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

DIVISION OF
CORPORATION FINANCE

April 1, 2022

Lillian Brown
Wilmer Cutler Pickering Hale and Dorr LLP

Re: State Street Corporation (the "Company")
Incoming letter dated January 15, 2022

Dear Ms. Brown:

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 asks that the board report on (1) how the majority of the Company's clients and shareholders—for whom overall stock-market performance is the primary determinant of financial returns—are affected by Company policies that account for the effect of social and environmental issues on portfolio companies' financial performance, but not for the effect that portfolio company activities have on overall stock-market performance through their impacts on social and environmental systems, and (2) whether its clients and shareholders would be better served by the adoption of asset management policies that directly accounted for the impact that portfolio companies have on the global economy.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(2) or Rule 14a-8(i)(6). We are unable to conclude that the Proposal, if implemented, would cause the Company to violate federal or state law. We also note the Company's argument that it has already substantially implemented the Proposal, which suggests that, in the Company's view, the Proposal can be implemented in a manner that would not violate federal or state law.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(3). We are unable to conclude that you have demonstrated objectively that the Proposal is materially false or misleading. We also are unable to conclude that the Proposal, taken as a whole, is so vague or indefinite that it is rendered materially misleading. In addition, we note the Company's argument that it has already substantially implemented the Proposal, which suggests that, in the Company's view, the Proposal is not so vague or indefinite that "neither the shareholders voting on it, nor the Company in implementing the Proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires."

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(10). Based on the information you have presented, it appears that the Company's public disclosures do not substantially implement the Proposal.

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: Frederick H. Alexander
The Shareholder Commons

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January 15, 2022

Via E-mail to shareholderproposals@sec.gov

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

Re: State Street Corporation
Exclusion of Shareholder Proposal of James McRitchie

Ladies and Gentlemen:

We are writing on behalf of State Street Corporation (the "Company") to inform you of the Company's intention to exclude from its proxy statement and proxy for its 2022 annual meeting of shareholders (the "Proxy Materials") the enclosed shareholder proposal and supporting statement (collectively, the "Proposal") submitted by James McRitchie (together with his designated representative, The Shareholder Commons, the "Proponent"). The Proposal requests that the Company's board of directors (the "Board") "report on (1) how the majority of its clients and shareholders . . . are affected by Company policies that account for the effect of social and environmental issues on portfolio companies' financial performance, but not for the effect that portfolio company activities have on overall stock-market performance through their impacts on social and environmental systems and (2) whether its clients and shareholders would be better served by the adoption of asset management policies that directly accounted for the impact that portfolio companies have on the global economy."

The Company believes it may properly exclude the Proposal from its Proxy Materials for the reasons discussed below. The Company further notes that the Proponent submitted a proposal last year that was, in substance, the same as the Proposal and the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission" or "SEC") concurred in exclusion under Rule 14a-8(i)(7). *See State Street Corporation* (March 26, 2021). The Company respectfully requests that the Staff advise the Company that it will not recommend any enforcement action to the Commission if the Company excludes the Proposal from its Proxy Materials.

Pursuant to Exchange Act Rule 14a-8(j) and Staff Legal Bulletin No. 14D (November 7, 2008) ("SLB 14D"), the Company is submitting electronically to the Commission this letter, and the Proposal and related correspondence (attached as Exhibit A to this letter), and is concurrently sending a copy to the Proponent, no later than eighty calendar days before the Company intends to file its definitive Proxy Materials with the Commission.

I. Company Background

State Street Corporation

State Street Corporation is a financial holding company organized under the laws of the Commonwealth of Massachusetts. Through its subsidiaries, including its principal banking subsidiary, State Street Bank and Trust Company, State Street Corporation provides a broad range of financial products and services to institutional investors worldwide. State Street Corporation's operations are organized into two lines of business: Investment Servicing and Investment Management, which are defined based on products and services provided. The Proposal relates to State Street's Investment Management line of business, which is conducted by State Street Global Advisors (SSGA)[1], the third largest investment manager in the world with over $3.86 trillion in assets under management as of September 30, 2021.

State Street Global Advisors' Corporate Engagement and Proxy Voting Practices

SSGA operates a globally integrated multi-asset class asset management business, offering services to clients in nearly every corner of the world, with employees in 31 global offices and more than 500 investment professionals worldwide. SSGA provides investment management services to both institutional and retail investors through investment products ranging from separate accounts and private funds to publicly offered mutual funds and exchange traded funds(ETFs). With nearly 40 years of experience in the Defined Contribution (DC) market, SSGA manages more than $741 billion in DC assets around the world, of which over $594 billion belong to participants in the United States.[2]

From its founding over 40 years ago, SSGA has been a pioneer in index investing and its index or "beta" investment strategies remain a core focus for the firm. On a global basis, as of September 30, 2021, approximately 61% of its $3.86 trillion in assets under management are equity investments held in client accounts that follow an index investment strategy, and the number of indexes and sub-indices tracked is over 500. As a result of this breadth, SSGA invests in over 10,000 public companies around the world and its corporate engagement and proxy voting obligations are significant. In 2020, for example, SSGA voted over 19,370 proxies and

[1] SSGA refers to the entirety of the Company's asset management business, an enterprise that operates global asset management through multiple entities globally.
[2] As of September 30, 2021.

engaged with 1,721 individual companies,[3] and as of the end of the third quarter in 2021, SSGA had voted over 17,630 proxies and held 707 engagements with companies.[4]

The primary manner in which SSGA seeks to meet the investment objectives of its equity index funds and accounts is to invest in and hold the shares of the companies included in the applicable index in the same proportion that those companies' shares are included in that index. As long as a company's shares are included in the index, they will be held by SSGA in accounts that track that index. This means that, unlike "active" investment strategies, SSGA in its index products does not divest from a company.

SSGA has acknowledged that the obligation to own index constituent companies makes SSGA a long-term investor and heightens the need for SSGA to engage with the companies it owns on issues that enhance long-term value and mitigate risk. SSGA's Chief Executive Officer, Cyrus Taraporevala has noted:

> On the index side of our business, our portfolio managers don't have that luxury [to sell a stock they don't like]. As long as the company is in the index it's going to be in their portfolios. So in that side of our business, a large part of our business, we're as close to permanent capital as it comes. We have to engage with the companies and with the boards to drive value.[5]

In furtherance of this obligation, SSGA has, for many years, devoted significant resources and attention to corporate engagement activities and has focused increasingly on engagement around non-company-specific issues of sustainability, corporate governance and culture and diversity at the board and executive management level. For example, beginning in 2017, SSGA launched a multi-year engagement program focused on gender diversity at the board level, which was announced publicly with the placement of the "Fearless Girl" statue in opposition to the famous Charging Bull statue in New York City's Bowling Green Park near Wall Street. SSGA has subsequently broadened this campaign to focus on racial and ethnic diversity in addition to gender diversity.[6]

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[3] SSGA Q4 2020 Stewardship Report, https://www.ssga.com/library-content/pdfs/asset-stewardship/asset-stewardship-report-2020.pdf

[4] SSGA Q1 2021 Proxy Season Review, https://www.ssga.com/library-content/products/esg/asset-stewardship-report-q1-2021.pdf, SSGA Q2 2021 Proxy Season Review, https://www.ssga.com/library-content/products/esg/asset-stewardship-activity-q2-2021.pdf, and SSGA Q3 2021 Proxy Season Review, https://www.ssga.com/library-content/products/esg/inst-firm-level-asset-stewardship-report-q3-2021.pdf

[5] Corporate Board Member Magazine 2019, https://boardmember.com/state-street-ceo-cyrus-taraporevala/4/

[6] *See, e.g.*, https://www.ssga.com/library-content/pdfs/global/letterhead_racial_equity_guidance.pdf, SSGA Q2 2021 Proxy Season Review, https://www.ssga.com/library-content/products/esg/asset-stewardship-activity-q2-2021.pdf, SSGA CEO's Letter on Our 2021 Proxy Voting Agenda, https://www.ssga.com/us/en/institutional/etfs/insights/ceo-

In 2019, SSGA introduced a proprietary environmental/social/governance or "ESG" scoring system called "R-Factor™" or Responsibility-Factor that measures the performance of a company's business operations and governance as it relates to financially material environmental and social issues facing the company's industry. The scoring methodology analyzes data from four leading data providers and leverages the Sustainability Accounting Standards Board (SASB) materiality framework. R-Factor generates unique scores for over 6,000 listed companies globally and allows SSGA to evaluate a company's performance against both regional and global industry peers.

Beginning in 2020, SSGA began using companies' R-Factor scores as an important tool in its corporate engagement activities and continued its longstanding efforts to encourage greater transparency and commitment to addressing environmental and social issues that detract from long-term performance and value. In SSGA's February 2020 CEO Letter on SSGA's 2020 Proxy Voting Agenda, Mr. Taraporevala stated:

> Beginning this proxy season, we will take appropriate voting action against board members at companies in the S&P 500, FTSE 350, ASX 100, TOPIX 100, DAX 30, and CAC 40 indices that are laggards based on their R-Factor scores and that cannot articulate how they plan to improve their score. Beginning in 2022, we will expand our voting action to include those companies who have been consistently underperforming their peers on their R-Factor scores for multiple years, unless we see meaningful change. We believe doing so is in the best interests of investors and companies alike.[7]

In September 2020, SSGA published an overarching document outlining its engagement strategy about driving action on climate change and sustainability across all the companies it invests in on behalf of clients.[8] This document charts SSGA's significant engagement efforts on the environment and sustainability historically and lays out its engagement agenda on these issues going forward.

In January 2021, SSGA published additional guidance regarding the expansion of its engagement efforts focused on diversity to include race and ethnicity, in addition to gender diversity.[9] In July

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letter-2021-proxy-voting-agenda, and Guidance on Enhancing Racial & Ethnic Diversity Disclosures, https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf

[7] SSGA CEO's Letter on Our 2020 Proxy Voting Agenda, https://www.ssga.com/us/en/institutional/etfs/insights/informing-better-decisions-with-esg. *See also State Street vows to turn up the heat on ESG standards*, https://www.ft.com/content/cb1e2684-4152-11ea-a047-eae9bd51ceba

[8] Driving Action on Climate Change, https://www.ssga.com/library-content/products/esg/driving-action-on-climate-change.pdf

[9] SSGA CEO's Letter on Our 2021 Proxy Voting Agenda, https://www.ssga.com/us/en/institutional/etfs/insights/ceo-letter-2021-proxy-voting-agenda, and Guidance on

2021, SSGA published further guidance to heighten focus on racial and ethnic diversity as it relates to workforce diversity and representation.[10] Mr. Taraporevala emphasized these issues in SSGA's January 2022 CEO Letter on SSGA's 2022 Proxy Voting Agenda, stating that:

> While COP26 and the pandemic have brought certain issues into sharper focus, we have been in dialogue with boards on a range of material issues – from climate to diversity to human capital management – for many years. For us, these issues are matters of value, not values – opportunities for companies to mitigate downside risk, innovate, and differentiate themselves from competitors. To that end, we view the use of our voice and our vote as central to our fiduciary responsibility to our clients to maximize long-term risk-adjusted returns. ***For these reasons, our main focus in 2022 will be to support the acceleration of the systemic transformations underway in climate change and the diversity of boards and workforces.***[11]

In addition to these engagement efforts, SSGA is also a thought leader regarding sustainable investing principles. It is a signatory to the Principles of Responsible Investing (PRI) and was recognized as part of PRI's Leaders Group for its efforts to advance corporate disclosure around the impact of climate change. In the U.S., SSGA is a founding member and signatory to the Investor Stewardship Group.[12] As noted above, SSGA is an explicit proponent of SASB. SSGA has also recently joined Climate Action 100+.[13] Additionally, SSGA supports the Task Force on Climate-related Financial Disclosures (TCFD)[14] and has held leadership roles with the Council of Institutional Investors (CII) as a member of the Corporate Governance Advisory Council. SSGA has also participated in a multi-stakeholder working group that published baseline and evolving practices for improving virtual shareholder meetings.[15]

SSGA provides detailed reporting to its clients and the public, including through an annual Stewardship Report and quarterly Asset Stewardship Activity Reports.

Enhancing Racial & Ethnic Diversity Disclosures, https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf. *See also State Street to insist companies disclose diversity data*, https://www.ft.com/content/2e512c76-4733-4821-8425-136ab9b98426 (discussing SSGA's new voting policy, to be implemented in 2022, that focuses on diversity in board composition).

[10] The Board's Oversight of Racial and Ethnic Diversity, Equity and Inclusion, https://www.ssga.com/library-content/pdfs/global/boards-oversight-of-racial-and-ethnic-diversity.pdf

[11] SSGA CEO's Letter on Our 2022 Proxy Voting Agenda, https://www.ssga.com/us/en/intermediary/ic/insights/ceo-letter-2022-proxy-voting-agenda

[12] https://isgframework.org/

[13] https://www.climateaction100.org/

[14] https://www.ssga.com/library-content/products/esg/statement-of-suppot-for-the-tcfd.pdf

[15] https://cclg.rutgers.edu/news/report-of-the-2020-multi-stakeholder-working-group-on-practices-for-virtual-shareholder-meetings/

II. The Proposal

On December 6, 2021, the Company received the Proposal from the Proponent, which states in relevant part as follows:

ITEM 4*: Report on Asset Management Policies and Diversified Investors

> **RESOLVED,** *shareholders ask that the board report on (1) how the majority of its clients and shareholders – for whom overall stock-market performance is the primary determinant of financial returns – are affected by Company policies that account for the effect of social and environmental issues on portfolio companies' financial performance, but not for the effect that portfolio company activities have on overall stock-market performance through their impacts on social and environmental systems and (2) whether its clients and shareholders would be better served by the adoption of asset management policies that directly accounted for the impact that portfolio companies have on the global economy.*
>
> **Supporting Statement:**
>
> Our Company provides investment management services and has more than $3.4 trillion in assets under management, primarily weighted towards indexed strategies. In line with Modern Portfolio Theory, most of its clients and shareholders are likely to be broadly diversified.
>
> Such diversified investors rely on healthy social, economic, and environmental systems to support all investments. Corporate practices that reduce GDP also decrease diversified portfolio returns.[1] As manager for more than $3 trillion in assets, the Company's stewardship activities – engaging with portfolio companies and voting their shares – could significantly improve overall market performance by stewarding companies away from practices that degrade the global commons, even when those practices are profitable to the company in question.
>
> However, the Company will currently steward a portfolio company to improve its social and environmental practices only when doing so improves such company's own internal financial performance.[2] The Company's stewardship policy does not address social and environmental practices of a portfolio company that harm the global economy if the practices can improve that company's financial performance. This position encourages companies to externalize environmental and social costs, and is thus counter to the interests of both its clients and its shareholders.

> The Proposal would encourage the Company to study whether it should explicitly account for any improved performance in the diversified portfolios of its clients that would result from individual portfolio companies ending practices that improve their internal performance but harm the systems that support a healthy global economy and overall financial market performance. Such a report would help diversified shareholders determine whether to seek a change in corporate direction so that the Company can better serve the interests of clients and shareholders.
>
> Please vote for: Report on Asset Management Policies and Diversified Investors – Proposal 4*
>
> ________________
> [1] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; https://archive.fortune.com/magazines/fortune/fortune_archive/2001/12/10/314691/index.htm (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).
> [2] https://www.ssga.com/library-content/pdfs/ic/global-Proxy-Voting-and-engagement-guidelines-es-issues.pdf.

III. Reasons for Excluding the Proposal

As described in more detail below, the Company believes that the Proposal may be properly excluded from the Proxy Materials under (i) Rule 14a-8(i)(2) and Rule 14a-8(i)(6) because in order to address the Proposal's true purpose, the Company would have to violate federal and state law, and the Company therefore lacks the power or authority to implement the proposal; (ii) Rule 14a-8(i)(3) because the Proposal is materially false and misleading in violation of Rule 14a-9; (iii) Rule 14a-8(i)(7) because the subject of the Proposal relates to the Company's ordinary business operations; and (iv) Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal. As noted above, the Proponent submitted a proposal last year that was, in substance, the same as the Proposal and the Staff concurred in exclusion under Rule 14a-8(i)(7).

IV. Analysis

A. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(2) and Rule 14a-8(i)(6) Because in Order to Address the Proposal's True Purpose, the Company Would Have to Violate Federal and State Law,[16] and the Company Therefore Lacks the Power or Authority to Implement the Proposal.

Rule 14a-8(i)(2) permits a company to exclude a proposal from its proxy materials if implementation of the proposal would cause the company to violate any state or federal law to which it is subject, and Rule 14a-8(i)(6) permits a company to exclude a proposal from its proxy materials if the company lacks the power or authority to implement the proposal. While the Proposal purports to seek a report, its underlying goal is to influence the practices of the Company, as described below. The ultimate effect of implementing the true purpose of the Proposal, which is to change behavior (i.e., changing how the Company engages with portfolio companies, not just to issue a report), would cause SSGA to violate both state and federal law. In addition, because implementation of the Proposal would violate federal and state law, the Company and the Board do not have the legal power or authority to impose the requirements of the Proposal on SSGA, and SSGA does not have the legal power or authority to violate federal or state law even if directed to do so by the Company or the Board. As such, the Proposal may be excluded pursuant to Rule 14a-8(i)(2) because it would cause the Company to violate federal and state law to which it is subject and pursuant to Rule 14a-8(i)(6) because the Company lacks the power or authority to implement the Proposal.

1. Rule 14a-8(i)(2) permits a company to exclude a proposal from its proxy materials if implementation of the proposal would cause the company to violate federal or state law.

SSGA's investment management operations in the United States are carried out through two operating entities: SSGA Funds Management, Inc. (SSGAFM), a Delaware corporation and a SEC-registered investment adviser, and State Street Global Advisors Trust Company (SSGATC), a Massachusetts chartered trust company. SSGAFM's asset management activities, including its corporate engagement and proxy voting obligations for client accounts, are governed primarily by the Investment Advisers Act of 1940 (the "Advisers Act"), while SSGATC's asset management activities, including its corporate engagement and proxy voting obligations, are governed by both the laws of the Commonwealth of Massachusetts, including the Massachusetts Uniform Trust Code (Mass. General Laws, Part II, Title II, Chapter 203A) and applicable federal

[16] All references herein to violation of law by the Company refer collectively to violation of law by the Company and/or its direct and indirect subsidiaries.

law, most notably the Employee Retirement Income Security Act ("ERISA").[17] As discussed more fully below, in order to address the Proposal's true purpose, SSGA would have to violate its fiduciary obligations under each of these laws and regulations.[18]

The Proposal is premised on an assumption that it would be permissible for SSGA to conduct its corporate engagement with companies it invests in for client accounts (portfolio companies) and proxy voting obligations with a goal of improving "overall financial market performance" by investing in and engaging with portfolio companies in a manner that would result in portfolio companies "ending practices that improve their internal performance but harm the systems that support a healthy global economy." More specifically, the Proposal seeks to have SSGATC engage with portfolio companies to urge those companies to act in ways that are harmful to their individual economic performance in the vague and hypothetical hope that convincing portfolio companies to act in a manner detrimental to their economic performance will have long-term benefits for the "global commons" that might then possibly (again in a vague and hypothetical way) improve global financial markets that might in turn possibly benefit the clients whose economic interests in the portfolio companies were harmed by SSGATC's engagement activities at the outset. By way of illustration and taken to its extreme, the Proposal would seek actions that would cause the Company to urge portfolio companies to cease operations, under the hope that such an action would improve the "global commons" and indirectly benefit the Company's clients. This proposed course of action fundamentally conflicts with SSGA's obligations under law and regulation, to the extent it suggests SSGA can or should, in its engagement and voting activities on behalf of clients, place the interests of the "global commons" before, or even on par with, the direct and more immediate economic interests of its clients absent direction from those clients to do so.[19]

Section 206 of the Advisers Act, as interpreted by the U.S. Supreme Court in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) ("*Capital Gains*"), imposes a fiduciary duty on investment advisers, including SSGAFM. The SEC has historically and repeatedly

[17] A substantial percentage of the assets advised by SSGATC are retirement plan assets subject to the requirements of ERISA. Accordingly, the asset management activities of SSGATC are conducted in a manner designed to comply with ERISA and Department of Labor regulations thereunder.

[18] The vast majority of SSGA's global AUM is managed by its U.S. operating entities and subject to fiduciary obligations under U.S. law, and many of SSGA's non-U.S. client accounts managed by its foreign operating entities are governed by foreign laws and regulation that have similar constraints.

[19] Further, in certain jurisdictions, the officers and directors of the portfolio companies with whom SSGA engages, consistent with their fiduciary duties to the portfolio companies, may not be able to adopt certain proposed actions promoted by SSGA in engagement if those actions (as the Proposal seeks) are harmful to the individual economic performance of the portfolio companies. In other words, even were it lawful for SSGA to engage on the basis urged by the Proposal, it may not be lawful for the officers of the portfolio companies to act on the engagement. The engagement would therefore be of no avail and result only in wasted cost and effort on the part of SSGA. Moreover, it could undercut the effectiveness of SSGA's other engagement efforts and result in a loss of the long-term benefit derived from its stewardship on key issues like diversity.

emphasized that an investment adviser's fiduciary duty of loyalty under the Advisers Act requires the adviser to place its client's interest before its own or the interests of others.[20] In its September 2019 interpretive release on the proxy voting obligations of investment advisers, the SEC reiterated that, "to satisfy its fiduciary duty in making any voting determination, the investment adviser must make the determination in the best interest of the client."[21] What flows from this requirement is that, absent direction and/or agreement from a client to the contrary, an investment adviser that engages with a portfolio company and votes a proxy in a manner that is not intended to further its client's best economic interest in a portfolio company violates the fiduciary duty of loyalty to the client. This can subject the adviser to SEC enforcement action and contractual liability to the client.[22]

Similarly, Massachusetts fiduciary and trust law imposes precisely the same obligations on SSGATC to place its clients' interests before its own or others' interests. The Massachusetts Uniform Trust Code's first enumerated duty of loyalty is to "administer the trust solely in the interests of the beneficiaries" (emphasis added).[23] Accordingly, if SSGATC engaged portfolio companies in discussions regarding the interests of the "global commons" ahead of the direct interests of the beneficiaries, it would be in violation of its first duty of loyalty under Massachusetts state law.[24]

In addition to the aforementioned federal and state law considerations applicable to the Company's fiduciary obligations to its clients' interests in portfolio companies, regulation under ERISA governs SSGATC's actions as an investment fiduciary to a large percentage of its client base. Federal courts have consistently recognized that ERISA's duty of loyalty is "the highest

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[20] The SEC has stated that "the fundamental obligation of the adviser to act in the best interest of his client also generally precludes the adviser from using client assets for the adviser's own benefit or the benefit of other clients, at least without client consent." Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Rel. No. 54165 (July 18, 2006) (emphasis added). The same fundamental obligation precludes an adviser from using client assets for the benefit of third parties absent informed consent.

[21] *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Investment Advisers Act Release No. 5325 (September 21, 2019) (the "Proxy Voting Release") (stating that an adviser has a duty to vote proxies in its clients' best interest).

[22] The Proposal acknowledges that SSGA may engage with specific portfolio companies to encourage the company to "improve ESG performance" to the extent it is profitable to the portfolio company to do so and, indeed, SSGA's corporate engagement strategy focuses in large measure on ensuring that portfolio companies are appropriately considering improvement in governance, environmental, and societal practices that can enhance long-term profitability and viability. However, this acknowledgement indicates that the Proposal is seeking SSGA to engage with portfolio companies and vote proxies to encourage the companies to take actions to support the "global commons" even where the broader benefits of those actions are not, or have not been evaluated as being, in the best interests of its clients.

[23] Mass. General Laws, Part II, Title II, Chapter 203E, Art.8, Section 802(a).

[24] To the extent that the bases for exclusion discussed herein are premised on matters of Massachusetts state law, this letter also represents the opinion of Wilmer Cutler Pickering Hale and Dorr LLP as to such state law matters.

known to the law,"[25] imposing an obligation to administer ERISA plan assets for the "exclusive benefit" of plan beneficiaries. In the context of proxy voting and engagement activities, the Department of Labor ("DOL") has consistently emphasized that plan fiduciaries "shall consider only those factors that relate to the economic value of the plan's investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. Votes shall only be cast in accordance with a plan's economic interests." *Interpretive Bulletin Relating to Exercise of Shareholder Rights* (Oct. 17, 2008), 29 C.F.R. pt. 2509.

Moreover, as recently as October 7, 2021, the DOL reiterated this longstanding principle in proposing amendments to 29 CFR §2550.404a-1(e)(2)(i), the rule governing the investment duties of retirement plan fiduciaries, including the selection of investments, the exercise of shareholder rights (*i.e.*, engagement activities) and the voting of proxies for retirement plan investors (the "Investment Duty Rule"). The proposed amendment clarifies the current Investment Duty Rule's formulation of the requirement and emphasizes that ERISA fiduciaries cannot sacrifice investment performance for other goals:

> A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals **unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan** (emphasis added).

Likewise, the proposed amendment reiterates the unambiguous obligation imposed by the Investment Duty Rule for fiduciaries to exercise shareholder rights only for the benefit of the ERISA plan beneficiaries. As proposed, a plan fiduciary may:

> Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective, or promote benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries.

Both the current Investment Duty Rule and the proposed revisions thereto provide clear guidance that, to fulfill their fiduciary obligations, when deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must:

> (A) act solely in accordance with the economic interest of the plan and its participants and beneficiaries; (B) consider any costs involved; and (C) **not subordinate the interests**

[25] *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Circuit, 1982).

> **of the participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective, or promote benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries** … (emphasis added).

The Proposal assumes that the Company, through its subsidiary SSGATC, is legally able to act in a manner contrary to the best direct economic interests of its clients in order to improve the "global commons" with the potential secondary effect of improving global markets over the long term. In this way, the Proposal would have SSGATC violate both the current and the proposed versions of the Investment Duty Rule.

Notably, The Shareholder Commons has publicly recognized and conceded that legal regulatory reform related to fiduciary duties of directors and investors is needed in order to achieve the goals set forth in the Proposal.[26] The Shareholder Commons policies call for "the rules governing capital markets [to] be revised to reflect the importance to investors of a company's impact on the market as a whole, and particularly how it affects diversified portfolios."[27] The call for regulatory reform of fiduciary obligations by The Shareholder Commons further bolsters the Company's assertion that the Proposal's apparent goal is to influence the practices of large investors to subordinate their fiduciary obligations under federal and state law in a way that would cause the Company to violate the law.

As described above, the ultimate effect of the Proposal, if implemented consistent with the true intent of the Proposal, would cause SSGA, SSGAFM and SSGATC to violate federal and Massachusetts law. Therefore, Rule 14a-8(i)(2) permits the Company to exclude the Proposal from its Proxy Materials because implementation of the Proposal would cause the Company to violate law.

2. <u>Rule 14a-8(i)(6) permits a company to exclude a shareholder proposal if the company lacks the power or authority to implement the proposal.</u>

Because the ultimate effect of the Proposal would cause SSGA, SSGAFM and SSGATC to violate federal and state law, neither the Company nor the Board has the legal power or authority to impose the requirements of the Proposal on SSGA, SSGAFM or SSGATC. Moreover, the Company is not the asset management advisor to SSGA's clients, and the Company could face regulatory liability for imposing its judgment on how SSGA should exercise its fiduciary duties

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[26] *See* https://theshareholdercommons.com/opportunities/#policymakers, which states that "the Shareholder Commons believes that state and federal lawmakers must ensure that the fiduciary duties of both corporate directors and investment professionals allow them to take broader societal concerns into account when it is important to investors that they do so."

[27] *See* https://theshareholdercommons.com/opportunities/#policymakers

if it imposed the requirements of the Proposal on SSGA. Furthermore, even if directed to do so by the Company or the Board, none of these subsidiaries have the legal power or authority to violate federal or state law and each would be legally required to disregard such direction.

The Staff has consistently concurred in exclusion of proposals under circumstances where implementation of the proposal would cause the company to violate law and, therefore, the company would have neither the power nor the authority to implement the proposal. For example, in *Arlington Asset Investment Corp.* (April 23, 2021), the Staff concurred in exclusion pursuant to Rule 14a-8(i)(2) and (i)(6) of a proposal that requested the officers liquidate the company's entire investment portfolio and distribute the net proceeds to shareholders, where the proposal would have caused the company to violate Virginia law. *See also eBay Inc.* (April 1, 2020), in which the Staff concurred in exclusion pursuant to Rule 14a-8(i)(2) and (i)(6) of a proposal to allow employees to elect 20% of board members, where implementation of the proposal would have caused the company to violate Section 211(b) of the Delaware General Corporation Law. *See also Trans World Entertainment Corporation* (May 2, 2019), in which the Staff concurred in exclusion pursuant to Rule 14a-8(i)(2) and (i)(6) of a proposal requesting that the company's bylaws be amended to provide for an elevated quorum requirement and implementation of such request would have caused the company to violate Section 608(a) of the New York Business Corporation Law.[28]

Neither the Board nor the Company has the legal power or authority to impose engagement activities and proxy voting policies and procedures on SSGA, SSGAFM and SSGATC that, as described in Section IV.A.1., are inconsistent with each such subsidiary's legal and fiduciary obligations to its clients. Accordingly, the Proposal may be excluded pursuant to Rule 14a-8(i)(2) and Rule 14a-8(i)(6) because if the Proposal is implemented, fundamental aspects of the Proposal would cause the Company to violate federal and state law. State Street Corporation, the publicly traded parent company, is not an asset management advisor to SSGA's clients, and State Street Corporation would be subject itself to potential regulatory liability if it imposed its judgment on how SSGA should exercise its fiduciary duties, and the Company therefore lacks the power or authority to implement the Proposal.

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[28] We believe the Proposal is distinguishable from the proposal at issue in *Franklin Resources, Inc.* (November 24, 2015) (denying the company's no-action request pursuant to Rule 14a-8(i)(2) and Rule 14a-8(i)(6) with respect to a proposal asking that the company list all instances of proxy votes cast against a climate proposal that were inconsistent with the company's policy positions regarding climate change). Unlike in *Franklin Resources, Inc.*, in which the proposal's apparent goal was transparency and congruency between the company's voting practices and its policy positions, the Proposal's apparent goal is to influence the practices of large investors to subordinate their fiduciary obligations under federal and state law in a way that would cause the Company to violate the law, including the current formulation of 29 CFR §2550.404a-1(e)(2)(ii).

B. The Shareholder Proposal May Be Excluded Pursuant to Rule 14a-8(i)(3) Because it is Materially False and Misleading in Violation of Rule 14a-9.

Rule 14a-8(i)(3) permits a company to exclude all or portions of a shareholder proposal "[i]f the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials." Specifically, Rule 14a-9 provides that no solicitation may be made by means of any proxy materials "containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading." Further, the Staff takes the view that a proposal may be excluded pursuant to Rule 14a-8(i)(3) on the basis that the proposal is so vague and indefinite as to be misleading where "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (September 15, 2004). A proposal may be materially misleading as vague and indefinite when the "meaning and application of terms and conditions . . . in the proposal would have to be made without guidance from the proposal and would be subject to differing interpretations" such that "any action ultimately taken by the company upon implementation [of the proposal] could be significantly different from the actions envisioned by shareholders voting on the proposal." *See Fuqua Industries, Inc.* (March 12, 1991).

1. <u>A number of statements in the Proposal, including the statements set forth below, are objectively and materially false or misleading in violation of Rule 14a-9.</u>

   i. The Proposal is fundamentally misleading in stating that for "the majority of [the Company's] clients and shareholders . . . overall stock-market performance is the primary determinant of financial returns."

The statement in the Proposal that overall stock-market (i.e., equity market) performance is the primary determinate of financial returns and the supporting statement's assertion that "most" of SSGA's clients are likely to be broadly diversified in line with "Modern Portfolio Theory" is misleading in multiple different ways. As a large multi-asset investment manager, SSGA manages client accounts across a wide spectrum of market segments and security types, from broad market segments to narrow and concentrated market segments, from equity securities to fixed income securities and everything in between. As noted above in Section I of this letter, approximately 61% of SSGA's client mandates are in equity strategies that track or are benchmarked to over 500 individual equity indices, many of which are narrow

indices that represent only a fraction of the "overall stock-market." The remaining 39% of SSGA are in fixed-income or commodities related strategies that track or are benchmarked to a similarly wide range of indices which, likewise, often encompass only a narrow range of the overall fixed income or commodities markets. SSGA does provide overall asset class and asset allocation advice to certain clients through its "outsourced chief investment officer" platform and similar asset allocation mandates ("Asset Allocation Mandates"). However, Asset Allocation Mandates make up less than 4% of SSGA's total $3.86 trillion assets under management. What this means is that, other than the Asset Allocation Mandates, SSGA's clients ask them to manage only a particular investment mandate against a specific benchmark which may, but in most cases does not, approximate "overall stock market" exposure. With these basic facts as a backdrop, the Proposal and the supporting statement are misleading in the following ways.

First, the Proposal misleadingly conflates the significant majority of SSGA's client accounts and mandates with the underlying total investment portfolios of those clients which in many, if not most, cases are unknown to SSGA. This is misleading because SSGA's fiduciary obligation to its clients relates first and foremost to the investment goal of the account which it has been hired to manage. In every case, SSGA is called upon to manage the account prudently, loyally and to seek to maximize the investment return of that account consistent with the investment strategy selected by the client and in compliance with the investment guidelines agreed to with the client. As it relates *to the account which SSGA has been hired to manage,* "overall stock market performance," however that may be defined, is likely not the "primary determinant of financial returns." As it relates to a client's overall investment portfolio such an assertion may or may not be true, but SSGA's fiduciary obligation to the client relates to the account which it has been hired to manage and it must not engage with portfolio companies in a manner that harms the investment objective of that account. In doing so, SSGA would be exposed to fiduciary liability to its clients for purposefully seeking to subvert the investment objective for the account which it has been hired to manage. This misleading conflation of hypothetical total investment portfolio of a client and actual SSGA-managed account is so fundamental to the premise driving the Proposal that the Company believes it cannot be cured by revised language in the Proposal or in a rebutting statement by the Company.

Second, the Proposal assumes, and the supporting statement asserts, that SSGA's clients are likely to be "broadly diversified" in line with "Modern Portfolio Theory." While this approach may be true for some clients who follow traditional mean variance optimization approaches, increasingly investors are adopting other approaches to portfolio construction. In addition, many investors look at attributes beyond risk adjusted return (such as liquidity, income generation and inflation sensitivity, as well as other considerations) to develop their overall investment process and approach. In addition, many investors are not static in their

allocation processes, further undermining the relevance of the Modern Portfolio Theory argument. Therefore, in reality, the Proposal's assumption is a misleading oversimplification of the way institutional investment portfolios are managed. One example of this oversimplification is that it fails to take into account the fact that the asset allocation practices of many, if not the majority of, institutional investors seek to actively over- or under-weigh asset classes and market segments that, in the investors' judgment, are likely to outperform over a *near-term period* (e.g., the next six months, year, three years or five years). These asset allocation decisions are driven by an assessment of near-term economic, geopolitical and even environmental conditions. The Proposal and the supporting statement misleadingly imply exactly the opposite – that institutional investors' asset allocations are largely static and fixed to track or beat "overall stock-market performance" over the long term, as opposed to asset allocations that seek to outperform a blended benchmark of assets that reflects such allocations. This assumption is incorrect in many cases. For example, pension plans quite often have valuation and cash flow needs that require increased portfolio returns over the near term to meet payment obligations to beneficiaries. This misleading assumption is foundational to the Proposal and highlights the underlying inaccurate assumption that institutional investors would always be better served by disregarding or sacrificing short-term investment performance for the long-term improvement in the global economy and financial markets. While that may or may not be the case, SSGA in its role as investment manager of disparate client accounts cannot make that same assumption without risking potential fiduciary liability for doing so. As with the misleading conflation of client and account in the preceding paragraph, the Company believes that the disregard of investors' needs or preference for short-term returns is so fundamental to the premise driving the Proposal that it cannot be cured by revised language in the Proposal or in a rebutting statement by the Company.

Relatedly, the reference to "Modern Portfolio Theory" ("MPT") is itself misleading because, while MPT is a foundational principle of asset allocation and portfolio management practices against a stated risk-return target, it does not suggest that investors should, or do in fact, have a uniform preference for investment returns that are primarily determined by "overall stock-market performance." MPT describes how investors can invest in an array of assets – stocks, bonds, cash, etc. – to create an efficient portfolio as defined by risk-adjusted return. However, it does not imply that all investors have a return objective that correlates to long-term overall stock market return. Indeed, many institutional investors (such as pension plans with immediate cash needs) have risk return targets that may be primarily influenced by fixed income market returns or other measures that are meaningfully divergent from long-term overall stock market performance. Accordingly, the Company believes that the Proponent's reference to MPT is misleading in light of the Proponent's simplification of "overall stock-market performance" as described above, and cannot be cured by revised language in the Proposal or in a rebutting statement by the Company.

ii. The Proposal is false and misleading because it is based on assumptions that are conjectural, unprovable and, at the very least, suggest benefits to the global economy and social systems that are beyond the Company's reasonable ability to analyze or predict with the specificity the Proposal suggests is possible.

As noted in the supporting statement, the Proposal is calling on the Company to "study whether it should explicitly account for any improved performance in the diversified portfolios of its clients that would result from individual portfolio companies ending practices that improve their internal performance but harm the systems that support a healthy global economy and overall financial market performance."

One assumption on which the Proposal is based is that improvement in the "global commons," as opposed to improvement in an individual portfolio company, that results from the proposed engagement and stewardship activities will have an impact on the "global economy and overall financial performance" and that such impact is knowable and measurable. The Proposal in this respect is false and misleading. Overall global economic performance and financial market performance are determined by a host of factors. For example, geopolitical developments and the law of supply and demand drive global economic and market performance in meaningful ways. While SSGA's engagement efforts are designed to encourage positive outcomes for its portfolio companies, it does not have the ability to control or calculate the effects of its engagement on global economic performance in the aggregate. Moreover, even assuming there was data available that would demonstrate that improvement in the "global commons" specifically leads to long-term overall stock market performance as a general matter (and assuming it was lawful for SSGA to undertake this particular type of engagement), the Proposal remains misleading because it assumes such improvement is knowable and measurable "*ex ante*" when a given engagement activity happens such that it would be prudent for SSGA to encourage the particular action.

This false and misleading assumption should be fatal to the Proposal under 14a-8(i)(3) as violative of Rule 14a-9. The Company also believes that this false and misleading assumption is so fundamental to the Proposal that it cannot be cured by revised wording or a rebuttal from the Company in the Proxy Materials.

For the reasons set forth above, each of the Proposal's assertions described in this Section IV.B.1. is materially false or misleading. The Staff has previously concurred that a shareholder proposal was excludable pursuant to Rule 14a-8(i)(3) because it contained statements that were materially false or misleading in violation of Rule 14a-9. For example, in *Ferro Corporation* (March 17, 2015), the Staff concurred in exclusion of a proposal requesting that the company reincorporate in Delaware based on misstatements of Ohio law, which suggested that the

shareholders would have increased rights if Delaware law governed the company instead of Ohio law. *See also General Electric Company* (January 6, 2009) (concurring in exclusion of a proposal regarding director service on board committees as false and misleading where the proposal repeatedly referred to "withheld" votes and incorrectly implied that the company offered shareholders the ability to withhold votes in elections of directors) *and Johnson & Johnson* (January 31, 2007) (concurring in exclusion of a proposal as materially false or misleading where the proposal involved an advisory vote to approve the company's compensation committee report but contained misleading implications about the contents of the report in light of SEC disclosure requirements). Accordingly, and consistent with prior no-action letters, the Proposal is properly excludable pursuant to Rule 14a-8(i)(3) because it contains several assertions that are materially false or misleading in violation of Rule 14a-9.

2. The Proposal includes terms, such as the terms set forth below, that are so inherently vague or indefinite that neither the shareholders voting on it, nor the Company in implementing the Proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires.

   i. *"Global commons" in paragraph 2 of the supporting statement in the Proposal is undefined.*

The Proposal suggests that the Company should steward companies "away from practices that degrade the global commons." The "global commons" is undefined in the Proposal and is an inherently vague and indefinite term that could implicate a myriad of social, economic, political or other considerations without providing any detail as to what is specifically contemplated. Because "global commons" is inherently vague and indefinite and means different things to different persons who are clients of SSGA's asset management services, neither the Company nor its shareholders would be able to identify what the Proposal is specifically requiring the Board to consider in its evaluation of the Company's voting and engagement policies.

   ii. *The Proposal's request for information about corporate policies that harm the systems that support a healthy global economy is vague and indefinite.*

Paragraph 4 of the supporting statement in the Proposal states that the Company should develop a report accounting for "practices that improve [company] internal performance but harm the systems that support a healthy global economy." This statement is vague and indefinite in that each investor has their own individual view of what constitutes a healthy global economy. Accordingly, the statement is vague and indefinite such that neither the shareholders voting on it, nor the Company in implementing the Proposal, would be able to

> determine with any reasonable certainty exactly what actions or measures the Proposal requires.

For the reasons set forth above, certain of the Proposal's key terms described in this Section IV.B.2. are vague or indefinite such that neither the Company, nor its shareholders, would be able to determine with any certainty what actions the Proposal is seeking from the Company. The Staff has previously concurred that proposals that are similarly vague and indefinite may properly be excluded from a company's proxy materials. *See, e.g., Philip Morris International Inc.* (January 8, 2021) (concurring in exclusion of a proposal requesting that the company significantly strengthen its balance sheet while failing to explain what measures it would require); *Apple, Inc.* (December 6, 2019) (concurring in exclusion of a proposal requesting that the company "improve guiding principles of executive compensation," while failing to define many key terms and leaving room for multiple interpretations); and *eBay Inc.* (April 10, 2019) (concurring in exclusion of a proposal requesting that the company "reform [its] executive compensation committee" without further instruction as to how to do so or in what regard it should be "reformed"). The Staff has also concurred in exclusion of shareholder proposals where no specific measures required to be implemented were specified in such proposals. *See, e.g., Cisco Systems, Inc.* (October 7, 2016) (concurring in exclusion of a proposal requesting that "[t]he board shall not take any action whose primary purpose is to prevent the effectiveness of shareholder vote without a compelling justification for such action" without further specifying what actions or measures were required to implement the proposal) and *United Continental Holdings, Inc.* (March 6, 2014) (concurring in exclusion of a proposal requesting the adoption of a bylaw providing that preliminary voting results would be unavailable for solicitations made for "other purposes" but would be available for solicitations made for "other proper purposes").

Because the Proposal includes terms that are so inherently vague or indefinite that neither the shareholders voting on it, nor the Company in implementing the Proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires, the Proposal may properly be excluded from the Proxy Materials.

C. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because the Subject Matter of the Proposal Directly Concerns the Company's Ordinary Business Operations.

Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal if the proposal "deals with a matter relating to the company's ordinary business operations." The Staff concurred in exclusion of the Proponent's substantively similar proposal on the basis of Rule 14a-8(i)(7) last year.

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." SEC Release No. 34-40018 (May 21, 1998) (the "1998 Release"). An exception to this principle may be made where a proposal focuses on significant policy issues (e.g., significant discrimination matters) that transcend the day-to-day business matters of the company. *See* 1998 Release.

As set out in the 1998 Release, there are two "central considerations" underlying the ordinary business exclusion. 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, as a practical matter, be subject to direct shareholder oversight." The other consideration is that a proposal should not "seek[] to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." The Proposal implicates both of these considerations.

Framing a shareholder proposal in the form of a request for a report does not change the underlying nature of the proposal. The Commission has long held that the Staff evaluates proposals requesting dissemination of a report by considering the underlying subject matter of the proposal when applying Rule 14a-8(i)(7), and that such proposals are excludable when the substance is within the ordinary business of the company. *See* Release No. 34-20091 (August 16, 1983) ("[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable"). *See also Rite Aid Corp.* (April 17, 2018) (concurring in exclusion of a proposal requesting a report on the feasibility of adopting company-wide goals for increasing energy efficiency and use of renewable energy, in which the Staff determined that the proposal focused "primarily on matters relating to the Company's ordinary business operations") and *Netflix, Inc.* (March 14, 2016) (concurring in exclusion of a proposal that requested a report relating to the company's assessment and screening of "inaccurate portrayals of Native Americans, American Indians and other indigenous peoples," in which the Staff determined that the proposal related to the ordinary business matter of the "nature, presentation and content of programming and film production").

1. The Proposal may be excluded because it relates to ordinary business matters of how the Company manages its day-to-day operations, specifically with regard to the Company's engagement and voting policies.

The Proposal may be excluded in reliance on Rule 14a-8(i)(7) because the matters to be addressed in the requested report – namely, the emphasis that the Company places on various environmental and social matters and how the Company engages with portfolio companies on the basis of such an evaluation – relate to the Company's ordinary business operations.

Specifically, the Company's determination of what standard the Company would use to analyze the impact that an individual issuer's policies have on a "healthy global economy" or "overall stock-market performance" (even if such terms were not misleading, vague and/or indefinite, as discussed above), the cost of such an analysis and the competitive impact to SSGA for conducting such an analysis are all squarely within the Company's management functions. Moreover, if implemented, the Proposal would seek to have the Company urge portfolio companies to engage in conduct that is contrary to the financial interests of such companies and consequently to such companies' stock performance, potentially causing additional competitive impact to SSGA. For these reasons, the engagement could be of no avail and could result in wasted cost and effort on the part of SSGA, and it is therefore squarely within the discretion of management to assess the costs involved compared to the likelihood of effectiveness of such policies. Engagement and voting policies and communicating with clients and shareholders on such policies, as well as developing an analysis of the impact of such policies, are fundamental to management's ability to run the Company on a day-to-day basis and could not, as a practical matter, be subject to direct shareholder oversight. The analysis that would be required by the Proposal is exactly the type of analysis that Rule 14a-8(i)(7) recognizes as a proper function of management, who have the requisite knowledge and resources to appropriately identify, analyze and weigh the various relevant financial, contractual, regulatory, operational and reputational considerations and consequences relating to the direction of diversified portfolio company investments.

The Staff has consistently taken the position that day-to-day decisions about products and services and the manner in which those products and services are designed, developed, produced, distributed and marketed are a fundamental part of a company's ordinary business operations and are excludable under Rule 14a-8(i)(7) as relating to ordinary business operations. For example, the Staff concurred in exclusion of a substantively similar proposal submitted by the Proponent last year on this basis. *See State Street Corporation* (March 26, 2021). As another example, in *Franklin Resources, Inc.* (December 1, 2014), the Staff concurred in exclusion of a proposal requesting a review of "proxy voting policies and practices, taking into account Franklin's own corporate responsibility and environmental positions and the fiduciary and economic case for the shareholder resolutions presented, and report the results of the review to investors," under Rule 14a-8(i)(7) on the basis that it related to Franklin's ordinary business operations. In *State Street Corporation* (February 24, 2009), the Staff concurred in exclusion of this same proposal on the same basis. *See also JP Morgan Chase & Co.* (March 26, 2021) and *The Goldman Sachs Group, Inc.* (March 9, 2021) (in each case concurring in exclusion of a proposal requesting a study on external costs created by the company's underwriting of multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return); *Amazon.com, Inc.* (March 27, 2015) (concurring in exclusion of a proposal requesting disclosure of potential reputational and financial risks that could result from negative public opinion pertaining to the treatment of animals used to produce products sold by the

company on the basis that the proposal related to "the products and services offered for sale by the company"); *Papa John's International, Inc.* (February 13, 2015) (concurring in exclusion of a proposal requesting that the company expand its menu offerings to include vegan cheeses and vegan meats on the basis that the proposal related to "the products offered for sale by the company and does not focus on a significant policy issue"); *Wal-Mart Stores, Inc.* (March 20, 2014) (concurring in exclusion of a proposal requesting board oversight of determinations whether to sell certain products that endanger public safety and well-being, could impair the reputation of the company and/or would be offensive to family and community values on the basis that the proposal related to "the products and services offered for sale by the company"), affirmed and cited in *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 1-14-cv-00405, at *18 (3d Cir. July 6, 2015); *Pepco Holdings, Inc.* (February 18, 2011) (concurring in exclusion of a proposal requesting that the company pursue the solar market on the basis that the proposal related to "the products and services offered for sale by the company"); *Dominion Resources, Inc.* (February 3, 2011) (concurring in exclusion of a proposal requesting that the company initiate a program to provide financing to home and small business owners for installation of rooftop solar or wind power renewable generation on the basis that the proposal related to "the products and services offered for sale by the company"); and *General Electric Company* (January 7, 2011) (concurring in exclusion of a proposal requesting that the company focus on defining, growing and enhancing aviation, medical, energy, transportation, power generation, lighting, appliances and technology businesses and deemphasize and reduce the role and influence of GE Capital on the basis such proposal "relates to the emphasis that the company places on the various products and services it offers for sale").

SSGA has devoted significant resources and attention to portfolio company engagement activities, including the recent development and rollout of R-Factor, and SSGA provides regular and detailed reporting to its clients and the public regarding stewardship activities. Further, SSGA's engagement with companies on environmental and social issues is intended to promote long-term value and risk avoidance. This engagement has focused increasingly on non-company-specific issues of sustainability, corporate governance and culture and diversity at the board and executive management level. These strategies and policies are all clearly matters that fall within the purview and expertise of the Company's management and do not lend themselves to shareholder evaluation, and are therefore all inherently and undeniably related to the ordinary business operations of the Company.

2. The Proposal does not transcend the Company's ordinary business operations.

As noted above, the 1998 Release provides that a proposal that would otherwise be excludable as related to ordinary business matters may not be excluded if it transcends the day-to-day business matters of a company. The Staff most recently discussed its interpretation of how the Staff will consider whether a proposal "transcends the day-to-day business matters" of a company in Staff

Legal Bulletin No. 14L (November 3, 2021) ("SLB 14L"), noting that it is "realign[ing]" its approach to determining whether a proposal relates to ordinary business with the standards the Commission initially articulated in 1976 and reaffirmed in the 1998 Release. Under this realignment, the Staff will "no longer take a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7)" but rather will consider only "whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company."[29]

Here, while the Proposal references environmental and social issues in general, its core focus is on the ordinary business matter of how the Company engages with clients. The Staff has long permitted exclusion of shareholder proposals where the proposal focuses on ordinary business matters notwithstanding that it references a potential significant policy issue. This approach predates the Rescinded SLBs and relies on a different analysis than that addressed by SLB 14L – it does not focus on whether a particular policy is broadly significant versus significant for a particular company, but rather on whether the Proposal is fundamentally about day-to-day operations versus any significant policy issue that may be referenced in the proposal. In addition to the precedent cited above, in *McDonald's Corp.* (March 22, 2019), the Staff concurred in exclusion of a proposal that touched on concerns about animal cruelty because the proposal was "focuse[d] primarily on" the company's ordinary business operations. *See also CIGNA Corp.* (February 23, 2011) (concurring in exclusion of a proposal that, while addressing access to affordable health care, asked the company to report on expense management, an ordinary business matter) and *JPMorgan Chase & Co.* (March 12, 2010) (concurring in exclusion of a proposal that requested the adoption of a policy banning future financing of companies engaged in a particular practice that impacted the environment because the proposal addressed "matters beyond the environmental impact of JPMorgan Chase's project finance decisions"). Accordingly, the Company may exclude the Proposal under Rule 14a-8(i)(7) as it relates to the ordinary business of the Company.

3. The Proposal may be excluded because it seeks to micromanage the Company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.

In addition to interfering with management's day-to-day operations, the Proposal also seeks to micromanage the Company by dictating the standards to be used in engagement policies for the Company's clients and shareholders. As the Staff explained in SLB 14L, in considering arguments under the micromanagement exclusion, the Staff will focus on "the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." The Staff applied this approach in *Deere & Company*

[29] SLB 14L also explicitly rescinded prior Staff Legal Bulletins 14I, 14J and 14K, which set out a company-specific approach to the significant policy issue analysis (the "Rescinded SLBs").

(January 3, 2022), in which the Staff concurred in exclusion of a proposal seeking a report on the company's training materials, stating that the proposal "micromanages the Company by probing too deeply into matters of a complex nature by seeking disclosure of intricate details regarding the Company's employment and training practices."

In this case, the Proposal would prescribe how SSGA engages with portfolio companies in client accounts, including in particular the specific items to be emphasized in such engagements, without affording SSGA sufficient flexibility or discretion to consider the complex considerations involved in developing its engagement policies.[30] Moreover, the Proposal would, as described above, also result in likely friction and disputes about the manner in which SSGA engages with portfolio companies on the clients' behalf.

Additionally, decisions around the Company's investment management services requires a deep understanding of the Company's business, strategy, risk profile and operating environment as well as an assessment of a variety of complex factors and risks, including internal methods of analysis, protection of client information, client communication and predictions of results, among others. Determining how to manage client needs is clearly probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.

In considering whether a proposal is too complex to enable shareholders to be in a position to make an informed judgment, the Staff "may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic." SLB 14L. Engagement and client stewardship policies are highly sophisticated topics for which there is not robust public discussion or analysis or broad-based understanding. Accordingly, the Proposal is excludable under Rule 14a-8(i)(7) because it seeks to micromanage the Company.

D. The Shareholder Proposal May Be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Proposal.

As discussed elsewhere in this letter, certain fundamental aspects of the Proposal are so vague and indefinite that neither shareholders voting on the Proposal nor the Company in implementing the Proposal would know what actions would be required to implement the Proposal. Further, in

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[30] For example, the Proposal would have SSGA urge companies to cease manufacture of certain products. Such micromanagement of SSGA's engagement activities with portfolio companies, as noted above and at note 19, would likely be of no avail. Such efforts would also likely detract from SSGA's existing efforts in the social and environmental arena, such as increasing board diversity and women in senior management (as described in Section I above), that have shown meaningful success to-date, and could undercut the long-term benefit derived from its stewardship on such key issues.

order to implement what we believe to be the true purpose of the Proposal, the Company and SSGA would be required to violate federal and state law, as described above. However, given that the ultimate purpose of the Proposal appears to be to alter behavior through changes in engagement policies, the Company believes it has substantially implemented the Proposal to the extent it is able under its fiduciary duties to its investment management clients and as permitted by federal and state laws and regulations. In this regard, we believe that the Company's actions to-date compare favorably with the guidelines of the Proposal and satisfy its essential objective to the extent that the Company is legally able to do so.

The purpose of the Rule 14a-8(i)(10) exclusion is to "avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by management." Commission Release No. 34-12598 (July 7, 1976). While the exclusion was originally interpreted to allow exclusion of a shareholder proposal only when the proposal was "'fully' effected" by the company, the Commission has revised its approach to the exclusion over time to allow for exclusion of proposals that have been "substantially implemented." Commission Release No. 34-20091 (August 16, 1983) and Commission Release No. 34-40018 (May 21, 1998). In applying this standard, the Staff has noted that "a determination that the [c]ompany has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal." *See also Texaco, Inc.* (March 6, 1991, *recon. granted* March 28, 1991). In addition, when a company can demonstrate that it already has taken actions that address the "essential objective" of a shareholder proposal, the Staff has concurred that the proposal has been "substantially implemented" and may be excluded as moot, even where the company's actions do not precisely mirror the terms of the shareholder proposal.

In the current instance, to the extent the focus of the Proposal is on having the Company take into consideration social and environmental issues in its engagement activities, the Company already takes significant actions to educate SSGA portfolio companies about these issues and provides extensive reporting to clients and investors (and the public) about its approach to stewardship, the reasons for its approach and the outcome of its engagement efforts. As demonstrated in the Company's public statements (see Exhibit B for examples of such statements), the Company's engagement focus is not solely on individual companies, but rather identifies important environmental and social issues on which the Company engages and on which it already reports to its clients and investors. As the Company's stewardship efforts make clear, given its focus on preserving long-term economic value, the concepts of company materiality and overall stock-market performance with respect to environmental and social issues are often more intertwined than different, which is why the Company's engagements focus on promoting consideration of societal factors as these societal issues drive long-term value. For example, as described in Section I., SSGA is a signatory to the Principles of Responsible Investing ("PRI") and was recognized as part of PRI's Leaders Group for their efforts to advance

corporate disclosure on the impact of climate change, it is a founding member and signatory to the Investor Stewardship Group and it is an explicit proponent of SASB. SSGA has also recently joined Climate Action 100+. Accordingly, to the extent the Proposal is focused on consideration of environmental and social issues, the Company's policies and engagement strategy already contemplate such issues.

The Staff has consistently permitted the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(10) when it has determined that the company's policies, practices and procedures or public disclosures compare favorably with the guidelines of the proposal or where the company had addressed the underlying concerns and satisfied the essential objective of the proposal, even where the company's actions did not precisely mirror the terms of the shareholder proposal. The Staff recently took this approach in *Apple Inc.* (October 16, 2020), in which the Staff concurred in exclusion of a proposal requesting that the board prepare a report based on a review of whether the company's governance and management systems should be altered to implement a Statement of the Purpose of a corporation signed by the CEO. Apple argued that its core values aligned with the Statement of Purpose, that its core values were disclosed on website and in filings with the SEC, and that the company "has been transparent about its [v]alues and its governance and management systems to implement them." Additionally, in *JPMorgan Chase & Co.* (February 5, 2020), the Staff concurred in exclusion of a proposal requesting that the board provide oversight and guidance as to how the Statement of Purpose should alter the company's governance practices and publish recommendations regarding implementation. The company argued that a committee had already reviewed the Statement of Purpose and determined that the company operates in accordance with the principles set forth in the Statement of Purpose. In granting the no-action request, the Staff noted that the "board's actions compare[d] favorably" with the guidelines of the proposal. *See also The Wendy's Company* (April 10, 2019), in which the Staff concurred in exclusion of a proposal requesting that the Board prepare a report on the Company's process for identifying and analyzing potential and actual human rights risks of operations and supply chain pertaining to environmental and social issues. In that instance, the company argued that it already had a code of conduct applicable to suppliers and other policies and public disclosures that achieved the proposal's essential objective. The Staff noted that the company's public disclosures "compare[d] favorably" with the guidelines of the proposal.

Therefore, because the Company has substantially implemented the Proposal (to the extent that what the Proposal seeks may be discerned and is not unlawful as described in Section IV.A.), the Proposal is excludable pursuant to Rule 14a-8(i)(10).

V. Conclusion

For the foregoing reasons, and consistent with the Staff's prior no-action letters, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal

from its Proxy Materials on the bases set forth herein.

If the Staff has any questions with respect to the foregoing, or if for any reason the Staff does not agree that the Company may exclude the Proposal from its Proxy Materials, please do not hesitate to contact Lillian Brown at lillian.brown@wilmerhale.com or (202) 663-6743, Timothy Silva at timothy.silva@wilmerhale.com or (617) 526-6502, Phillip Gillespie at phillip.gillespie@wilmerhale.com or (617) 526-6703, or Jeremy Kream, Head of Legal, Corporate and Global Delivery, State Street Corporation at JKream@StateStreet.com. In addition, should the Proponent choose to submit any response or other correspondence to the Commission, we request that the Proponent concurrently submit that response or other correspondence to the Company, as required pursuant to Rule 14a-8(k) and SLB 14D, and copy the undersigned.

Best regards,

Lillian Brown

Timothy F. Silva

Phillip Gillespie

Enclosures

cc: David C. Phelan
Jeremy Kream
Sara E. Murphy, The Shareholder Commons

EXHIBIT A

Via electronic mail
December 6, 2021

State Street Corporation
One Lincoln Street
Boston, MA 02111

Attn: David Phelan, General Counsel and Corporate Secretary

RE: Rule 14a-8 shareholder proposal for 2022 Annual Shareholder Meeting

Dear Mr. Phelan,

The Shareholder Commons ("TSC") is filing a shareholder proposal on behalf of James McRitchie, a shareholder of State Street Corporation (the "Company"), for action at the next Company annual meeting. The Proponent submits the enclosed shareholder proposal for inclusion in the Company's 2022 proxy statement, for consideration by shareholders, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

A letter from the Proponent authorizing TSC to act on his behalf is enclosed. A representative of the Proponent will attend the stockholders' meeting to move the resolution as required.

The Proponent and I are available to meet with the Company via teleconference on December 20, 2021, at 1:00 p.m. EST or 1:30 p.m. EST. In SLB 14L Section F, SEC Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested." Please acknowledge receipt of this proposal, and kindly indicate whether you wish to accept either of our proposed meeting times.

The proponent can be reached at [redacted]. I can be contacted at [redacted] or [redacted]. Please address any future correspondence regarding the proposal to me. I am available to discuss this issue and would welcome the opportunity to engage.

Sincerely,

Sara E. Murphy

Sara E. Murphy

cc: [redacted]

[State Street Corporation: Rule 14a-8 Proposal, December 6, 2021]
[This line and any line above it – *Not* for publication]
ITEM 4*: Report on Asset Management Policies and Diversified Investors

RESOLVED*, shareholders ask that the board report on (1) how the majority of its clients and shareholders—for whom overall stock-market performance is the primary determinant of financial returns—are affected by Company policies that account for the effect of social and environmental issues on portfolio companies' financial performance, but not for the effect that portfolio company activities have on overall stock-market performance through their impacts on social and environmental systems and (2) whether its clients and shareholders would be better served by the adoption of asset management policies that directly accounted for the impact that portfolio companies have on the global economy.*

Supporting Statement:

Our Company provides investment management services and has more than $3.4 trillion in assets under management, primarily weighted toward indexed strategies. In line with Modern Portfolio Theory, most of its clients and shareholders are likely to be broadly diversified.

Such diversified investors rely on healthy social, economic, and environmental systems to support all their investments. Corporate practices that reduce GDP also decrease diversified portfolio returns.[1] As manager for more than $3 trillion in assets, the Company's stewardship activities—engaging with portfolio companies and voting their shares—could significantly improve overall market performance by stewarding companies away from practices that degrade the global commons, even when those practices are profitable to the company in question.

However, the Company will currently steward a portfolio company to improve its social and environmental practices only when doing so improves such company's own internal financial performance.[2] The Company's stewardship policy does not address social and environmental practices of a portfolio company that harm the global economy if the practices can improve that company's financial performance. This position encourages companies to externalize environmental and social costs, and is thus counter to the interests of both its clients and its shareholders.

The Proposal would encourage the Company to study whether it should explicitly account for any improved performance in the diversified portfolios of its clients that would result from individual portfolio companies ending practices that improve their internal performance but harm the systems that support a healthy global economy and overall financial market performance. Such a report would help diversified shareholders determine whether to seek a change in corporate direction so that the Company can better serve the interests of clients and shareholders.

Please vote for: Report on Asset Management Policies and Diversified Investors – Proposal 4*

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[1] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; https://archive.fortune.com/magazines/fortune/fortune_archive/2001/12/10/314691/index.htm (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).
[2] https://www.ssga.com/library-content/pdfs/ic/global-Proxy-Voting-and-engagement-guidelines-es-issues.pdf

[This line and any below are *not* for publication]
[*Number to be assigned by the Company]

The graphic above is intended to be published with the rule 14a-8 proposal. The graphic would be the same size as the largest management graphic (and accompanying bold or highlighted management text with a graphic) or any highlighted management executive summary used in conjunction with a management proposal or a rule 14a-8 shareholder proposal in the 2021 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.

Notes: This proposal is believed to 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 remind you of the SEC's recent guidance and my request that you acknowledge receipt of this shareholder proposal submission. In 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."

EXHIBIT B

Examples of Public Statements Made By The Company

Global Proxy Voting and Engagement Principles (March 2021) (available at https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-principle.pdf)

"As an investment manager, State Street Global Advisors has discretionary proxy voting authority over most of its client accounts, and State Street Global Advisors votes these proxies in the manner that we believe will most likely protect and promote the long-term economic value of client investments, as described in this document."

"We maximize our voting power and engagement by maintaining a centralized proxy voting and active ownership process covering all holdings, regardless of strategy. Despite the vast investment strategies and objectives across State Street Global Advisors, the fiduciary responsibilities of share ownership and voting for which State Street Global Advisors has voting discretion are carried out with a single voice and objective."

"In conducting our engagements, we also evaluate the various factors that influence the corporate governance framework of a country, including the macroeconomic conditions and broader political system, the quality of regulatory oversight, the enforcement of property and shareholder rights, and the independence of the judiciary. We understand that regulatory requirements and investor expectations relating to governance practices and engagement activities differ from country to country. As a result, we engage with issuers, regulators, or a combination of the two depending upon the market. We are also a member of various investor associations that seek to address broader corporate governance-related policy at the country level as well as issuer-specific concerns at a company level."

"As a fiduciary, State Street Global Advisors takes a comprehensive approach to engaging with our portfolio companies about material environmental and social (sustainability) issues. We use our voice and our vote through engagement, proxy voting, and thought leadership in order to communicate with issuers and educate market participants about our perspective on important sustainability topics."

State Street Global Advisors' Issuer Engagement Protocol (March 2021) (available at https://www.ssga.com/library-content/pdfs/ic/state-street-global-advisors-issuer-engagement-protocol.pdf)

State Street Global Advisors' engagement activities are driven exclusively by our goal to maximize and protect the long-term value of our clients' assets. These guidelines are utilized by State Street Global Advisors' proxy voting and engagement team, known as the Asset Stewardship team, to develop annual engagement objectives and priorities based upon an assessment of the greatest risks and opportunities within our clients' funds. The protocol clearly

defines instances in which the Asset Stewardship team is willing to participate in reactive engagement, thereby allowing the team to focus on active, thematic, or sector specific engagement across our global portfolios."

"Each year, as part of its strategic review process, the Asset Stewardship team develops an annual engagement strategy, and it identifies a target list of companies that we intend to engage with during the year. Factors considered in developing the target list include:

…

• Thematic environmental, social, and governance (ESG) issues that the team identifies as potential risks facing investee companies"

Guidance on Diversity Disclosures and Practices (January 2022) (available at https://www.ssga.com/library-content/pdfs/asset-stewardship/guidance-on-diversity-disclosures-practices.pdf)

"At State Street Global Advisors, we believe that companies have a responsibility to effectively manage and disclose risks and opportunities related to diversity, equity, and inclusion, particularly regarding gender, race, and ethnicity. Research suggests that diversity can drive returns, and that companies that neglect this topic face risks to their reputation, productivity, and overall performance. This essential dimension of ESG risk management is a priority for our Asset Stewardship team, and what follows is an overview of our expectations and actions on this topic.

…

While our existing diversity voting policies are mainly focused on increasing diverse representations on boards, given our belief in the centrality of effective board governance and oversight, we intend to shift our focus to the workforce and executive levels in the coming years. Companies should prepare by ensuring they are recruiting, promoting, and retaining diverse talent at all levels of the organization.

…

As stewards, we help portfolio companies see that what is fair for people and sustainable for the planet can deliver long-term performance. And, as pioneers in index, ETF, and ESG investing, we are always inventing new ways to invest."

Letter dated August 27, 2020 from SSGA to Board Chairs (available at https://www.ssga.com/library-content/pdfs/global/letterhead_racial_equity_guidance.pdf)

"The ongoing issue of racial equity has caused us to focus more closely on the ways in which racial and ethnic diversity impacts us as investors. As such, we are writing to inform you that starting in 2021, State Street Global Advisors will ask companies in our investment portfolio to articulate their risks, goals and strategy as related to racial and ethnic diversity, and to make relevant disclosure available to shareholders.

. . .

These topics will be part of our engagement conversations. As always, our primary tool is engagement with management and the board with the objective of understanding a company's plan and how the board is carrying out its oversight role. However, if required, we are prepared to use our proxy voting authority to hold companies accountable for meeting our expectations."

Guidance on Enhancing Racial & Ethnic Diversity Disclosures (available at https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf)

"We have expanded our firm's longstanding focus on gender diversity to include race and ethnicity, and this essential dimension of ESG risk management will be a priority for our Asset Stewardship team in 2021."

Proxy Season Review (Q2 2020) (available at https://www.ssga.com/library-content/products/esg/asset-stewardship-report-q2-2020.pdf)

"The global health, social and economic impacts of COVID-19 intensified during the 2020 proxy season. As a result, many of our discussions with investee companies focused on immediate ESG issues, including employee health, human capital, serving and protecting customers and ensuring the overall safety of supply chains. We also focused on near-term survival issues such as business continuity and resilience (including C-suite succession planning), financial stability, capital allocation and liquidity. That being said, as long-term investors we continued to engage with our investee companies on long-term issues. To manage a crisis of this magnitude successfully we believe companies need to strike the right balance between managing short-term priorities and staying focused on long-term goals."

Stewardship Report 2020 (available at https://www.ssga.com/library-content/pdfs/asset-stewardship/asset-stewardship-report-2020.pdf)

"Overall Engagement and Core Campaigns

In 2020, we engaged with 1,721 companies, accounting for 78% of our equity AUM. We continued to make significant progress on our core multi-year campaigns of gender diversity and climate change. I'm especially pleased to announce that as of end of February 2021, 862 of the 1,486 companies identified as part of our Fearless Girl campaign responded to our call, either by adding a female director or committing to do so. We also further elevated our focus on climate change and enhanced our reporting by launching a new annual report and web hub dedicated to climate stewardship. During the year we became a signatory to Climate Action 100+ and continued our extensive climate-risk engagement program."

"Driving ESG Progress Across Our Portfolio

We have successfully integrated our R-Factor™ scoring system into our stewardship efforts. We use R-Factor to encourage companies to manage and disclose ESG risks, thereby reducing risks across not only our own portfolio but the market overall. In 2020, we wrote to companies to inform them of our intentions to take voting action against the bottom 10% of R-Factor scores, subsequently voting against 14 of those companies. We also shared scores with 698 companies, and continued to incorporate our transparent scoring system into our engagements, giving companies an opportunity to assess their ESG risk management efforts and take action to improve their practices."

"As near-perpetual holders of the constituents of the world's primary indices, we take a value-based approach and use our voice and vote to influence companies on long-term governance and sustainability issues. Our approach to stewardship focuses on making an impact. Accordingly, our stewardship program proactively identifies companies for engagement and voting in order to mitigate ESG risks in our portfolios."

"[I]n order to maximize our impact, we publish thought leadership that is intended to both inform companies and educate market participants."

"Stewardship Program Philosophy and Objectives

Through our overarching stewardship philosophy of protecting and promoting the long-term economic value of client investments and in an effort to fully embrace our commitment to external initiatives such as the PRI (see page 23), our stewardship objectives are as follows:

Clearly communicate our commitment to responsible investing on behalf of our clients and report on the impact of our stewardship activities We aim to achieve this objective through honest evaluation, continuous enhancement and increased transparency of our stewardship practices.

<u>Develop effective proxy voting and engagement guidelines that enhance and evolve ESG practices in the market</u> We aim to achieve this objective by applying higher voting standards in markets where governance and sustainability practices are below global investors' expectations, and by <u>clearly identifying engagement priorities that focus on sector, thematic and/or market-specific issues</u>. We collaborate with other investors in markets where we believe collective action is needed."

"R-Factor: A Transparent ESG Score to Build Sustainable Capital Markets

The R-Factor or the Responsibility-Factor Score measures the performance of a company's business operations and governance as it relates to financially material ESG challenges facing the company's industry. It was designed to address market infrastructure challenges around ESG data quality and give companies a road map to implement and improve disclosure of financially material ESG data to all investors, thereby helping build more sustainable capital markets.

…

Beginning in the 2020 proxy season, we started taking action against board members at companies in the S&P 500, FTSE 350, ASX 100, TOPIX 100, DAX 30 and CAC 40 indices that are laggards based on their R-Factor scores and that cannot articulate how they plan to improve their score. In the event that we feel a company is not committed to engaging with us or improving its disclosure or performance related to financially material ESG matters, we may not support the re-election of the board's independent leader."

"ESG Investment Integration

<u>All our global investment teams manage ESG portfolios and conduct ongoing research on ESG data and themes</u>, with ESG portfolios being managed within each investment team rather than by a dedicated team. This reflects the breadth and depth of investment capabilities we provide, while effective collaboration ensures client assets are managed by professionals with expertise in their asset class and investment style with support from subject-matter experts."

"Market-Level Successes

We track the broader adoption of the thematic ESG issues that we have been championing by assessing the number of market participants that have embraced positions consistent with our thought leadership. <u>The following issues are examples of ESG topics where over the years we have published robust thought leadership that has influenced market participants</u>:

• Diversity Strategy, Goals & Disclosure: Our Expectations for Public Companies

• Effective Independent Board Leadership (Global)

• <u>Incorporating Sustainability into Long-Term Strategy</u> (Global)

• Gender Diversity — Fearless Girl Campaign (Global)

• Climate-Related Disclosures in Oil and Gas, Mining, and Utilities

• Board Accountability in Europe: A Review of Director Election Practices Across the Region"

"Selecting Our Sector Focus

We regularly review our holdings within sectors to identify the business and ESG trends that are impacting them. Doing so strengthens our ability to provide input to boards and management when they seek feedback or guidance from us. We select our focus sectors based on a variety of factors, including:

• **Emerging Systemic Challenges** We focus on sectors that are meaningfully impacted by wider systemic challenges we observe in the market.

• **Time Since Previous Focus** We revisit previously focused sectors when sufficient time has passed for progress to have been made or where the sector faces new challenges or opportunities.

• **Alignment to Our Thematic Priorities** We select sectors that are relevant to our thematic ESG focus.

• **Client Input** received in the past year.

• **ESG Insights** derived from our R-Factor scores."

Frederick H. Alexander
info@theshareholdercommons.com
+1.302.485.0497

February 10, 2022

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

RE: *Shareholder proposal of James McRitchie to State Street Corporation—Securities Exchange Act of 1934 ("Exchange Act") Rule 14a-8*

Division of Corporate Finance Staff Members:

James McRitchie (the "Proponent") is beneficial owner of State Street Corporation (the "Company") common stock and has submitted a shareholder proposal (the "Proposal") to the Company. The Proponent has asked me to respond to the letter dated January 15, 2022 ("Company Letter") that Lillian Brown ("Company Counsel") sent to the Securities and Exchange Commission (the "SEC"). In that letter, the Company contends the Proposal may be excluded from the Company's 2022 proxy statement. A copy of the Proposal is attached to this letter.

Based on the Proposal, as well as the letter the Company sent, we respectfully submit that the Proposal must be included in the Company's 2022 proxy materials and that it is not excludable under Rule 14a-8. A copy of this letter is being emailed concurrently to Company Counsel.

SUMMARY

The Proposal requests a study of how the Company's voting and engagement policies, which focus solely on individual corporation materiality to the exclusion of capital markets materiality, affect the majority of the Company's clients and shareholders, who rely primarily on overall stock market performance for their returns, rather than on the returns of individual companies. The Company asserts that the Proposal is excludable (1) under Rule 14a-8(i)(3) for being vague and misleading, (2) under Rule 14a-8(i)(2) and Rule 14a-8(i)(6) because implementing the Proposal would be illegal under both state and federal law and thus beyond its authority to implement, (3) under Rule 14a-8(i)(10), because it has been substantially implemented, and (4) under Rule 14a-8(i)(7), because it relates to the Company's ordinary business.

According to the "kettle logic"[1] of the Company Letter, then, the following three things are true: the Proposal cannot be understood, the Proposal can be understood well enough to know that it would be illegal to implement, and the Company has implemented the illegal Proposal. This contradictory tangle of arguments results from a clear misconstruction of the Proposal, as discussed below.

ANALYSIS

The proposal is as follows:

> **RESOLVED**, *shareholders ask that the board report on (1) how the majority of its clients and shareholders—for whom overall stock-market performance is the primary determinant of financial returns—are affected by Company policies that account for the effect of social and environmental issues on portfolio companies' financial performance, but not for the effect that portfolio company activities have on overall stock-market performance through their impacts on social and environmental systems and (2) whether its clients and shareholders would be better served by the adoption of asset management policies that directly accounted for the impact that portfolio companies have on the global economy.*

1. **The Proposal asks the Company to report whether its policies to maximize individual portfolio companies' value harm its clients; this request is neither illegal nor outside the Company's authority, and thus should not be excluded under Rules 14a-8(i)(2) or (6)**

A. The proposal does not propose subordinating beneficiaries' interests to any other interests.

Much of the Company Letter springs from the false idea that the Proposal might require the Company to put any interests before those of its clients. The Company Letter works from this conditional claim:

> *This proposed course of action fundamentally conflicts with SSGA's obligations under law and regulation, **to the extent it suggests SSGA can or should**, in its engagement and voting activities on behalf of clients, place the interests of the "global commons" before, or even on par with, the direct and more immediate economic interests of its clients absent direction from those clients to do so. (Emphasis added).*

The Company's argument under clauses (2) and (6) rests on an assumption that the Proposal asks that the Company deprioritize its clients, but as the emphasized language shows, the Company does not even have sufficient confidence in its argument to assert that the Proposal would require such deprioritization.

[1] Slavoj Zizek, IRAQ: THE BORROWED KETTLE ("In order to render the strange logic of dreams, Freud quoted the old joke about the borrowed kettle: (1) I never borrowed a kettle from you, (2) I returned it to you unbroken, (3) the kettle was already broken when I got it from you. Such an enumeration of inconsistent arguments, of course, confirms exactly what it attempts to deny—that I returned a broken kettle to you.")

If the Company cannot bring itself to state affirmatively that the Proposal involves conduct that would violate law, and thus invoke clauses (1) and (2), it should not ask the Staff to reach that conclusion themselves. For this reason alone, the argument under these two clauses should fail.

In any event, it is clear for several reasons that the Proposal is consistent with law. First, the Proposal only suggests a report, and not any action at all. More to the point, however, is the nature of the requested report, which is disclosure of how ignoring the global commons will "affect the majority of its clients and shareholders." Rather than suggesting that the interests of Company clients be subjugated, the Proposal asks for a report on whether the Company is harming its clients with its current policy of maximizing shareholder value at individual companies.[2] In other words, the Proposal seeks to determine whether the Company is subjugating its clients' interests to those of individual portfolio companies. There is nothing illegal in determining whether the clients' interests are being subordinated to the interests of companies in the clients' portfolios.

The Company letter cites a number of fiduciary standards to which it is subject; in each case, the Proposal complies with the standard:

- *It must "place its client's interest before its own or the interests of others."* The Proposal is in keeping with this standard as it seeks to discover whether the Company is harming the interests of its clients, who rely not on individual company performance, but on market performance.[3]

- *"[T]o satisfy its fiduciary duty in making any voting determination, the investment adviser must make the determination in the best interests of the client."* As the quotes in the margin show,[4] the Company's own description of its voting and engagement strategies focuses first on individual companies' interests, apparently believing that will best serve its clients. The goal of the Proposal is to study whether those companies' interests are entirely aligned with clients' interests.

- *The Company must "administer the trust solely in the interest of the beneficiaries."* Again, the Proposal asks that the Company determine whether its current policies, which focus on individual portfolio companies, protect its clients/beneficiaries' interests when individual companies' value-maximizing conduct harms those investors' portfolios.

The Company Letter cites additional expressions of the fiduciary standard to which the Company is held as an asset manager, but they all boil down to the same point: it must put its clients' interests first. Because the Proposal is designed to further those clients' interests, the Company Letter can only make the illegality argument by proposing a hypothetical the Proposal does not even remotely suggest: "if [the

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[2] *Global Proxy Voting and Engagement Policies* (March 2020) available at https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-principle.pdf ("We will generally support transactions that maximize shareholder value" and "Proposals that are in the best interests of shareholders, demonstrated by enhancing share value or improving the effectiveness of the company's operations, will be supported.")

[3] To be clear, the Proposal only requests a report; if that report were to show that, contrary to the Proponent's concern, the Company's current policies in fact were in the best interest of beneficiaries, no law would be broken.

[4] *Supra,* n.2; *see also id.* ("When voting, we fundamentally consider whether the adoption of a shareholder proposal addressing a material sustainability issue would promote long-term shareholder value.")

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Company] engaged portfolio companies in discussions regarding the interests of the 'global commons' ahead of the direct interests of the beneficiaries, it would be in violation of its first duty of loyalty."

Of course it would. But the Proposal never suggests putting the global commons "ahead of beneficiaries." Instead, it asks the Company to investigate whether the Company's failure to engage with companies directly in relation to their impact on the global commons will harm those beneficiaries. As discussed in the next section, this is a critical concern.

B. The Company's focus on maximizing the value of individual companies risks harming investors who hold diversified portfolios

i. Diversification and the importance of overall market return

Sound investing practice mandates that fiduciaries adequately diversify their portfolios.[5] This allows investors to reap the increased returns available from risky securities while greatly reducing their overall risk. This insight defines Modern Portfolio Theory.[6] This core principle is reflected in ERISA (the source of some of the standards cited in the Company Letter), which requires plan fiduciaries to act prudently "by diversifying the investments of the plan."[7] The late John Bogle, founder of one of the world's largest mutual funds companies, summarized the wisdom of a diversified investment strategy: "Don't look for the needle in the haystack; instead, buy the haystack."[8]

Thus, accepted investment theory and fiduciary standards require adequate diversification. However, once a portfolio is diversified, the most important factor determining return will not be how the companies in that portfolio perform relative to other companies ("alpha"), but rather how the market performs as a whole ("beta"). As one work describes this, "[a]ccording to widely accepted research, alpha is about one-tenth as important as beta [and] drives some 91 percent of the average portfolio's return."[9]

a. Beta and ESG

This distinction between individual company returns and overall market return is critical because shareholder return at an individual company does not reflect its "externalized" costs, i.e., those costs it generates but does not pay. Externalized costs may include harmful emissions, resource depletion, and the instability and lost opportunities caused by inequality. Diversified shareholders (including the Company's clients) absorb the collective costs of such externalities because they degrade and endanger the stable, healthy systems upon which corporate financial returns depend. Thus, while individual companies can "efficiently" externalize costs from their own narrow perspective in order to "maximize shareholder value" (as the Company's Governance Principles contemplate), diversified shareholders pay

[5] *See generally*, Burton G. Malkiel, A Random Walk Down Wall Street (2015)
[6] *Id.*
[7] 29 USC Section 404(a)(1)(C).
[8] John C. Bogle, The Little Book of Common Sense Investing: The Only Way to Guarantee your Fair Share of the Stock Market, 86 (2007).
[9] Stephen Davis, Jon Lukomnik and David Pitt-Watson, *What They Do with Your Money* (2016).

these costs through a lowered return on their portfolios.[10] Stewardship of the externalizing companies reduces externalities (even profitable ones) and provides an opportunity to increase portfolio-level return.

Thus, if a fiduciary such as the Company focuses only on the effect that environmental, social, and governance ("ESG") behaviors have on the performance of companies whose activity is at issue, and not on the external costs the behaviors create, the fiduciary may be sacrificing the 91 percent of potential return attributed to market return in order to optimize the 9 percent that comes from outperformance. Externalized social and environmental costs can play an outsized role in that 91 percent. A recent study (the "Schroders Report") by a major asset manager discerned that 55 percent of the profits attributed to publicly listed companies globally were consumed by external costs the rest of the economy absorbed:

> *In total, the earnings listed companies generate for shareholders currently total US$4.1 trillion, which would fall by 55% to US$1.9 trillion if those social and environmental impacts crystallised as financial costs. One third of companies would become loss-making.*[11]

But those costs will crystalize: as the economy absorbs them, growth and productivity will fall, leading to decreasing overall market returns.[12] The PRI, an investor initiative whose members (including the Company) have $89 trillion in assets under management, recently explained (in the "PRI Report") how an individual company's pursuit of profit can reduce the return of diversified owners even if the company is included in their portfolio, highlighting problems that arise from optimizing for too narrow a scope:

> *A company strengthening its position by externalising costs onto others. The net result for the [diversified] investor can be negative when the costs across the rest of the portfolio (or market/economy) outweigh the gains to the company;*
>
> *A company or sector securing regulation that favours its interests over others. This can impair broader economic returns when such regulation*

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[10] *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers,* Robert G. Hansen and John R. Lott, JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS, 1996, vol. 31, issue 1, 43-68 (abstract) ("If shareholders own diversified portfolios, and if companies impose externalities on one another, shareholders do not want value maximization to be corporate policy. Instead, shareholders want companies to maximize portfolio values. This occurs when firms internalize between-firm externalities.")

[11] *Foresight,* Schroders, *available at* https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf

[12] On the economic cost of climate change, *see, e.g.,* Swiss Re Institute, The Economics of Climate Change: *No Action Not an Option* (April 2021) (Up to 9.7% loss of global GDP by mid-century if temperature increase is consistent with current trajectory rather than if goal of the Paris Accords is met) available at https://www.swissre.com/dam/jcr:e73ee7c3-7f83-4c17-a2b8-8ef23a8d3312/swiss-re-institute-expertise-publication-economics-of-climate-change.pdf ; as to the economic cost of inequality, *see, e.g., Dana Peterson and Catherine Mann, Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.* (2020) (closing racial gaps could lead to $5 trillion in additional GDP over next five years) available at https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D; *Inequality is Slowing U.S. Economic Growth,* Economic Policy Institute (December 12, 2017) (Inequality reduces demand by 2-4% annually) available at https://www.epi.org/publication/secular-stagnation/; Heather Boushey, Unbound: How Inequality Constricts Our Economy and What We Can Do about It (2019).

> *hinders the development of other, more economic companies or sectors;*
>
> *A company or sector successfully exploiting common environmental, social or institutional assets. Notwithstanding greater harm to societies, economies, and markets on which investment returns depend, the benefits to the company or sector can be large enough to incentivise and enable them to overpower any defence of common assets by others.*[13]

b. The Need for System Stewardship

Given the critical importance of overall market return, and the danger to that return from company activities that damage social and environmental systems, the Company's clients/beneficiaries clearly need protection from individual portfolio companies that improve their own performance in ways that damage overall market return. To protect the interest of plans and beneficiaries, plan fiduciaries must consider whether they can effectively engage and vote to limit or eliminate conduct that threatens the social and economic systems on which investors with diversified portfolios rely.

Because investors collectively have the power to vote against the management at companies that endanger systems that are critical to all companies, they have the power to steward companies away from negative-sum activities and toward authentically productive profits. The PRI report cited above reaches the conclusion that collective investor action to manage social and environmental systems is needed to satisfy investment trustees' fiduciary duty:

> *Systemic issues require a deliberate focus on and prioritisation of outcomes at the economy or society-wide scale. This means stewardship that is less focused on the risks and returns of individual holdings, and more on addressing systemic or 'beta' issues such as climate change and corruption. It means prioritising the long-term, absolute returns for universal owners, including real-term financial and welfare outcomes for beneficiaries more broadly.*[14]

Thus, the Proposal simply asks the Company to investigate an issue raised by two investor alliances of which it is a member. Providing the requested report would not violate state or federal law and is fully within the Company's authority.

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[13]PRI, *Active Ownership 2.0: The Evolution Stewardship Urgently Needs,* available at https://www.unpri.org/download?ac=9721. *See also Addressing Climate as a Systemic Risk: A call to action for U.S. financial regulators, available at* https://www.ceres.org/resources/reports/addressing-climate-systemic-risk ("The SEC should make clear that consideration of material environmental, social and governance (ESG) risk factors, such as climate change, to portfolio value is consistent with investor fiduciary duty."). Ceres is a non-profit organization with a network of investors with more than $29 trillion under management. The Company is a member of its Investor Network.

[14] *Supra,* n.13 (emphasis added.)

2. The Proposal is neither misleading nor vague and is therefore not excludable pursuant to Rule 14a-8(i)(3)

A. It is not misleading to point out that overall stock market performance is the primary determinant of return for most investors

The Company Letter claims the Proposal falsely states that for a majority of the Company's shareholders and clients, overall stock market performance is the primary determinant of financial returns. However, the Company Letter then says that the statement is only untrue with respect to the particular client accounts, not clients themselves:

> *In every case, SSGA is called upon to manage the account prudently, loyally and to seek to maximize the investment return of that account consistent with the investment strategy selected by the client and in compliance with the investment guidelines agreed to with the client. As it relates to the account which SSGA has been hired to manage, "overall stock market performance," however that may be defined, is likely not the "primary determinant of financial returns." <u>As it relates to a client's overall investment portfolio such an assertion may or may not be true</u>, but SSGA's fiduciary obligation to the client relates to the account which it has been hired to manage and it must not engage with portfolio companies in a manner that harms the investment objective of that account. (Emphasis added).*

The Company Letter is thus arguing that the Company manages its clients' individual accounts in a manner that maximizes the accounts' return, even if doing so harms the clients of those accounts. This distinction—between the interests of the account and those of the account holder—is exactly the distinction the Proposal is asking the Company to investigate: does its focus on individual companies and accounts hurt its own clients? This admission against interest simply confirms the concern that motivates the Proposal—that maximizing returns at individual companies can hurt clients.

Moreover, while the Company Letter refers to a number of different strategies investors may pursue as indicating that some investors may not rely on overall stock market performance, there is a significant literature that shows that over the long run, even the individual accounts and the different strategies that the Company Letter describes will fare more poorly if asset managers and other fiduciaries do not focus on overall market performance. This is for the obvious reason that if the "pie" investors share is larger, the average piece will be bigger.

Indeed, it is intuitive that a productive economy—and consequent GDP growth—is built upon healthy social and environmental systems that the Proposal addresses. It would be difficult to do business in a society that lacked trust, cohesion, order, and a shared sense of norms. By the same token, where the natural systems upon which we depend are failing, it is difficult to grow the economy.

Recent economic literature reinforces this intuition. The World Economic Forum estimates that more than half the world's GDP is dependent on nature and the services it provides:

> *Our research shows that $44 trillion of economic value generation – more than half of the world's total GDP – is moderately or highly dependent on nature and its services, and therefore exposed to risks from nature loss.*[15]

A 2011 study estimated the value of services the earth's ecosystem provides at $125 trillion.[16] The same article estimated that land use had reduced the value of eco-services by $4.3 trillion to $20.2 trillion per year between 1997 and 2011.[17] The Dasgupta Review, a 2021 study of the economics of biodiversity commissioned by the United Kingdom Treasury, explained the nature of this dependence:

> *We rely on Nature to provide us with food, water and shelter; regulate our climate and disease; maintain nutrient cycles and oxygen production; and provide us with spiritual fulfilment and opportunities for recreation and recuperation, which can enhance our health and well-being. We also use the planet as a sink for our waste products, such as carbon dioxide, plastics and other forms of waste, including pollution. Nature is therefore an asset, just as produced capital (roads, buildings and factories) and human capital (health, knowledge and skills) are assets.*[18]

Social systems support productivity just as do environmental systems: "a lack of social development, including poverty, inequality and weak rule of law, can hamper business operations and growth."[19] Examples of specific social and environmental risks that threaten GDP are included in the following section.

The relationship between GDP, social and environmental systems, and market returns means the centrality of beta cannot be avoided simply by picking stocks that outperform. Diversified investors cannot avoid certain common risks almost all companies face. These are the risks to the social and environmental systems in which the economy is embedded. One recent work explained that these systematic risks inevitably "swamp" any alpha strategy:

> *It is not that alpha does not matter to an investor (although investors only want positive alpha, which is impossible on a total market basis), but that* ***the impact of the market return driven by systematic risk swamps***

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[15] *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy,* New Nature Economy, World Economic Forum (2020), available at https://www3.weforum.org/docs/WEF_New_Nature_Economy_Report_2020.pdf.
[16] Robert Costanza, et al, *Changes in the Global Value of Ecosystem Services,* 26 Global Environmental Change 152 (2014).
[17] *Id.*
[18] *The Economics of Biodiversity: The Dasgupta Review; Headline Messages* (2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957629/Dasgupta_Review_-_Headline_Messages.pdf.
[19] United Nations Global Compact, *Do Business in Ways that Benefit Society and Protect People,* available at https://www.unglobalcompact.org/what-is-gc/our-work/social.

> ***virtually any possible scenario created by skillful analysis or trading or portfolio construction***.[20]

B. *Recent scholarship reinforces the need for the Company to address overall market returns to best serve its clients*

The Company Letter argues the Proposal is misleading because the Company has no "reasonable ability" to engage in the systemic stewardship the Proposal contemplates. This unsupported assertion flatly contradicts recent scholarship. A new report from the international law firm Freshfields Bruckhaus Deringer (the "Freshfields Report") explains how the reality of externalized costs reverberates in the fiduciary duty of investment trustees across jurisdictions:

> *In recent years investors have increasingly focused on what must be done to protect the value of their portfolios from system-wide risks created by the declining sustainability of various aspects of the natural or social environment. System-wide risks are the sort of risks that cannot be mitigated simply by diversifying the investments in a portfolio. They threaten the functioning of the economic, financial and wider systems on which investment performance relies. If risks of this sort materialised, they would therefore damage the performance of a portfolio as a whole and all portfolios exposed to those systems.*[21]

Thus, contrary to the Company's assertion that it is misleading to assume asset managers should have a role in stewarding portfolio companies' impact on social and environmental systems, there is a growing recognition they have a duty to do so. Because investors have the power to vote on matters at investees that endanger systems critical to all companies, they have the power—and the responsibility—to steward companies away from such practices. The PRI Report described the investor action necessary to manage social and environmental systems:

> *Systemic issues require a deliberate focus on and prioritisation of outcomes at the economy or society-wide scale. This means stewardship that is less focused on the risks and returns of individual holdings, and more on addressing systemic or 'beta' issues such as climate change and corruption. It means prioritising the long-term, absolute returns for universal owners, including real-term financial and welfare outcomes for beneficiaries more broadly.* [22]

[20] Jon Lukomnik & James P. Hawley, Moving beyond Modern Portfolio Theory: Investing that Matters, Chapter 5, Routledge (April 30 2021) (emphasis added).
[21] *A Legal Framework for Impact: Sustainability Impact in Investor Decision-Making* (2021). The report, which ran to 558 pages, studied the law of jurisdictions significant to global capital markets, including the United States, and the conclusions cited in this comment letter extend to U.S., trustee law.
[22] *Supra*, n.13.

In a similar vein, the Freshfields Report suggests alpha-oriented strategies (e.g., ESG integration) are of limited value to diversified shareholders, and that system stewardship is the best way for investors to improve performance:

> *The more diversified a portfolio, the less logical it may be to engage in stewardship to secure enterprise specific value protection or enhancement. Diversification is specifically intended to minimise idiosyncratic impacts on portfolio performance…*
>
> *Yet diversified portfolios remain exposed to nondiversifiable risks, for example where declining environmental or social sustainability undermines the performance of whole markets or sectors… Indeed, for investors who are likely to hold diversified portfolios in the long-term, the question is particularly pressing since these are likely to be the main ways in which they may be able to make a difference.*[23]

For similar reasons, Professor John Coffee, the Adolf A. Berle Professor of Law at Columbia University Law School and Director of its Center on Corporate Governance, predicted system stewardship would surpass ESG integration in a recent law review article:

> *This latter form of activism [system stewardship] is less interested in whether the target firm's stock price rises (or falls) than in whether the activist investor's engagement with the target causes the total value of this investor's portfolio to rise (which means that the gains to the other stocks in the portfolio exceed any loss to the target stock). This recognition that change at one firm can affect the value of other firms in the portfolio implies a new goal for activism: namely, to engineer a net gain for the portfolio, possibly by reducing "negative externalities" that one firm is imposing on other firms in the investor's portfolio.*[24]

Another legal scholar recently contrasted the legal preclusion of ends activism with the need for system stewardship in fulfilling a fiduciary's obligations:

> *But engagements aimed at reducing systematic risk [system stewardship] do not run afoul of the "exclusive benefit" criterion; rather they are in service to it.* ***Indeed, pension fund managers who are not thinking about the systematic dimension in their engagements are falling short of the objective of maximizing risk-adjusted returns.***[25]

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[23] *Id.*
[24] Coffee, John C., The Coming Shift in Shareholder Activism: From "Firm-Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable them), p.2 (August 26, 2021). Available at SSRN: https://ssrn.com/abstract=3908163 or http://dx.doi.org/10.2139/ssrn.3908163
[25] Jeffrey N. Gordon, *Systematic Stewardship,* ECGI Working Paper No. 566/2021, p.3 (February 2021) (emphasis added).

All these sources follow an undeniable logic: given the critical importance of overall market return, and the danger to that return from corporate activity that damages social and environmental systems, plan fiduciaries must protect plans from individual companies that focus on their own performance in ways that damage overall market return. Far from being misleading, the idea at the heart of the Proposal represents a growing consensus.

C. The Proposal is not vague

The Company's argument that the Proposal is vague grasps at straws to try to find vagueness in a clearly written proposal. As the Company Letter correctly states: "The Staff consistently has taken the position that vague and indefinite shareholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because 'neither the [share]holders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.'" In contrast to this standard, the Proposal is quite clear.

First, the Company argues, "[t]he 'global commons' is undefined in the Proposal and is an inherently vague and indefinite term that could implicate a myriad of social, economic, political or other considerations without providing any detail as to what is specifically contemplated" and "[t]he Proposal's request for information about corporate policies that harm the systems that support a healthy global economy is vague and indefinite."

But read in context, the references to the global commons and particular systems are quite clear: the Proposal is referring to public goods and common resources that support the systems critical to a healthy economy and, in turn, a healthy securities market. The Proposal and supporting statement explain how shareholder engagement based on preserving market value would operate—by preserving common goods upon which all companies depend. The supporting statement also explains the conflict that can arise between individual companies maximizing financial return and such preservation. What the Company Letter calls "vague" is actually just "unaddressed," which is the very point the Proponent wants the Company to remedy. The Proposal asks the Company to investigate and disclose just what type of behavior by the companies in its portfolios may be harming the commons and its clients.

There is no question that compilation of the report described in the Proposal will require discretion and business judgment on the Company's part because it will have to make decisions as to the best methodologies to follow, but that does not make the request vague or misleading. The Proposal presents a conceptually simple request: that the Company investigate whether its focus on maximizing shareholder value of portfolio companies while ignoring the systemic effects of their externalities harms its clients and shareholders. A request to report on these issues may be difficult and perhaps uncomfortable for the Company's management, but it there is nothing vague or misleading about it.

3. The Proposal does not relate to ordinary business and thus cannot be excluded under Section 14a-8(i)(7)

The Proposal is not excludable pursuant to Rule 14a-8(i)(7) because it is solely directed to a significant social policy issue the Company's ongoing business poses, namely the question of how corporations

account for the systemic and other costs they impose on other companies when they prioritize the shareholder returns and ignore the costs they externalize. These externalized costs harm the economy and diversified investors such as the Company's clients and shareholders. The Company Letter fails to acknowledge that this policy issue is at the heart of the Proposal, and therefore fails to address the key question of whether that issue transcends the Company's ordinary business.

A. Commission and Staff guidance

The Commission has indicated that a shareholder proposal that might otherwise be excludable as relating to ordinary business under Rule 14a-8(i)(7) may not be excludable if it raises significant social policy issues. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, (May 21, 1998). In explaining ordinary business, the Release noted:

> *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.***

Staff Legal Bulletin 14A (July 12, 2002) noted public debate was indicative of the presence of a significant policy issue:

> *The Division has noted many times that the presence of widespread public debate regarding an issue is among the factors to be considered in determining whether proposals concerning that issue "transcend the day-to-day business matters."*[26]

Staff Legal Bulletin 14E (October 27, 2009) addressed additional relevant considerations. Under the bulletin guidance, a proposal that requests analysis of risks to investors does not necessarily render the proposal excludable. Instead, the Staff suggested that a key question is whether the particular risk that is being analyzed involves a significant policy issue:

> *On a going-forward basis, rather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk.* ***The fact that a proposal would require an***

[26] https://www.sec.gov/interps/legal/cfslb14a.htm#P36_4602

> ***evaluation of risk will not be dispositive of whether the proposal may be excluded under Rule 14a-8(i)(7).*** *Instead, similar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document — where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business — we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company****. In those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7)*** *as long as a sufficient nexus exists between the nature of the proposal and the company. Conversely, in those cases in which a proposal's underlying subject matter involves an ordinary business matter to the company, the proposal generally will be excludable under Rule 14a-8(i)(7). In determining whether the subject matter raises significant policy issues and has a sufficient nexus to the company, as described above, we will apply the same standards that we apply to other types of proposals under Rule 14a-8(i)(7).*

The Staff has also stated that shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives.[27]

As SLB E made clear, the Staff at the time required that a proposal permitted under the significant policy exception was required to have a "nexus" to the Company's business. The Staff recently announced its intention to refocus its analysis of the significant social policy exception on the policy in question, and not the nexus between the policy issue and the company. Staff Legal Bulletin No. 14L (November 3, 2021):

> *Going forward, the staff will 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, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues before other shareholders by means of the company's proxy statement, while also recognizing the board's authority over most day-to-day business matters.* ***For these reasons, staff will no longer focus on determining the***

[27] JD Supra, *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) ("In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.")

> ***nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.***
>
> *Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7).* ***For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.***

In addition to eliminating the nexus test, SLB L also limited the analysis as to whether a proposal related to a significant policy issue would "micromanage" the company:

> *The Commission has stated that the policy underlying the ordinary business exception rests on two central considerations. The first relates to the proposal's subject matter; the second relates to the degree to which the proposal "micromanages" the company "by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."[6] The Commission clarified in the 1998 Release that specific methods, timelines, or detail do not necessarily amount to micromanagement and are not dispositive of excludability.*
>
> *Consistent with Commission guidance, the staff will take a measured approach to evaluating companies' micromanagement arguments – recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement. Instead, we will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management. We would expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input. …*
>
> *Additionally, in order to assess whether a proposal probes matters "too complex" for shareholders, as a group, to make an informed judgment, we may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis*

> *on the topic. …*
>
> *This approach is consistent with the Commission's views on the ordinary business exclusion, which is designed to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters.*

As one commentator described the change:

> *The new bulletin resets the interpretation of micromanagement to focus on whether the granularity of the proposal is consistent with shareholders' capacity to understand and deliberate; i.e., proponents are expected to tailor proposals to a level of inquiry that is consistent with the current state of investor discourse and knowledge.*[28]

As the quoted language from SLB L makes clear, the elimination of the extra hurdles would apply even if the proposal related to otherwise ordinary business. Thus, an otherwise eligible proposal that relates to ordinary business can no longer be excluded if those issues have "a broad societal impact" and are consistent with the current state of investor discourse and knowledge.

The Company Letter points out that the Staff concurred in the exclusion of a proposal that was similar to the Proposal in the prior proxy season. The clarifications and guidance provided in SLB L should remove any concern that the issue the Proposal raises satisfies the standard of being a significant social policy with broad societal impact and that the proposed report is appropriate to the "sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic," as demonstrated below. See Johnson & Johnson (February 8, 2022) (declining to exclude as ordinary business a proposal seeking a report on external costs arising from the company's policies concerning protection of COVID-19 technology and the effect of such costs on the company's diversified shareholders; the company had argued that "the macroeconomic effect of… intellectual property decisions… is not a significant policy issue.")

The report on external risks and costs the Proposal requests relates to an underlying issue with broad societal impact: the appropriate way for the Company to address the social costs companies in its portfolio are likely to externalize if they choose to optimize their own financial returns. The social costs created by companies is part of the public discourse discussed below.

B. Significant policy issue: externalizing costs to stakeholders

The Proposal is unambiguous about the underlying policy issue: the Company may be stewarding portfolio companies in a manner that maximizes individual company profits but harms society (and ultimately the diversified portfolios of most of its clients and shareholders). The supporting statement details how focus on individual company profitability may fail to address social and environmental

[28] Sanford Lewis, *SEC Resets the Shareholder Proposal Process,* Harvard Law School Forum on Corporate Governance (December 23, 2021).

practices that harm the global economy, and ultimately the return of diversified portfolios. This "trade" of company wealth for social harm has broad societal impact and has been the subject of legislation, regulation, and public debate, as shown below.

i. Corporate law and shareholder primacy

U.S. corporate directors have long focused their efforts on improving the financial return of their corporation to its shareholders. While there has been a fierce ongoing debate as to whether corporations should in fact be managed for the benefit of only shareholders or for a broader group of stakeholders,[29] the concept of shareholder primacy has dominated corporate law. This doctrine eschews consideration of a business's external costs unless those costs affect the corporation's own financial return to its shareholders. A series of Delaware court decisions cemented the place of shareholder primacy in the United States.[30]

eBay Domestic Holdings, Inc. v. Newmark[31] is a recent example of the judicial focus on shareholder wealth maximization. The court embraced shareholder primacy, finding it was a violation of the directors' fiduciary duties to make decisions primarily for the benefit of users of the corporation's platform:

> *Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form.* ***Those standards include acting to promote the value of the corporation for the benefit of its stockholders****. The "Inc." after the company name has to mean at least that. Thus,* ***I cannot accept as valid… a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders****.*[32]

The former Chief Justice of the Delaware Supreme Court has explained that the law clearly favors shareholders, stating, "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests

[29] Frederick Alexander, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2018) at 21-26.
[30] *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, the directors' duty is to maximize the cash value to shareholders, regardless of the interests of other constituencies, because there is no long term for the shareholders); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [*e.g.*, debtholders] . . . does not . . . constitute a breach of duty."); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1169, 1170 (2002) ("The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.") Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 Seattle Univ. L. Rev. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")
[31] 16 A.3d 1 (Del. Ch. 2010) (emphasis added).
[32] *Id*. at 34-35 (referring to corporate justification for shareholder rights plan meant to forestall a change in control that might threaten platform users' interests).

may be taken into consideration only as a means of promoting stockholder welfare."[33] Toward the end of the twentieth century, many jurisdictions in the United States adopted "constituency statutes," fully or partially opting out of shareholder primacy.[34] None of those states mandates stakeholder interest consideration, however.[35] Delaware, the jurisdiction in which the Company is incorporated, has not adopted such a statute.

Delaware's common law commitment to shareholder primacy has led to a reaction regarding the risk it poses to stakeholders and the public.[36] Legislatures have responded by creating an alternative: beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests. Legislatures have acted in 39 U.S. jurisdictions (including Delaware), the Canadian province of British Columbia, and the countries of Italy, Colombia, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in both houses of the U.S. Congress that would have imposed benefit corporation duties on all billion-dollar companies' directors.[37] The issue even surfaced in the most recent U.S. presidential election, as one candidate decried "the era of shareholder capitalism."[38] In response, critics argued that favoring shareholders was the best recipe for a successful economy:

> *In reality, corporations do enormous social good precisely by seeking to generate returns for shareholders.*[39]

ii. Unwinding shareholder primacy protects shareholders

Benefit corporation statutes are a legislative expression of the need to provide corporations with a basis to account for non-shareholder interests with a priority equal to that given to shareholder interests. But there is also a strong argument that shareholders themselves are better served if a corporation deprioritizes its own financial returns. Lynn Stout, a leading academic opponent of shareholder primacy, explains that evolving arguments against shareholder primacy do not rely on a zero-sum calculus that protects stakeholders to the detriment of shareholders; instead, she explains that these arguments "focus not on how shareholder primacy hurts stakeholders or society per se, but on how shareholder primacy can hurt shareholders, both individually and immediately, and collectively and over time."[40]

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[33] Leo Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law* 50 WAKE FOREST LAW REVIEW 761 (2015).
[34] Alexander, *supra n.* 3, at 135–148.
[35] *Id.*
[36] *See generally,* Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012).
[37] Copies of the legislation are available here: https://www.congress.gov/bill/116th-congress/senate-bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1 (Senate) and here: https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2 (House)
[38] *Biden says investors 'don't need me,' calls for end of 'era of shareholder capitalism,'* (CNBC) (July 9, 2020), available at https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html.
[39] Andy Pudzer, *Biden's Assault on 'Shareholder Capitalism,* (Wall Street Journal) (August 17, 2020), available at https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153.
[40] *See* n.36 at 59.

Thus, because most shareholders are also stakeholders of their corporations through their diversified portfolios, the value maximization of any individual company in their portfolio may be detrimental to their interests:

> *[F]or widely held public corporations, most shareholders are broadly diversified investors who are dependent on a stable society and environment to support all of their investments and would be financially injured if some corporations create extra profits by externalizing social and environmental costs.*[41]

The Proposal's request for an externalities report reflects this recognition that diversified shareholders' interests converge with broad social interests when it comes to corporate cost externalization. As detailed in the next subsection, policymakers have begun to incorporate this convergence into the rules that govern investment fiduciaries.

iii. Trust law

This policy issue has also appeared in recent regulatory and legislative activity relating to trustees for retirement plans and other investment advisors. The Department of Labor recently proposed a Rule that would have made it more difficult for trustees to account for environmental and social costs, but, after receiving public comments, revised the final rule in a manner that gives trustees the ability to address corporate activity that imposes the type of social costs the Proposal describes when the trustees believe those costs would affect their diversified portfolios—exactly the type of costs on which the Proposal seeks a report:

> *In addition, Final Rules should also permit stewardship that discourages portfolio companies from engaging in behaviour that harms society and the environment, and consequently the value of shareholders' diversified portfolios (For example, plan fiduciaries might vote to encourage all companies to lower their carbon footprint, not because it will necessarily increase return at each and every company, but because it will promote a strong economy and thus increase the return of their diversified portfolio).*[42]

[41] Frederick Alexander, *How to Leverage Benefit Governance*, in Katayun Jaffari and Stephen Pike, ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS (American Bar Association, forthcoming).

[42] Frederick Alexander, *The Final DOL Rules Confirm That Fiduciary Duty Includes 'Beta Activism,'* RESPONSIBLE INVESTOR (December 15, 2020) available at https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-beta-activism.

Further evidencing the widespread debate around this issue, the President of the United States suspended those Final Rules by Executive Order on Inauguration Day[43] and put a new set of Proposed Rules in their place.[44]

Moreover, in 2020 a bill was introduced in the U.S. House of Representatives that included an express finding that plan fiduciaries should consider the costs corporations in their portfolios impose on the financial system:

> *The Congress finds the following:*
>
> *Fiduciaries for retirement plans should…*
>
> *(D) consider the impact of plan investments on the stability and resilience of the financial system; …*[45]

While the bill related to costs to the financial system, rather than the full spectrum of systems that support a thriving economy, it was clearly focused on the same policy concern: costs that a company's profit-seeking activities impose on stakeholders.[46]

iv. The Business Roundtable (BRT) statement

In addition to the activity noted in the prior section regarding political and legislative activity around the issue of external costs to stakeholders, the business community—including the Company itself—has noted the importance of considering stakeholder interests other than those of shareholders. In August of 2019, the CEOs of 181 of the largest corporations in the United States signed on to the Statement on the Purpose of a Corporation (the "Statement"), emphasizing that companies should not prioritize only their own financial returns to shareholders, but should consider the interests of other stakeholders as well:

> ***Americans** deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all…*
>
> *While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We*

[43] *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, (January 20, 2021), available at https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis
[44] Proposed Rule RIN 1210-AC03, 85 FR 57272 (2021).
[45] H.R. 8959 (116th): Retirees Sustainable Investment Policies Act of 2020
[46] *See also* Frederick Alexander, Holly Ensign-Barstow, Lenore Palladino, and Andrew Kassoy, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (arguing that fiduciary duties of trustees should incorporate external costs of individual companies that harm portfolios).

> *commit to:*
>
> *Delivering value to our **customers**. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations…*
>
> *Supporting the communities in which we work. We respect the **people in our communities** and protect the environment by embracing sustainable practices across our businesses…*
>
> *Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and **our country**.*[47]

Thus, the Statement, which the Company's own CEO signed, explains exactly why the Proposal is a critical policy question: it asks the Company to report on the social costs of the practices of its portfolio companies, which fall upon "Americans," "customers," "people in our community," and "our country," the very stakeholders to whom the Company publicly committed less than two years ago.

The reaction to the Statement's issuance (as well as the number of companies signing on) in August 2019 demonstrated the policy significance of addressing external costs. One dubious commentator noted, "For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business."[48] Others noted the importance of the change, but also that it was meaningless without ending shareholder primacy:

> *Ensuring that our capitalist system is designed to create a shared and durable prosperity for all requires this culture shift. But it also requires corporations, and the investors who own them, to go beyond words and take action to upend the self-defeating doctrine of shareholder primacy.*[49]

Other commentators were worried that the Statement went too far:

> *Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril.*[50]

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[47] Available at https://opportunity.businessroundtable.org/ourcommitment/ (emphasis added).
[48] Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).
[49] Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don't Believe the Business Roundtable Until It's CEO's Actions Match Their Words,* FAST COMPANY (August 22, 2019).
[50] Karl Smith *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).

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Another writer agreed, linking the issue to the same essay by Milton Friedman:

> *The issue of which constituency – or "stakeholder" – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally) possible. That all changed on August 19, 2019.*[51]

While exploring the commitments to corporate social responsibility, the latter two articles each returned to Friedman's famous article, which stated:

> *[T]he doctrine of 'social responsibility' taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book Capitalism and Freedom, I have called it a 'fundamentally subversive doctrine' in a free society, and have said that in such a society, 'there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.*[52]

Showing that the controversy is long-lived, the 50th anniversary of the essay in 2020 set off another round of commentary.[53]

v. The Proposal addresses the policy issue of corporate cost externalization in pursuit of financial return

The outpouring of legislative activity around benefit corporations, regulatory and legislative activity around trustee obligations to consider external corporate costs, and commentary around the Statement raises a critical policy issue: should corporations continue to prioritize financial return or should they, at least in some instances, sacrifice financial return to reduce the social costs they would otherwise externalize?

The Proposal asks the Company to begin to address this question by identifying the externalized costs of companies in its portfolios, and how those costs affect its own clients and shareholders. An

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51 Christopher Carosa *Did Business Roundtable Just Break A Fiduciary Oath?*, FiduciaryNews.com. August 27, 2019, available at http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/.

[52] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (magazine).

[53] See, e.g., *Friedman 50 Years later*, PROMARKET (collecting 27 essays about Friedman's article and its legacy) (Stigler Center for the Study of the Economy and the State).

understanding of the nature of these costs, even if imperfect, can inform the process of addressing whether and where excessive external costs are being generated, and whether the Company could address these costs through changed stewardship practices.

This question is of great moment. The Schroders Report determined that publicly listed companies imposed social and environmental costs on the economy with a value of $2.2 trillion annually—more than 2.5 percent of global GDP and more than half the profits those companies earned.[54] These costs have many sources, including pollution, water withdrawal, climate change, and employee stress. The study shows exactly the areas where corporations are likely to ignore stakeholder interests, to the detriment of the global economy. The questions the Proposal raises are directly responsive to this problematic paradigm, which constitutes a significant policy issue. See Johnson & Johnson 2022.

Thus, the Proposal's request for a report on how the Company externalizes certain social costs and risks addresses the significant policy issue of whether corporations should account for stakeholder interests and is therefore not excludable for purposes of Rule 14a-8(i)(7).

vi. The Proposal does not attempt to micromanage the Company

The Company Letter claims the Proposal would micromanage the Company and should thus be excluded even though it relates to a significant policy issue. However, the Proposal simply asks the Company to investigate whether it is harming its clients and shareholders by focusing on individual company value maximization and ignoring the external costs such conduct creates. The Proposal prescribes neither a method for conducting the investigation nor the proper remedy. Instead, as is completely appropriate, the Proposal leaves the details of the report in the hands of the board and management, whose detailed understanding of the business will afford them the ability to design this important task.[55]

Effecting the Proposal will leave problem-solving firmly in the board and management's hands—it does not address any particular product, service, or decision. Instead, it asks the Company, through disclosure, to address a significant policy issue by providing its shareholders with sufficient context to understand how the Company's business fits into the policy debate around corporate responsibility to stakeholders.

4. The Proposal has not been substantially implemented and thus should not be excluded under Rule 14a-8(i)(10)

As is made clear throughout this letter, the Company Letter fails to acknowledge the simple distinction the PRI Report makes: the difference between the effects social and environmental issues have on

[54] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf

[55] Once again, the internal inconsistency of the Company Letter is jarring: in Section B.2, it asks that the Proposal be excluded for using "an inherently vague and indefinite term that could implicate a myriad of social, economic, political or other considerations without providing any detail to what is specifically contemplated" and for not suggesting "specific considerations or metrics to evaluate potential harm to the economy," while in Section B.3, the Company Letter requests exclusion because the Proposal "seeks to dictate the standards… without affording [the Company] sufficient flexibility or discretion in addressing the complex matter." One is reminded of the diner who complained the food was inedible and the portions too small.

companies (including on companies composing an entire industry) and the effect companies have on society and the environment. The Proposal is concerned entirely with the latter:

> *As manager for more than $3 trillion in assets, the Company's stewardship activities—engaging with portfolio companies and voting their shares—could significantly improve overall market performance by stewarding companies away from practices that degrade the global commons, even when those practices are profitable to the company in question.*

In Exhibit B, the Company provides more than five pages of internal material that purports to show the Proposal has been substantially implemented. But none of that material suggests the Company has considered the issue that is the subject of the Proposal: whether its clients would benefit if it were to steward companies in a manner that required them to sacrifice individual company financial return to protect society and the environment. Indeed, the material confirms the Company's stewardship emphasizes individual company performance. For example, the Company focuses on:

- "Thematic environmental, social, and governance (ESG) issues that the team identifies as potential risk facing investee companies," rather than on risks investee companies create.
- "[S]ectors that are meaningfully impacted by wider systemic challenges we observe in the market," rather than on the impact of those sectors on the systemic challenges.

The Exhibit B material includes multiple references to the "R-Factor," the Company's proprietary system for "building sustainable companies." But this system illustrates that the Company's environmental and social programs do not focus on the core idea of the proposal.[56] R-Factor relies on materiality models that stretch across industries but are still focused on companies, not systems. It leverages "widely accepted, transparent materiality frameworks from the Sustainability Accounting Standards Board (SASB) and corporate governance codes to generate a unique ESG score for listed companies."[57] The reliance on SASB as the primary determinant of materiality demonstrates the Company's failure to consider companies' social and environmental impact beyond the limited effect that impact has on the company itself. SASB is a reporting framework that establishes standards for reporting on social and environmental issues, but determines the materiality of such issues solely by reference to their effects on the reporting company's financial performance:

> *The SASB Standards… focus exclusively on enabling companies to identify the sub-set of sustainability information that is material for enterprise value creation.*[58]

[56] *R-Factor™ — A Roadmap to Build Sustainable Companies*, available at https://www.ssga.com/us/en/institutional/ic/capabilities/esg/data-scoring/r-factor-transparent-esg-scoring.
[57] *Id.*
[58] Statement of Intent to Work Together Towards Comprehensive Corporate Reporting (September 2020) available at https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf.

The R-Factor focus on systemic impacts on companies rather than the inverse is consistent with statements from the Company's Proxy Voting Guidelines that also focus on individual companies:

> *At State Street Global Advisors, we take our fiduciary duties as an asset manager very seriously…* ***The underlying goal is to maximize shareholder value****…*
>
> *Proposals that are in the best interests of shareholders,* ***demonstrated by enhancing share value or improving the effectiveness of the company's operations****, will be supported.*[59]

None of the material provided by the Company suggests it has investigated the effect individual companies in its portfolios have on other portfolio companies, which is the issue at the heart of the Proposal.[60] The Company has not even partially implemented the Proposal, and it should not be excluded under Rule 14a-8(i)(10).

CONCLUSION

The Company's inconsistent and contradictory arguments provide no basis for the conclusion that the Proposal is excludable from the 2022 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff deny the Company's no-action letter request. If you have any questions, please contact me at rick@theshareholdercommons.com or 302-593-0917.

Sincerely,

Frederick Alexander
CEO

cc: Shannon Stanley
James McRitchie

[59] Global Proxy Voting and Engagement Policies (March 2020) available at https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-principle.pdf.

[60] Indeed, it would be surprising if they had substantially implemented the Proposal since they argue that complying with the Proposal would be illegal on pp 8-12 of the Company Letter.

THE PROPOSAL

***RESOLVED**, shareholders ask that the board report on (1) how the majority of its clients and shareholders—for whom overall stock-market performance is the primary determinant of financial returns—are affected by Company policies that account for the effect of social and environmental issues on portfolio companies' financial performance, but not for the effect that portfolio company activities have on overall stock-market performance through their impacts on social and environmental systems and (2) whether its clients and shareholders would be better served by the adoption of asset management policies that directly accounted for the impact that portfolio companies have on the global economy.*

Supporting Statement:

Our Company provides investment management services and has more than $3.4 trillion in assets under management, primarily weighted toward indexed strategies. In line with Modern Portfolio Theory, most of its clients and shareholders are likely to be broadly diversified.

Such diversified investors rely on healthy social, economic, and environmental systems to support all their investments. Corporate practices that reduce GDP also decrease diversified portfolio returns.[61] As manager for more than $3 trillion in assets, the Company's stewardship activities—engaging with portfolio companies and voting their shares—could significantly improve overall market performance by stewarding companies away from practices that degrade the global commons, even when those practices are profitable to the company in question.

However, the Company will currently steward a portfolio company to improve its social and environmental practices only when doing so improves such company's own internal financial performance.[62] The Company's stewardship policy does not address social and environmental practices of a portfolio company that harm the global economy if the practices can improve that company's financial performance. This position encourages companies to externalize environmental and social costs, and is thus counter to the interests of both its clients and its shareholders.

The Proposal would encourage the Company to study whether it should explicitly account for any improved performance in the diversified portfolios of its clients that would result from individual portfolio companies ending practices that improve their internal performance but harm the systems that support a healthy global economy and overall financial market performance. Such a report would help diversified shareholders determine whether to seek a change in corporate direction so that the Company can better serve the interests of clients and shareholders.

Please vote for: Report on Asset Management Policies and Diversified Investors – Proposal 4*

[61] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; https://archive.fortune.com/magazines/fortune/fortune_archive/2001/12/10/314691/index.htm (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).
[62] https://www.ssga.com/library-content/pdfs/ic/global-Proxy-Voting-and-engagement-guidelines-es-issues.pdf

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