven-employee/new-employee-employer-compact>



Notes: This proposal conform with Staff Legal Bulletin No. [14B](#) (CF), September 15, 2004 including (emphasis added):

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:

- the Company objects to factual assertions because they are not supported;
- the Company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the Company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the Company, its directors, or its officers; and/or
- the Company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also Sun Microsystems, Inc. (July 21, 2005)

I also take this opportunity to remind you of the SEC's recent guidance and my request that you acknowledge receipt of this shareholder proposal submission. SLB 14L Section F, <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>, Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested."

# Corporate Governance

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

Office of Chief Counsel

Division of Corporation Finance

US Securities and Exchange Commission

100 F Street, NE

Washington, DC 20549

cc: [REDACTED] <sup>PII</sup> [Peter.Kraus@microsoft.com](mailto:Peter.Kraus@microsoft.com), [AHandy@perkinscoie.com](mailto:AHandy@perkinscoie.com)

August 4, 2022

Re: Shareholder Proposal to Microsoft Corporation Regarding "Create an Ownership Culture"

Ladies and Gentlemen:

I am the beneficial owner of common shares of Microsoft Corporation (the "Company") and submitted a shareholder proposal (the "Proposal") to the Company. I am responding to the letter dated August 3, 2022, (the "Company Letter") sent to the Securities and Exchange Commission (the "Commission") authored by Allison C. Handy, of Perkins Coie, on behalf of the Company. In that letter, the Company contends my Proposal may be excluded from the Company's 2022 proxy statement. Any response to this letter should copy John Chevedden at the email addresses noted above.

The Proposal requests the Company report annually all stock distributed to employees, directors and consultants under compensation plans approved by shareholders. The report should include a matrix, sorted by an appropriate classification scheme with five or more categories chosen by the Committee, showing aggregate amounts of stock ownership distributed and utilized, including associated voting power, if any. The Company Letter asserts the Proposal relates to general employee compensation policies and practices or management of the workforce, which are solely matters of ordinary business. Most notably, the no-action request cites a recent staff ruling in *Repligen Corporation* (Apr. 1, 2022) and *Amazon.com, Inc.* (Apr. 8, 2022) as a nearly identical proposals requesting a report of the distribution of *all* stock-based incentives throughout the company's workforce. The Staff found those proposals to be excludable as relating to ordinary business.

I acknowledge the prior proposal was treated as excludable. Therefore, I redrafted the proposal to limit the focus to an issue of clear relevance and interest to investors. Unlike in *Repligen* and *Amazon*, the current Proposal is limited to disclosure of *stock distributed under compensation plans approved by shareholders*. In contrast, the prior proposals sought disclosure of *all* stock-based incentives, regardless of whether they were shareholder-approved. This refocusing of the proposal should suffice to render the proposal non-excludable. The request at Microsoft is for information related *only to stock distributed under compensation plans approved by shareholders, not to general employee compensation policies or practices*.

Having approved a specific equity compensation plan, investors have good reason to want to be informed on how our company has carried out that plan. **Analysis of such reports may be crucial to how they vote on** such plans in the future. Thus, the proposal addresses a material issue for investors, critical information which may be decisive in deciding how to vote on future equity compensation plans. In TSC Industries the Court noted that information is material if there is a “substantial likelihood that a reasonable [investor] would consider it important” in voting decisions. [*TSC Industries Inc. v Northway Inc.*, 426 US 438 (1976)] As demonstrated below, this information clearly qualifies.

### **Shareholder approved compensation plans: implementation data needed**

As argued in a June 7, 2022, rulemaking petition<sup>1</sup> from the *Working Group on Human Capital Accounting Disclosure (WGHCAD)*, whose members include former SEC officials, better disclosure of company investments in labor is critical to assessing firm value. In part, this is due to the rapid rise in the proportion of firm value due to intangibles – from 17% of the S&P 500 to 90% in 2020.

Equity compensation to employees, they wrote, “seems more likely to be classified as an investment, given the evidence that providing employees with equity compensation significantly improves retention.” Their petition seeks extensive quantitative human capital disclosures so that investors can more clearly differentiate expenses from investments.

While shareholders may need to wait for the Commission to act in order to obtain the detailed, quantitative disclosures requested by the WGHCAD, we should not have to wait to obtain a report describing the disposition of *stock already approved by shareholders*. As stated in the June 30, 2003, release requiring approval of such plans:

Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation. To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval...<sup>2</sup>

As stated in the June 30, 2003, release, exemptions are *not* limited to inducement awards as the Company Rebuttal contends. Exemptions include “awards during mergers and acquisitions, when conversions, replacements or adjustments of outstanding options or other equity compensation awards are necessary to reflect the transaction, and when shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval; and plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code (*e.g.*, ESOPs), plans intended to meet the requirements of Section 423 of the Internal Revenue Code, and parallel excess plans.”

This is clearly an issue of disclosures that are important to investors. Shareholders are required under NASDAQ and NYSE filing requirements, approved by the Securities and Exchange

<sup>1</sup> See <https://www.sec.gov/rules/petitions/2022/petn4-787.pdf>

<sup>2</sup> <https://www.sec.gov/rules/sro/34-48108.htm>

Commission in 2003, to vote on the approval of equity compensation plans before they can be awarded. It would be incongruous and inappropriate to bar shareholders from requesting a report that would provide, in clear tabular form, the data needed for investors to begin to assess the subsequent impact of their votes on those compensation plans.<sup>3</sup>

Staff Legal Bulletin 14A, cited by the Company, which discussed the idea of a bright-line rule was issued in 2002, before the SEC's approval of the NASDAQ and NYSE requirements for shareholder approval of equity compensation plans. As such, this so-called bright-line rule has never been aligned with the approved NASDAQ and NYSE rules, which necessitate *informed* shareholder voting on equity compensation plans. The current proposal provides the Staff with an opportunity to do so by allowing shareholders to decide if they want this important additional information that would inform their votes.

Because the proposal would provide, and is limited to, information necessary for informed shareholder voting on equity compensation, the proposal does not relate to ordinary business and is not excludable on that basis.

### **Staff rulings do not consistently bar proposals on disclosure relative to employee compensation**

I note as well that there are other precedents to support non-exclusion. The Proposal's request for *disclosure* of distribution of stock ownership incentives throughout the workforce does not equate to excludable ordinary business under Rule 14a-8(i)(7).<sup>4</sup> For example, a proposal that requested disclosure of the distribution of 2003 stock options by the recipient's race and gender, which discussed recent trends in stock options granted to women and employees of color, was found not excludable under Rule 14a-8(i)(7). *Verizon Communications, Inc.* (Jan. 26, 2004).

Disclosure-related requests applying to the whole workforce have been found *not* excludable under Rule 14a-8(i)(7), where the focus was on pay differentials between upper- and lower-level employees. For instance, in *Wells Fargo* (Feb. 21, 2019), the proposal requested disclosure of the global median gender pay gap—including associated policy, reputational competitive and operational risks, and risks related to recruiting and retaining female talent—and was found not excludable under Rule 14a-8(i)(7). That proposal also included disclosure of equity compensation through an inclusive definition: "A report adequate for investors to assess company strategy and performance would include the percentage *global median* pay gap between male and female employees across race and ethnicity, including base, bonus, and equity compensation" (emphasis added).

Additionally, subsequent rulings also found non-excludable proposals directed toward CEO or senior executive compensation have included provisions that either imply decision-making or disclosure based on nonmanagement employee compensation levels or disclosure that would

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<sup>3</sup> *Frequently Asked Questions on Equity Compensation Plans*, NYSE (last revised Dec. 1, 2021), <https://www.nyse.com/publicdocs/nyse/regulation/nyse/equitycompfaqs.pdf>; NASDAQ Listing Rule 5635(c), [https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series#nasdaq-rule\\_5635](https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series#nasdaq-rule_5635).

<sup>4</sup> Precedents cited by the Company, such as *Yum! Brands, Inc.* (Feb. 24, 2015), which seeks a comparison of senior executive compensation and "our store employees' median wage" being excludable as relating to ordinary business, are contradicted by numerous proposals allowing integration of rank-and-file employee-related compensation disclosures or considerations.

reveal the contrast between senior executive compensation and other employees. For instance, in *BB & T Corporation* (Jan. 17, 2017), an ordinary business exclusion was rejected for a proposal asking the company to "take into consideration the pay grades and/or salary ranges of all classifications of company employees when setting target amounts for CEO compensation." Similarly, in *Siebel Systems, Inc.* (Apr. 15, 2003), a proposal designating the intended use of equity and management compensation programs, including certain principles, was not excludable under ordinary business despite the focus principles for *management* compensation, which required discussion of "the proportion of the equity of the company intended to be available for transfer to employees through stock plans, as measured by possible percentage dilution; and the distribution of that wealth opportunity intended within the company, between the CEO, Senior Executives, and other employees."<sup>5</sup>

Moreover, I note that many other general workforce-related proposals have been deemed permissible under Rule 14a-8(i)(7) as addressing significant policy issues, such as workforce diversity and racial equity, as well as general standards for the workforce. For example, the Staff made clear in several precedents that proposals asking a company to adopt and enforce a workplace code of conduct based on the International Labor Organization's (ILO) Convention on Workplace Human Rights are not excludable under the ordinary business rule. See, e.g., *E. I. Du Pont de Nemours* (Mar. 11, 2002). The ILO Convention includes a series of principles applicable to workforce management, such as no use of child labor, no discrimination or intimidation in employment, workers' right to form and join unions, workers representatives not subject to discrimination, access to workplaces to carry out representation, and no use of forced labor.

### **Disclosures on wealth inequality are a significant policy issue**

In its 1998 Release, the Commission noted certain tasks are generally considered so fundamental to management's ability to run a company on a day-to-day basis that they could not be subject to direct shareholder oversight (e.g., the hiring, promotion, and termination of employees, as well as decisions on retention of suppliers, and production quality and quantity). However, proposals related to such matters, but *focused on sufficiently significant social policy issues* (i.e., significant discrimination matters), are generally not excludable.

In this instance, the significant policy issue is wealth inequality and its relationship to the distribution of employee stock ownership. While the Company Letter attempts to dismiss this focus, it is evident that the Proposal is concentrated on this issue, including that the Proposal is titled "Create an Ownership Culture." Stock compensation packages are a powerful means of creating or reducing wealth inequality. The central purpose behind the Proposal is to inform shareholders about the role the Company is playing in reducing or exacerbating income inequality in its stock-based compensation packages.

The Company Letter generally cites precedents where rejected proposals attempted to otherwise limit, amend, request, or place a moratorium on employee compensation. Here, the Proposal does no such thing. It merely requests the Company compile a report showing the

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<sup>5</sup> The proposal requested a statement about the proportion of the equity of the company intended to be available for transfer to employees through stock plans, as measured by possible percentage dilution; and the distribution of that wealth opportunity intended within the company, between the CEO, Senior Executives, and other employees.

distribution of stock-based compensation packages among employees. Contrary to the Company's citations and arguments, the Proposal does not ask the Company to implement any sort of reform to its current compensation packages. Instead, the Proposal merely requests that the Company publishes a report detailing which employees receive stock compensation packages or similar compensation.

The current Proposal is not directive. It does not attempt to alter the outcome of stock ownership arrangements. But at least one Staff decision demonstrates that, under certain circumstances, even such a proposal can transcend ordinary business.<sup>6</sup> The current Proposal contrasts with proposals that request a specific outcome in stock options, such as canceling equity compensation that affects all employees. *Amazon.com, Inc.* (Mar. 7, 2005). The current Proposal does not require any particular outcome other than appropriate disclosures for investors.

There can be no doubt that wealth inequality, especially in the US, is a significant policy issue. Moreover, the United Nations has recognized wealth inequality as a significant social policy issue that creates many tangible problems, particularly in the United States:

"Income inequality has been compounded by wealth inequality, particularly in countries with already high inequality levels such as the United States of America . . . It is clear that inequality can be a serious threat to social and political stability."

As a result of recognizing such concerns, reducing inequality is one of 17 Sustainable Development Goals<sup>7</sup> established by the United Nations in 2015. This is a distinct problem facing any corporation headquartered in the United States since income inequality in the US is the highest of *all* the G7 nations.<sup>8</sup> The wealth gap between "America's richest and poorest families

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<sup>6</sup> In *International Business Machines* (Feb. 16, 2000), the proposal asked the board to adopt a policy that: (1) all employees, regardless of age, will receive the same retirement medical insurance and pension choice as employees who are within five years of retirement; and (2) the portable cash-balance plan will provide a monthly annuity equal to that expected under the old pension plan or a lump sum that is actuarially equivalent. In that instance, there was significant controversy associated with the company's newly announced pension and retirement plans for IBM employees, including Wall Street Journal coverage reporting that some employees would face losses as high as 50% under the new policy. IBM had also acknowledged to some employees that its new individual medical insurance accounts would probably run out of money as they approach old age. The new plan's limited medical insurance is especially a problem for lower-paid workers.

Feeding the outrage was IBM's declaration that it planned to use the \$200 million saved to fund stock options for executives and other targeted employees. Many of IBM's most talented employees did not feel comfortable with their deserved bonus being tied to the reduction of promised retirement pay and medical insurance for fellow employees. The Staff noted "widespread public debate concerning the conversion from traditional defined benefit pension plans to cash-balance plans and the increasing recognition that this issue raises significant social and corporate policy issues, it is our view that proposals relating to the conversion from traditional defined benefit pension plans to cash-balance plans cannot be considered matters relating to a registrant's ordinary business operations."

<sup>7</sup> See *United Nations Sustainable Development Goals*, <https://upload.wikimedia.org/wikipedia/commons/d/d5/N1529189.pdf>

<sup>8</sup> *Organization for Economic Co-operation and Development*, <https://www.oecd.org/social/income-distribution-database.htm>

have *more than doubled* from 1989 to 2016" (emphasis added).<sup>9</sup> This gap has grown even more significant during the pandemic.<sup>10</sup>

The business case for addressing this issue is clear. Widespread employee stock ownership is correlated with better employee and firm performance, fewer layoffs, better employee compensation and benefits, higher median household income, longer median job tenure, and reduced racial and gender wealth gaps. All these positive outcomes would have the effect of reducing wealth inequality in the US.

I have gathered data regarding wealth distribution on a national level. For instance, according to the Congressional Budget Office, 10% of families currently hold 76% of the total wealth in this country.<sup>11</sup> But little data is available on a corporate level, where many of the critical policy decisions are made, and the distribution of stock ownership is clearly a key element. For example, Rutgers' analysis of the General Social Survey estimated that, in 2018, nearly 23 million employees—representing more than 19% of all US workers—owned some share in their employer. However, the bottom 37% of workers had less access to company stock programs. Below are a few key findings:

- Employee-owners of color have a 30% higher wage income than non-employee owners of color.
- Women employee-owners have a 17% higher wage income than women who are not employee-owners.
- Employee ownership was generally linked to higher income, benefits, gain/profit sharing, training, and involvement in company decision-making.
- Of the low- and moderate-income worker-owners surveyed, those aged 60 to 64 had 10 times more wealth than typical Americans in that age group.<sup>12</sup>

The trickle-down notion for justifying wealth inequality is accompanied by the assumption that rewarding top corporate employees with abundant cash and stock benefits will ultimately boost the economy and raise all ships. Actual data supports an opposite finding. Economic growth is

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<sup>9</sup> Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, Pew Research Center (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>

<sup>10</sup> See Peter Coy, *Wealth Inequality Is the Highest Since World War II*, N.Y. Times (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/opinion/inequality-wealth-pandemic.html>

<sup>11</sup> See *Turning Employees Into Owners: Rebuilding the American Dream*, Ownership America (Oct. 2021), <https://secureservercdn.net/192.169.220.85/111.986.myftpupload.com/wp-content/uploads/2021/10/WhitePaper-TurningEmployeesIntoOwners.pdf>. Among data compiled by the Bureau of Labor Statistics—surveying workers aged 28–34 that were born between Jan. 1, 1980, and Dec. 31, 1984—employee-owners have, relative to workers who are not employee-owners:

- 92% higher median household wealth
- 33% higher income from wages
- 52% longer median job tenure
- Almost twice the household net worth

*Employee Ownership & Economic Well-Being*, Nat. Center for Employee Ownership (May 14, 2017), [https://www.ownershipeconomy.org/wp-content/uploads/2017/05/employee\\_ownership\\_and\\_economic\\_wellbeing\\_2017.pdf](https://www.ownershipeconomy.org/wp-content/uploads/2017/05/employee_ownership_and_economic_wellbeing_2017.pdf)

<sup>12</sup> See *Race and Gender Wealth Equity and the Role of Employee Share Ownership*, <https://www.aspeninstitute.org/publications/race-and-gender-wealth-equity-and-the-role-of-employee-share-ownership/>

also hindered as the wealth gap grows.<sup>13</sup> On the other hand, increasing employee ownership—including stock ownership—could significantly improve the distribution of wealth in society.<sup>14</sup>

Moreover, the issue of wealth inequality in the US is tied to another critically important social policy issue: racial inequality. This is demonstrated by a recent editorial board opinion piece in the Washington Post, titled "Narrowing the US Wealth gap is important. Narrowing the racial wealth gap is urgent."<sup>15</sup> Although many publicly traded companies made racial justice commitments, few report using stock incentives as a means of addressing those commitments. Disseminating access to this data and shedding light on the issue is an essential first step in identifying necessary improvements.

In sum, there is ample evidence the current Proposal is focused on wealth inequality, which is a significant social policy issue in the US today, reaffirmed as an exception to as reaffirmed as an ordinary business exception in Staff Legal Bulletin 14L.

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<sup>13</sup> According to data from the International Monetary Fund:

“An inverse relationship between the income share accruing to the rich (top 20 percent) and economic growth. If the income share of the top 20 percent increases by 1 percentage point, GDP growth is actually 0.08 percentage point lower in the following five years, suggesting that the benefits do not trickle down. Instead, a similar increase in the income share of the bottom 20 percent (the poor) is associated with 0.38 percentage point higher growth.”

*Causes and Consequences of Income Inequality: A Global Perspective*, IMF (June 2015),  
<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf>

<sup>14</sup> One study, using data from the Survey of Consumer Finances, found that if businesses were to become 30% employee-owned, it would produce a significant change in the concentration of wealth. Specifically, the wealth share of those with below-median wealth would increase from 1% to 6% of total wealth, and the net wealth of the average black family would increase by more than 400%, from \$24,100 to \$106,271. Additionally, those with only high school diplomas would see similar wealth increases. In 2016, the median white family had \$147,000 in wealth, compared with \$3,600 for Black families and \$6,600 for Latinx families. White women had a median wealth of \$66,930, while that of Black and Latinx women was just \$6,000 and \$6,700, respectively. Thomas Dudley & Ethan Rouen, *Employee Ownership and Wealth Inequality: A Path to Reducing Wealth Concentration*, Harvard Business School Accounting and Management Unit Working Paper No. 22-021 (Sept. 30, 2021),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3942536](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942536)

<sup>15</sup> *Narrowing the Wealth Gap is Important. Narrowing the Racial Wealth Gap is Urgent*, Washington Post (July 30, 2021)  
<https://www.washingtonpost.com/opinions/2021/07/30/us-wealth-gap-race/>

## Conclusion

Under Rule 14a-8(g), the burden of proof falls on the company to show the proposal may be excluded. Here, the Company has failed to demonstrate the Proposal is excludable under Rule 14a-8(i)(7). Therefore, I request Staff inform the Company that SEC proxy rules require denial of the Company's no-action request.

I would be pleased to respond to Staff questions or negotiate mutually agreeable terms for withdrawing the Proposal, as I have done with other companies.

Sincerely,

  
James McRitchie  
Shareholder Advocate