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

DIVISION OF
CORPORATION FINANCE

May 2, 2022

Scott Shepard
National Center for Public Policy Research

Re: BlackRock, Inc. (the "Company")
Incoming letter dated April 11, 2022

Dear Mr. Shepard:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the National Center for Public Policy Research. On April 4, 2022, we issued a no-action response expressing our informal view that the Company could exclude the Proposal from its proxy materials for its upcoming annual meeting. You have asked us to reconsider our position and present the matter to the Commission.

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

The Company has informed us that when it received your request for reconsideration and Commission review, the Company had already begun printing its 2022 proxy materials. In light of these timing considerations, we deny the requests for reconsideration and Commission review.

Sincerely,

Rule 14a-8 Review Team

cc: Marc S. Gerber
Skadden, Arps, Slate, Meagher & Flom LLP


April 11, 2022

**Via email: shareholderproposals@sec.gov**

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

**RE: Request for Reconsideration of April 4, 2022 Decision Permitting BlackRock, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8**

Dear Ladies and Gentlemen,

We at the National Center for Public Policy Research respectfully request review and reconsideration by the staff of the Division of Corporation of Finance ("the Staff") and the U.S. Securities and Exchange Commission ("the Commission") of the Staff's April 4, 2022 concurrence with the no-action request of BlackRock, Inc. ("the Company") dated January 24, 2022 ("the Request Letter") regarding our Proposal that the Company issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity (EEO) policy.

We respectfully request that the Division of Corporate Finance, under Part 202.1(d) of Title 17 of the Code of Federal Regulations, present the Staff decision to the full Commission for review.

Under Part 202.1(d) of Title 17 of the Code of Federal Regulations, the Division of Corporate Finance may request Commission review of a Division no-action response relating to Rule 14a-8 of the Exchange Act if it so determines that the request involves "matters of substantial importance and where the issues are novel or complex."

The many reasons our request easily meets this threshold are considered in detail below.

## *I. SLB 14L and subsequent precedent demonstrate that our Proposal is akin to other proceedings that have been deemed to transcend ordinary business matters.*

In response to our attempt to submit our viewpoint and ideology discrimination proposal last December for the 2022 shareholder meeting at the Company, the Staff found our Proposal omissible under Rule 14a-8(i)(7) on the grounds that our "Proposal relates to, and does not transcend, ordinary business matters." In response to the Company's attempt to omit our Proposal on those very grounds, we argued in our no-action and supplemental reply letters that our Proposal, which seeks the issuance of a report gauging the risk of not prohibiting discrimination, does not inappropriately interfere with workforce management and even if it did, it implicates such important social policy issues as to transcend ordinary business matters. Although we explained why our Proposal should not be deemed omissible under Rule 14a-8(i)(7) and SLB 14L in our reply letter, we believe the relevant history of the interpretation of that rule and guidance bears repeating for purposes of this request for reconsideration.

As we previously pointed out, the initial Rule 14a-8(i)(7) does not flesh out this provision at all. It has, though, been amended over the years. One of those amendments, made in 1998, was restated and explained in a Staff Legal Bulletin (SLB) in 2002. There the Staff explained that:

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. …[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues … would not be considered to be excludable because the proposals would transcend the day-to-day business matters.'[1]

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

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, 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.*[2]

---

[1] *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998), *available at* https://www.sec.gov/rules/final/34-40018.htm) (last accessed Jan. 3, 2022).

[2] *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added) ("*Amendments to Rules"*), *available at* https://www.sec.gov/rules/final/34-40018.htm (last accessed Jan. 3, 2022).

There matters stood until 2017. That fall, Staff issued a bulletin ("SLB 14I") recognizing that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[3] It therefore invited corporations, in arguing for an ordinary business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of those proposals.[4] Staff expanded this guidance further in 2018 ("SLB 14J") and suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff.[5] In doing so, Staff welcomed details about particulars such as whether the company had already addressed the issue in some manner, including the difference – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presented a significant policy issue for the company.[6] Additional Staff guidance appeared again in the fall of 2019 ("SLB 14K"), wherein Staff underscored the value of the 2018 "delta analysis."[7]

Then most recently, on November 3, 2021, Staff issued SLB L, reverting to the aforementioned 1998 guidance by rescinding SLB 14I, SLB 14J, and SLB 14K following "a review of staff experience applying the guidance in them."[8] Relevantly, of the rescinded bulletins, Staff said an "undue emphasis was placed on evaluating the significance of a policy issue to a particular company at the expense of whether the proposal focuses on a significant social policy…." Staff went on to explain that it was prospectively realigning 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."[9] The Staff explained that it:

---

[3] *See Staff Legal Bulletin* No. 14I (Nov. 17, 2017), *available at* https;//www.sec.gov/interps/legal/cfslb14i.htm (Feb. 20, 2020) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

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

[5] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed Jan. 3, 2022).

[6] *Id.*

[7] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals (last accessed Jan. 3, 2022).

[8] *See Staff Legal Bulletin* No. 14L (Nov. 3, 2021), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals (last accessed Jan. 3, 2022).

[9] *Id.*

> will no longer focus on determining the 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.[10]

The staff in particular emphasized that "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."[11] Our proposal raises exactly such an issue: whether current Company policies and practices raise risks as a result of a discriminatory workplace.

Several decisions by the Staff reinforce this concept. As we point out in our initial reply and our supplemental letter, our Proposal concerns issues that has been determined by the Staff as non-omissible. Our Proposal requests the Company to "issue a public report detailing the potential risks associated with omitting 'viewpoint' and 'ideology' from its written equal employment opportunity (EEO) policy." Nowhere, despite the Company's claims to the contrary, does the Proposal seek to manage the Company's workforce. It instead seeks the issuance of a report gauging the risk of not prohibiting discrimination – a request that has been consistently recognized by the Staff as an appropriate request that either does not inappropriately interfere with workforce management or implicates such important social policy issues as to transcend that concern. *See, e.g., Amazon.com, Inc.* (avail. April 7, 2021), *The Walt Disney Co.* (avail. January 19, 2022), and *Levi Strauss* (avail. Feb. 10, 2022). We just ask for a risk-management review of a failure to forbid discrimination – a report of just the sort found non-omissible in *Amazon.com*, *Disney*, *Levi Strauss,* and *CorVel Corp.* (avail. June 5, 2019) (the proposal in CorVel Corp. being the one upon which our Proposal here was explicitly modeled – is indistinguishable except for the type of discrimination on which the proposals focus).

Subsequent precedent echoes the decisions in *Amazon.com*, *Disney*, *Levi Strauss*, and *CorVel Corp.* On March 9, 2022, Staff issued a decision in *Tractor Supply Co.*, disagreeing that the company could exclude a proposal related to issues of discrimination on the basis of Rule 14a-8(i)(7). That proposal reads:

> RESOLVED, shareholders ask that the board commission and publish a report on (1) whether the Company participates in compensation and workforce practices that prioritize Company financial performance over the economic and social costs and risks created by inequality and racial and gender disparities and (2) the manner in which such costs and risks threaten returns of diversified shareholders who rely on a stable and productive economy.

---

[10] *See Staff Legal Bulletin* No. 14L (Nov. 3, 2021), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals (last accessed Jan. 3, 2022).

[11] *Id.*

In siding with proponents, the Staff determined, "In our view, the Proposal transcends ordinary business matters because it raises human capital management issues with a broad societal impact. See Staff Legal Bulletin No. 14L (Nov. 3, 2021)." Here the Staff concluded based on SLB 14L that an issue concerning discrimination (inequality and racial and gender disparities) transcended ordinary business matters. Given that SLB 14L especially privileges proposals that raise concerns of "human capital management issues with a broad societal impact,"[12] and Rule 14a-8(i)(7) challenges have been particularly disfavored when brought against proposals that raise "significant discrimination matters" for more than 20 years,[13] the conclusion reached by Staff in *Tractor Supply* is not unsurprising. What is surprising is the refusal of Staff to determine that our Proposal, which similarly raises concerns of human capital management with a broad societal impact (*i.e.,* discrimination), was not likewise found to be non-omissible. A conforming decision was reached in *CVS Health Corp.*, (avail. Mar. 18, 2022, regarding employee sick leave). In fact, it appears that since the announcement of SLB 14L in November, no other proposal raising a significant issue of human capital management – much less discrimination – was found omissible, only ours. And the Staff not only failed to explain this outlying result, but failed even to acknowledge that our Proposal raised issues not only of human capital management but of the vital and particularly non-omissible human capital management issue of discrimination.

## *II. Staff's lack of explanation for its decision leaves us no choice but to conclude that it views discrimination based on viewpoint and ideology to be less pernicious than other forms of discrimination.*

Despite the precedent outlined above, Staff has somehow determined that our Proposal uniquely concerns ordinary business. But the only distinction between our Proposal and the proposals in *Tractor Supply* (and *Levi Strauss, Disney Co.*, *Amazon.com*, and *CorVel*) is that our Proposal focuses on discrimination on the basis of *viewpoint and ideology* while those earlier proposals focused on discrimination on other, also pernicious, grounds such as "race" or "gender." In finding our discrimination-related Proposal omissible, the Staff has left no other conclusion to draw – the Staff certainly provides no basis for one – than that the Staff itself dislikes discrimination on some grounds, but doesn't mind that same discrimination on other grounds. And as there is no other way to distinguish these proposals, our Proposal should have been found omissible.

The Company failed to provide any basis for a conclusion that viewpoint or ideology discrimination is objectively less morally reprehensible, less risky to the company, or less widespread than other forms of discrimination – the analysis of which the Staff has found non-omissible. Staff similarly failed to provide any basis or evidence in its decision for its conclusion that viewpoint or ideology discrimination is any less objectionable or pernicious than other types of discrimination.

---

[12] *See Staff Legal Bulletin* No. 14L (Nov. 3, 2021), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals (last accessed Jan. 3, 2022).

[13] *Amendments to Rules*, *supra* note 3.

This is in spite of the evidence we provided in this proceeding that viewpoint and ideological discrimination *is* an issue of significant policy concern. As we explained in our March 18 supplemental letter:

> Polls in recent years demonstrate that individuals holding viewpoints other than liberal often feel discriminated against. For instance, a March 2021 *The Economist*/YouGov poll reveals that 45% of conservatives polled feel that conservatives are discriminated against "a great deal" and 34% of conservatives feel that conservatives are discriminated against "a fair amount;" only 21% feel that conservatives are not discriminated against "much" or "at all."[14] Similarly, in a 2019 Hill-HarrisX survey, "78 percent of GOP respondents said that they believe that conservatives have to deal with discriminatory behavior from other Americans," with the "plurality of Republicans, 31 percent, sa[ying] that conservatives face 'a lot' of discrimination."[15] The same survey found that "just 16 percent of Democrats said that liberals face a lot of discrimination from society."[16]
>
> Surveys show that these feelings of discrimination are particularly pervasive in certain industries. For example, a 2018 survey of tech workers show that "employees who identify as conservative or very conservative are increasingly uncomfortable at work."[17] According to the survey's results, "[t]wo-thirds or more of respondents who describe themselves as libertarian, conservative or very conservative say they feel less comfortable sharing their ideological views with colleagues…. But only 30 percent of liberals and 14 percent of people who say they are very liberal feel that way."[18] Other reporting reveals a bias in academia, wherein faculty search committees are instructed to spare no expense in finding a female or minority candidate for hire while qualified conservative and libertarian candidates have their resumes dismissed.[19] And a survey conducted by the *Crimson* at Harvard University found that only seven of Harvard's faculty members identify as "somewhat" or "very" conservative.[20] "While the University has made a concerted

---

[14] *The Economist*/YouGov Poll, Mar. 20-23, 2021, available at: https://docs.cdn.yougov.com/5v6z1pywv7/econTabReport.pdf (last accessed Mar. 10, 2022).
[15] The Hill, *Poll: Republicans more likely to see 'a lot' of discrimination against conservatives than Democrats see against liberals,* Mar. 8, 2019, available at: https://thehill.com/hilltv/what-americas-thinking/433259-poll-republicans-more-likely-to-see-a-lot-of-discrimination (last accessed Mar. 10, 2022).
[16] *Id.*
[17] Wired, *Survey Finds Conservatives Feel Out of Place in Silicon Valley*, Feb. 2, 2018, available at: https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/ (last accessed Mar. 11, 2022).
[18] *Id.*
[19] National Review, *Yes, Universities Discriminate Against Conservatives*, April 1, 2016, available at: https://www.nationalreview.com/corner/yes-universities-discriminate-against-conservative-scholars/ (last accessed Mar. 11, 2022).
[20] The Harvard Crimson, *'An Endangered Species': The Scarcity of Harvard's Conservative Faculty,* April 9, 2021, available at: https://www.thecrimson.com/article/2021/4/9/disappearance-conservative-faculty/ (last accessed Mar. 11, 2022).

> effort across the past decade to promote gender and racial diversity among its faculty, Harvard has not made any explicit attempts to bolster representation from across the ideological spectrum," reported the campus newspaper.[21]

As we therefore previously demonstrated, it is undeniable that discrimination exists throughout many facets of society against conservatives, libertarians, and effectively anyone else holding or expressing viewpoints or ideologies that don't identify as liberal.

In fact, we have been sounding the alarm over viewpoint and ideology discrimination for years, yet these concerns have been – and continue to be – ignored by the Staff. Take, for instance, our December 4, 2020 Request for Reconsideration of the decision to omit our proposal from the 2021 Walgreens Boots Alliance, Inc. shareholder meeting. In that request we outlined the growing issue of individuals being "cancelled" for expressing his or her viewpoint and how this particular issue is "at the very top of any list of the most important issues currently affecting – and threatening – our culture."[22] In that request we also discuss the rise in calls by government officials for discrimination on the basis of viewpoint and public participation.[23] As we explained, there have been calls by current and former members of congress and presidential administrations effectively seeking revenge against those individuals who have dared to participate in democracy in ways that displease them.[24]

The evidence therefore shows that viewpoint and ideology discrimination are indeed an issue of significant policy concern that transcends ordinary business. Absent any explanation by the Staff to the contrary, it appears that the only reason the Staff has refused to agree with this assessment is because it, as a matter of personal policy preference, does not object to viewpoint and ideology discrimination of the sort that too many companies have indulged in over the past few years.

## *III. The Staff decision illustrates again that its no-action review process is arbitrary & capricious, in violation of its legal obligations.*

Our organization has submitted viewpoint-nondiscrimination proposals in each of the last three shareholder seasons – each time hopeful that changes to our proposals, or to our arguments in no-action proceedings, or this year because of the changes wrought by 14L, would result in a finding of non-omissibility. Instead, each time our proposals have been found omissible by the staff without any explanation of why viewpoint non-discrimination is just fine, so that proposals that object to viewpoint discrimination fall within ordinary business; while other sorts of discrimination – no more pernicious or widespread, and arguably less harmful to company success – are not, and so are not omissible. Each year we have sought reconsideration of these

---

[21] *Id.*
[22] *See* Request for Reconsideration of November 25, 2020 Decision Permitting Walgreens Boots Alliance, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8, Section V (December 4, 2020), included herein as an attachment.
[23] *Id.* at Section IV.
[24] *Id.*

decisions. The Attachment includes instances of our requests for reconsideration from both of the last two years. In each of those requests we argued that the opacity of the no-action process and the minimal explanation by the Staff of its decisions represent an impermissibly arbitrary and capricious process, in that it both opens wide the door for bias – a door through which the Staff has fulsomely charged – and because it gives proponents no insights about how to revise future proposals to make them more acceptable to the Staff (which itself additionally creates room for Staff bias). We renew those arguments here, as they apply this year with at least as much force as in previous years.

This seems a particularly bad time for the SEC baldly to reconfirm the politicized bias and lack of transparency that characterizes its Staff work, especially given other recent evidence of Staff bias and inappropriate and opaque behavior.[25] It is a reconfirmation that will have ramifications in other proceedings, should it survive this request for reconsideration.

## Conclusion

Given the guidance offered by SLB 14L, and relevant precedent in *Tractor Supply, CVS, Levi Strauss*, *Disney Co., Amazon.com* and *CorVel Corp.*, our Proposal should have been found by the Staff to include a non-omissible issue of significant policy concern that transcends ordinary business matters. Omission of our proposal leaves us with no other conclusion than the Staff, as a matter of personal policy preference, does not believe that anti-center/right viewpoint or ideology discrimination should be given the same consideration in its decision-making as other forms of discrimination it deems significant and is preventing us from presenting our Proposal as a result of its own bias. We therefore ask the Commission to reverse the decision of the Staff and to deny the Company's no-action request.

Thank you to the Staff and the Commission for their time and consideration.

[25] New Civil Liberties Alliance, *SEC Enforcement Staff Accessed Adjudicatory Documents in Midst of Administrative Proceedings*, Press Release (Apr. 7, 2022) *available at* https://nclalegal.org/2022/04/sec-enforcement-staff-accessed-adjudicatory-documents-in-midst-of-administrative-proceedings/ (last accessed Apr. 8, 2022).

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

Sincerely,

Scott Shepard
Director

Sarah Rehberg
Free Enterprise Project
National Center for Public Policy Research

Enclosure (Attachment)

cc: Marc Gerber (marc.gerber@skadden.com)
SEC Chairman Gary Gensler (Chair@sec.gov)
Commissioner Allison Herren Lee (CommissionerLee@sec.gov)
Commissioner Hester M. Peirce (CommissionerPeirce@sec.gov)
Commissioner Caroline A. Crenshaw (CommissionerCrenshaw@sec.gov)

# Attachment


December 4, 2020

**Via email: shareholderproposals@sec.gov**

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

**RE: Request for Reconsideration of November 25, 2020 Decision Permitting Walgreens Boots Alliance, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8**

Dear Ladies and Gentlemen,

We at the National Center for Public Policy Research respectfully request review and reconsideration by the staff of the Division of Corporation Finance ("the Staff") and the U.S. Securities and Exchange Commission (the "Commission") of the Staff's November 25, 2020 concurrence with the no-action request of Walgreens Boots Alliance, Inc. ("the Company") dated September 18, 2020 (the "Request Letter") and the untimely but apparently accepted supplemental request of October 30, 2020 (the "Supplemental Request Letter") regarding our Proposal that the Company study the risks associated with its ongoing failure to add viewpoint nondiscrimination to its Equal Employment Opportunity ("EEO") policy.

We respectfully request that the Division of Corporate Finance, under Part 202.1(d) of Title 17 of the Code of Federal Regulations, present the Staff decision to the full Commission for review.

Under Part 202.1(d) of Title 17 of the Code of Federal Regulations, the Division of Corporate Finance may request Commission review of a Division no-action response relating to Rule 14a-8 of the Exchange Act if it so determines that the request involves "matters of substantial importance and where the issues are novel or complex."

The many reasons that our request easily meets this threshold are considered in detail below. First, though, we must address a threshold issue. We sent an email to the Staff and to counsel for the Company, Elizabeth Ising, on December 1, 2020, that declared our intention to submit, by December 4, this request for reconsideration. At mid-afternoon of December 3, Ms. Ising sent a reply email stating that the Company had already begun printing its proxy materials,

excluding our proposal, and that cost would thereby be occasioned were the Staff to entertain our request.

This argument cannot be entertained. The Staff rendered its decision on the afternoon of Wednesday, November 25. The next day was Thanksgiving; Thanksgiving Day and the following Friday are all but universally taken as holidays in the United States, and they are so taken by us. This means that we submitted our intent to seek reconsideration on the second business day after the Staff made its decision. Companies cannot simply start printing the moment that a decision is delivered so as to, on its own motion, foreclose proponents' protected opportunity to seek reconsideration, and no rational party can plausibly argue that taking fewer than two business days to make the decision to seek reconsideration, and immediately informing parties of that intention, and then actually filing the request within a single business week is untimely.

If, as counsel avers, the Company really did begin producing and printing its proxy materials fewer than two business days after the delivery of the decision by the Staff, then it clearly did so either in complete disregard for our right to seek reconsideration or actively to foreclose that right. Neither strategy can be rewarded by a refusal to consider our request for reconsideration. If anything, Ms. Ising ought to face sanctions for attempting to foreclose our right to request reconsideration in this meretricious manner. This is the sort of behavior that renders the legal profession so despised by the public, an evaluation that is warranted in the case of counsel that is willing to employ such strategies.

Counsel's declaration is particularly galling in light of the fact, discussed further below, that any untoward extension of this proceeding has arisen from counsel's own actions. It is she who submitted a Supplemental Request Letter, nearly 90 days after we submitted our Proposal, that contained no information that could not or should not have been submitted in the initial Request Letter. We asked that that extremely untimely submission be rejected as untimely, but it appears that the Staff instead rejected our request. It is also counsel who had the responsibility to inform the Company that it must wait before incurring proxy-material expenses until a reasonable time had passed for us to consider whether to seek reconsideration and then to file this request for reconsideration.

Ms. Ising cannot use her failures of timely submission and of providing necessary information to her client to bar us from a protected proponent right. If the Company has indeed begun incurring proxy-information expenses because of counsel errors, we will wholeheartedly agree that someone should bear the responsibility for making the Company good. But that responsibility should fall on counsel and her law firm, Gibson, Dunn – not be used as an excuse to deny us protected proponent rights.

And, with direct relevance to the subject of this request for reconsideration: Staff apparently ignored or rejected our argument that the Supplemental Request Letter be rejected as untimely, it having been submitted nearly 90 days after the Company and its counsel had everything they needed to make every argument contained therein, and the letter in no way responding to anything we had argued in our reply to the Request Letter. We explained in our reply to the Supplemental Request Letter that untimely submissions create costs for us in the same way that untimely submissions by proponents create costs for companies. Were the Staff now to decide

that taking fewer than two business days to inform the Company of our intention to seek reconsideration, and fewer than five full business days to submit that reconsideration, is impermissibly untimely, but that taking almost 90 days to make arguments that could have been made immediately is not, the Staff will irrefutably have established its own bias – mounting concern about and evidence of which is a central foundation of this request for consideration itself.

Throughout 2020 we have attempted to get the Commission or its Staff to address a number of issues. These are:

- (1) why our arguments are incorrect that its new interpolation of Rule 14a-8, and its concomitant policy of not explaining its decisions in most instances are not themselves arbitrary and capricious;
- (2) whether or not that policy of silence is arbitrary and capricious in the face of direct requests from us to help us understand how to conform our proposals to its guidelines in a way that will make them non-omittable while still pursuing our policy goals, goals that have different subject-matter foci but the same form and intent as previous proposals from other organizations that have been found non-omittable;
- (3) how it can be other than arbitrary and capricious to decide, without explanation, that a company's flat refusal to provide actionable protections against viewpoint discrimination is "close enough" to a request to conduct a study to determine the risks and costs that arise from not having exactly the actionable protections it refuses to provide; and
- (4) how it can be other than arbitrary and capricious to forbid omission of proposals seeking reports studying the risks and costs associated with failure to provide actionable protection against discrimination on the basis of sexual orientation and gender identity from a company that did not provide that actionable protection, while allowing omission of a proposal seeking a report studying the risks and costs associated with failure to provide actionable protection against discrimination on the basis of viewpoint from a company that does not provide that actionable protection.

We first submitted a request for reconsideration making these requests on January 8, 2020, and attach and incorporate those arguments herein. We extend and expand our request with the additional evidence of arbitrary and capricious Staff conduct evinced in the intervening months and in the present proceeding, and additional cultural developments that underscore the saliency and propriety of our concerns, and the increasing need for the Commission, or at least the Staff, to address them directly.

I. ***An apparent conclusion, though without explanation, that a flat refusal to do a thing is "close enough" to a request even to study the risks and harms arising of a failure to do that thing certainly must be explained if it is not to be judged arbitrary and capricious.***

In response to our attempt to submit our viewpoint-nondiscrimination proposal last December for the 2020 shareholder meeting at Apple, the Staff found our proposal omittable on the grounds that "we considered the board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company's current policies and practices."[1] It also noted as relevant that it had taken into consideration "the committee's analysis," which "noted that a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote."[2]

We argued there and in later proceedings that our Proposal was insufficiently related to the previous proposal to permit exclusion on that ground (the former related to the composition of the board, while the latter dealt with hiring and employment practices.) We surmised that the Staff rejected this argument. (We had to surmise, as the Staff has consistently refused to explain.) And we adapted as best we could: no previous proposal of any argued relevance has been submitted to shareholders at Walgreens.

This leaves us to conclude – which, again, we must do because the Staff refuses to explain, despite our express and repeated requests for explanation – that the Staff found our Proposal omissible in this proceeding because the Company's express refusal to provide legally actionable protection against viewpoint discrimination – which, as we established below, the Company is not doing and will not agree to do – is "close enough" to providing it to allow for omission.

This leaves us asking, as we asked in the *Apple* proceeding, how providing *no* actionable protection against discrimination on the basis of viewpoint is not very different from actually providing protection against discrimination on the basis of viewpoint, as well as renewing the detailed objections to misapplication of 14a-8 that we raised in that proceeding. We do not think this a foolish or unimportant question, especially in light of the complete break with precedent that we explained in detail in the Attachment.

Rather, the reiterative refusal of the Staff to engage with us in any way about this fundamental issue increases our concern that the Staff has no acceptable justification for its conclusion, and that its silence cloaks the fact that its actions are arbitrary and capricious – are in fact the very sort of viewpoint discrimination that we are working against, and that is forbidden to government actors in our American system – and are fully aware of the fact.

---

[1] Attachment at 3.

[2] Attachment at 3-4.

### *II. The Staff appears to be applying rules about timeliness of submission in arbitrary and capricious ways, and again, fails to explain how its facially non-neutral applications of the timeliness standards can be justified.*

Our concern about arbitrary and capricious determinations is magnified by the Staff's apparently biased application of timeliness rules. As we pointed out in our reply to the Company's Supplemental Request Letter, that supplemental request was in no way responsive to our reply to the Request Letter, yet came nearly three months after we had submitted our Proposal. We noted that our request for consideration in *Apple* (which forms the Attachment to this letter) was denied material consideration because it was submitted 19 days – a period that included the Christmas and New Years' holidays – after the Staff's decision had issued. The Staff explained that the timeliness bar had fallen because Apple had begun printing materials for its shareholder meeting, so that material reconsideration would cost that multi-trillion-dollar company some extra printing fees. We pointed out that a nearly 90-day delay creates for our small policy shop difficulties and expenses that are surely proportional to some extra printing costs for Apple, and that given the vastly longer period of untimeliness, exclusion of the Supplemental Request Letter was appropriate.

Once again, this struck us as a wholly reasonable argument – again, certainly worthy of explanatory response, if not concurrence. But again, we are left only to assume that our timeliness argument was either rejected or simply ignored, and are therefore left with no choice but to see additional evidence of arbitrary and capricious Staff application of rules and standards.

### *III. The Staff's new system of failing to publish many of its decisions and related arguments appears to work to the unique disadvantage of our organization.*

Since the Staff issued its new guidance, our objections to which are explained in significant detail in the Attachment, and instituted its new system of refusing to explain most of its decisions, the proportion of our proposals that has been found non-omissible has fallen precipitously.[3] Our repeated attempts to get the Commission or the Staff to address our legitimate, evidence-based and growing concerns about Staff arbitrariness and capriciousness in its new guidance, its new failure to accompany most decisions with guidance any guidance, and its failure to follow precedent when our proposals are at issue have similarly been denied.[4]

As the Staff is well aware, nearly 95 percent of shareholder proposals arise from a coalition of left-of-center advocacy organizations, with the remaining 5 percent coming mostly from us – an

---

[3] *See* https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf.

[4] *See id.*

admittedly, and proudly, right-of-center advocacy organization.[5] Every evidence suggests that the large coalition of left-of-center organizations is not facing the same sort of complete rejection of its proposals that we have faced; in fact, it is just this week bragging of its continuing efficacy.[6] In light of all of the other considerations – the Staff's seeming divergence from precedent on no ground other than its dislike of the grounds on which we seek to restrict discrimination; its apparently incoherent application of its new guidance to allow the opposite of a thing to be "close enough" to enactment of the thing itself to permit exclusion; its refusal to respond to what has in effect become pleading that it explain itself and explain to us how to survive omission under its new guidance – in light of all of that, this significantly decreased non-exclusion rate creates additional concern that the Staff has drawn back from clear record statements of and explanations for its decisional reasoning in an effort to render its bias less detectable and less transparent to regulated parties and to the corporate world and other relevant stakeholders generally.

## IV. *A rise in calls by government officials for discrimination on the basis of viewpoint and public participation increases our legitimate concern that this is what the Staff is presently enacting, and increases the need for the Commission and/or the Staff to address our concerns comprehensively.*

There is certainly irony – and no little particularly grim humor – in the fact that evidence of Staff discrimination on the basis of viewpoint and public participation of which the Staff disapproves arises from a series of proceedings in which our organization is fighting to reduce active discrimination on the basis of viewpoint and public participation in corporate America. As we explained in this proceeding itself,

> [a]dditional evidence of viewpoint discrimination piles up every day. Consider, for instance, the call last week by a sitting member of Congress to blacklist American citizens, and to destroy their lives and their ability to earn a living, for the sin of supporting policy positions with which she personally disagrees.[7] This call joins others by current and former congresspeople and administration officials

---

[5] See Heidi Welsh & Michael Passoff, PROXY PREVIEW 2020 (March 2020), *available at* https://static1.squarespace.com/static/59f0ef404c326d3b5a4cf6a0/t/5e72e2e0824c026bd66fca88/1584587503663/Proxy+Preview+2020+Final_v4.pdf (last accessed Dec. 3, 2020).

[6] *See, e.g.*,
https://go.asyousow.org/webmail/344561/698776103/659c772cda3a660e850d075800587d9088f506f29750ead83955e14a9944334d.

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

> seeking, if anything, even more ominous revenge for daring to participate in our democracy in ways that displease them.[8] And in recent days the Staff itself has received requests from Disney[9] and Starbucks[10] seeking a decision from the Staff that the Commission will take no action against them if they omit a neutrally drawn proposal from us in material part on the grounds that members of our organization have dared to take public-policy positions that those two companies consider unappealing; they are asking the Staff to strip from us civil and economic rights protected by federal statute because of our viewpoint. Viewpoint discrimination could hardly constitute a more pressing concern.

There is simply no way to deny it: government and corporate officials are actively calling for discrimination on the basis of viewpoint and public participation for those on the center/right in this country. We have significant evidence that such discrimination is occurring against us, right now, in this and other proceedings. We might be wrong. We hope we are. But given our showing of evidence pointing in that direction, and the active and open attempts to produce exactly that sort of discrimination in government and corporate realms, we are certainly within our rights to ask for a clear and full demonstration of our error, and guidance on how to proceed under nondiscriminatory and openly, neutrally applied rules in the future.

## V. *Viewpoint discrimination, which has given rise to America's rampant cancel culture, is a significant policy issue and therefore non-excludable under Rule 14a-8(i)(7).*

In nearly every walk of American life – politics, entertainment, sports, journalism, education, and business – some forces in society are seeking to "cancel" those who fail to agree enthusiastically with their most radical demands. Refusal to protect diversity of thought has fanned the flames of this increasingly appalling social and cultural development. As such, viewpoint diversity and debates surrounding the topic are at the very top of any list of the most important issues currently affecting – and threatening – our culture.

The Commission has made it clear that proposals relating to ordinary business matters that center on "sufficiently significant social policy issues . . . would not be considered to be excludable because the proposals would transcend the day-to-day business matters." Staff Legal Bulletin No. 14E (the "SLB 14E"). SLB 14E signaled an expansion in the Staff's interpretation of significant

---

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

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

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

social policy issues, noting that "[i]n 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)."

Viewpoint discrimination, and its horrifying effects, were addressed this past summer by leading, primarily *left-of-center* thought leaders, who penned an open letter declaring that "[t]he free exchange of information and ideas, the lifeblood of a liberal society, is daily becoming more constricted… censoriousness is also spreading more widely in our culture: an intolerance of opposing views, a vogue for public shaming and ostracism, and the tendency to dissolve complex policy issues in a blinding moral certainty. We uphold the value of robust and even caustic counter-speech from all quarters. But it is now all too common to hear calls for swift and severe retribution in response to perceived transgressions of speech and thought. More troubling still, institutional leaders, in a spirit of panicked damage control, are delivering hasty and disproportionate punishments instead of considered reforms."[11]

That discrimination is running rampant in the American business community. Employees are fired for participating in an ongoing employee debate on the disfavored side, while employees on the favored side of the argument are permitted to excoriate anyone who disagrees with them and to trumpet their own positions throughout the company.[12] Employees are fired for contributing to disfavored political candidates, while they and even clients are encouraged to vote for, and celebrated for contributing to, favored candidates.[13] Employees are fired for refusing to enthusiastically endorse social positions with which they disagree.[14] Employees are instructed by corporations that they may display their solidarity with approved political positions and groups at work, but that there is "no tolerance" for showing support for disfavored political opinions or groups.[15] Even left-of-center journalists and opinion makers are drummed out of businesses that they helped to found or to lead because they are not willing enthusiastically

---

[11] *A Letter on Justice and Open Debate*, HARPERS (July 7, 2020), *available at* https://harpers.org/a-letter-on-justice-and-open-debate/ (last accessed Dec. 3, 2020).

[12] *See* First Amended Complaint, *Damore v. Google, LLC.*, No.: 18CV321529 (Cal. Sup. Ct. April 17, 2018).

[13] *See, e.g.*, Jamie Feltham, Palmer Luckey: *'I Left Facebook Because I Got Fired, I Wouldn't Have Otherwise,'* UPLOAD (May 23, 2019), *available at* https://uploadvr.com/palmer-luckey-facebook-fired/ (last accessed Dec. 3, 2020); Tim Pearce, *Expensify CEO Tells 10 Million Customers To Vote For Biden Or Face Possible 'Civil War.'* DAILY WIRE (Oct. 28, 2020), *available at* https://www.dailywire.com/news/expensify-ceo-tells-10-million-customers-to-vote-for-biden-or-face-possible-civil-war-clients-pummel-him (last accessed Dec. 3, 2020).

[14] *See, e.g.*, Chris Enloe, *Lawsuit alleges Starbucks fired Christian barista who refused to wear LGBT 'pride' shirt*, THE BLAZE (Nov. 29, 2020), *available at* https://www.theblaze.com/news/lawsuit-alleges-starbucks-fired-christian-barista-who-refused-to-wear-lgbt-pride-shirt (last accessed Dec. 3, 2020).

[15] *See, e.g.*, Shawn Wheat, *Goodyear responds to zero-tolerance policy slide labeled by employee as discriminatory*, WMTV (Aug. 18, 2020) https://www.nbc15.com/2020/08/18/goodyear-employees-say-new-zero-tolerance-policy-is-discriminatory/ (last accessed Dec. 3, 2020).

to endorse all manner of viewpoint conformity and active discrimination on the basis of viewpoint.[16]

Walgreens is asking the SEC to allow it to retain the ability, without legal consequences, to cancel its own employees who don't toe the line of the day, and to reject even our limited Proposal that it study the risks and consequences that arise from its refusal to protect employees from discrimination on the basis of viewpoint or public participation. This is a chilling signal to the nearly quarter-million Walgreens workers who put on their company uniforms to earn a paycheck. The SEC should not cover for the Company's willingness to confront the consequences of its appalling eagerness to continue to retain full latitude to discriminate on this basis, and certainly should not allow the Staff to hide behind opaque and arbitrary and capricious procedures in order to facilitate what increasingly appears to be its own wholly illegitimate discrimination on the basis of viewpoint and public participation.

**Conclusion**

The Staff, in affirming the Company's no-action request in this case, provided additional evidence that our concerns about the arbitrary and capricious nature of its decisions and about its decisional process generally are warranted. These concerns have been magnified by recent actions by elected officials and government employees that demonstrate an eagerness to behave in punitive ways on the basis of viewpoint and public participation – the very things about which the Staff is, without explanation, refusing to allow us to present proposals. We therefore ask the Commission to reverse the decision of the Staff, and to deny the Company's no-action request. In the alternative, we ask that the current Staff decision be withdrawn, and the matter returned to the Staff with the options of either denying the no-action request or fully explaining its reinterpretation of the Rule 14a-8 grounds and the implications of that reinterpretation, its detailed analysis in this case, and the means by which it will in the future demonstrate both the non-arbitrary and -capricious nature of its decisions and provide instruction about how defective proposals can be made non-omissible in ways that are neutral as to subject matter and that are then neutrally applied.

Thank you to the Staff and the Commission for their time and consideration.

---

[16] *See, e.g.*, Steven Nelson, *Glenn Greenwald quits The Intercept over 'censorship' of Hunter Biden article,* NEW YORK POST (October 29, 2020), *available at* https://nypost.com/2020/10/29/glenn-greenwald-quits-the-intercept-over-hunter-biden-article/ (last accessed Dec. 3, 2020); Bari Weiss, *Bari Weiss on why she left the New York Times,* NEW YORK POST (July 14, 2020), *available at* https://nypost.com/2020/07/14/bari-weiss-on-why-she-left-the-new-york-times/ (last accessed Dec. 3, 2020); Matt Tiabi, *The American Press Is Destroying Itself,* TK NEWS (June 12, 2020), *available at* https://taibbi.substack.com/p/the-news-media-is-destroying-itself?r=1ejgy (last accessed Dec. 3, 2020).

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

Sincerely,

Scott Shepard

Enclosure (Attachment)

cc: Elizabeth A. Ising, Gibson Dunn (shareholderproposals@gibsondunn.com)
SEC Chairman Jay Clayton (chairmanoffice@sec.gov)
Commissioner Robert J. Jackson Jr. (CommissionerJackson@sec.gov)
Commissioner Allison Herren Lee (CommissionerLee@sec.gov)
Commissioner Hester M. Peirce (CommissionerPeirce@sec.gov)
Commissioner Elad L. Roisman (CommissionerRoisman@sec.gov)
Justin Danhof, National Center for Public Policy Research

# Attachment


January 8, 2020

Via email: shareholderproposals@sec.gov

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

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

Dear Sir or Madam,

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

In its Response Letter, the Staff agreed with the Company that our Proposal could be excluded from its 2020 proxy materials for its 2020 annual shareholder meeting. In reaching this decision, the staff concluded that the Proposal "does not transcend the Company's ordinary business operations." Staff Response Letter. In so concluding, it relied on the Company's assertion that the difference between the Company's current practices and the proposal is relatively small, while nevertheless failing to accept the Company's claim that it has already substantially implemented the proposal, thus justifying exclusion under Rule 14a-8(i)(10). *Id.* It further relied on the fact that "a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote," while nevertheless declining to endorse the Company's assertion that our Proposal is excludable under Rule 14a-8(i)(12)(i) as being substantially similar to that earlier proposal. *Id.*

We think that the Staff's decision is in error in this specific instance, because it diverges from exactly relevant precedent that sought to study the risks of discrimination against other potentially at-risk groups on irrelevant or unsubstantiated grounds.

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

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

**Summary of Proceedings**

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

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

[1] 17 CFR § 202.1(d) ("The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.").

matter as a recently submitted proposal that failed of shareholder support, allowing exclusion under Rule 14a-8(i)(12)(i). Finally, it averred that it has already substantially implemented this Proposal, invoking Rule 14a-8(i)(10).

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

The Staff issued its Response Letter on December 20. In that letter, it asserted that our Proposal fell within the ambit of the Company's ordinary business activities, and was thus excludable under 14a-8(i)(7). As is its normal procedure, the Staff failed to explain how our Proposal fell within the ordinary business exception while the proposal implicated in *CorVel Corp.*, which, again, was exactly the same as our Proposal except that it sought to review and deter discrimination on the basis of sexual orientation rather than viewpoint, did not qualify as an ordinary business decision.

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

Similarly, the Staff Response Letter stated that it had, in reaching its Rule 14a-8(i)(7) conclusion, considered "the committee's analysis," which "noted that a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote." Staff Response Letter. Again, though, the Staff failed to describe how it considered the proposals related. It failed to endorse the Company's claim that the proposals were sufficiently related to

allow for exclusion of our Proposal under 14a-8(i)(12). And it failed to explain how the relationship, however it might arise or however strong it might be, might render our Proposal to be more within the ambit of ordinary business activity than the *CorVel Corp.* proposal and thus excludable under Rule 14-8(i)(7).

**Analysis**

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

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

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

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

That the Company provided no evidence that the content of the board's analysis and conclusions related in any way to the question of whether our Proposal implicated issues treated effectively by the company in its normal course of business suggests that there was no such evidence to provide. But it also renders the Staff's reliance on the board's analysis here incoherent and potentially deeply disruptive. The Company board's analysis does not go to the question of ordinary business operations at all. By allowing that analysis, without explanation

or obvious connection, to bolster an otherwise insufficient claim under Rule 14a-8(i)(7), the Staff has effectively turned the Rule 14a-8 grounds as aggregated under Rule 14a-8(i)(7) from a list of unique grounds – any one of which must be independently satisfied for exclusion to be justified – into a list of *factors*, which may be aggregated to justify exclusion even if no specific ground is itself satisfied.

This latter move may constitute plain error under the Commission's own published guidance,[2] as discussed further below. Even if it is not plain error to treat the Rule 14a-8 grounds as factors rather than unique rules, though, it is a mistake to do so given the Staff's standard method of replying to no-action requests, as modified in the instant case. While courts of law often employ multi-factor tests in a variety of settings, they are careful when they do so to explain how each factor was relevant, how it weighed into the determination, and related considerations. In short, multi-factor tests require detailed and extensive analysis. But the Staff provides no such detailed analysis – rather, it offers just a series of unsupported assertions that that board analysis, which on its face has nothing in particular to do with the coverage that our Proposal already receives under the Company's ordinary business operations, nevertheless substantiates an otherwise insufficient Rule 14a-8(i)(7) claim.

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

Each of these arguments is elaborated below.

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

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

---

[2] *See Staff Legal Bulletin* No. 14: Shareholder Proposals (July 13, 2001) at B.1. ("The rule generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within *one* of the 13 substantive bases for exclusion described in the table below." (emphasis added)).

> RESOLVED Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting "sexual orientation" and "gender identity" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.

Likewise, our Proposal to the Company states:

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

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

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

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

In order to defeat this baseline proposition, the Staff cited two other factors that entered into its decision-making process. The first of these was the Company's "board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company." Staff Response Letter. That analysis not only failed to demonstrate any way in which discrimination *vel non* by the Company *on the basis of viewpoint* was being actively studied. It went even further, by its demonstration of other ways in which discrimination has been prohibited, to demonstrate that nothing whatever was being done to study – far less to prohibit – discrimination on the basis of viewpoint. In fact, the Company's asserted confusion between discrimination on the basis of viewpoint and discrimination on the basis of totally unrelated characteristics underscored the complete failure of the Company to grapple with viewpoint discrimination – the issue raised by our Proposal – in any way at all.

The Commission has made significant efforts recently to explain how companies may usefully provide details of their boards' analysis in helping the Staff to determine whether a particular proposal falls within or beyond the ambit of ordinary business operations. *See Staff Legal Bulletin* 14K (October 16, 2019); *Staff Legal Bulletin* 14J (October 23, 2018). Most recently, it advised that companies that sought to exclude proposals would be well advised to demonstrate "that the policy issue raised by the proposal is not significant to the company." *Staff Legal Bulletin* 14K. In particular, it indicates that

> [w]hen a proposal raises a policy issue that appears to be significant, a company's no-action request should focus on the significance of the issue to that company. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7).

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

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

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

The Company is eager to imply that viewpoint discrimination is really protected against while being careful to say no such thing. Neither does it suggest, as it easily could, that it intends to rectify the oversight in its non-discrimination policy by adding viewpoint discrimination, to

bring the actual policy in line with what it suggests to be the import of the single sentence from its website.

Likewise, the Company does not indicate that it has any plans to study the problem of potential viewpoint discrimination on its own, despite direct and public communication of a problem of viewpoint discrimination at the Company from employees to the CEO himself.[3] Nor did it, despite this direct evidence about problems at the Company as well as increasing problems with and perceptions of viewpoint discrimination in Silicon Valley and nationally,[4] provide any contradictory evidence that viewpoint discrimination presented no real, legitimate problem at the Company.

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

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

---

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

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

[5] See *Staff Legal Bulletin* 14K (October 16, 2019); *Staff Legal Bulletin* 14J (October 23, 2018) ("The discussions we found most helpful focused on the board's analysis and the specific substantive factors the board considered in arriving at its conclusion. Less helpful were those that described the board's conclusions or process without discussing the specific factors considered.").

Company. Rather, it simply showed that it does *other* things tangentially related to the subject matter of the proposal, while straightforwardly admitting that it does not do – and implicitly admitted that it does not intend to do – anything like what the proposal seeks.

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

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

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

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

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

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

Finally, then, we were left, after the Staff's decision, with this knowledge:

(1) The staff agreed that our Proposal would *not* have been excludable under Rule 14a-8(i)(7) absent the Company's discussion of the Company board's analysis.
(2) That analysis did not demonstrate anything additional about the Company's having dealt with our Proposal in the ordinary course of its business.
(3) Rule 14a-8(i)(7) has therefore in effect been turned into a sort of catch-all provision under which factors unrelated to the question of ordinary business operations can nevertheless be aggregated together to allow a generalized decision of exclusion.
(4) The Company board's analysis did not demonstrate that our Proposal was substantially similar to a previous proposal (else the Staff would have excluded the proposal under Rule 14a-8(i)(12)(i)), but did demonstrate that our Proposal is to some completely indeterminate amount related to that previous proposal in such a way so that the indeterminate resemblance contributes in some unspecified degree to reaching a general determination of excludability under the new catch-all version of Rule 14a-8(i)(7).
(5) The Company board's analysis did not demonstrate that our Proposal had already been substantially implemented by the Company, but did demonstrate that matters factually irrelevant to our Proposal but linguistically connected to it had been addressed in detail by the Company, so that the Company is for some undefined reason excused in some degree from addressing the *actual* subject matter of our Proposal in any way.

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

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

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

There are two problems with this *sub silentio* conversion. The first is that it appears to be prohibited by the Staff's own previous interpretations of Rule 14a-8. As Staff Legal Bulletin No.

14 explains, "rule [14a-8] generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within *one* of the 13 substantive bases for exclusion described in the table below."[6] Turning Rule 14a-8(i)(7) into a catch-all aggregation of factors, none of which would satisfy *one* of the 13 substantive Rule 14a-8 grounds, appears straightforwardly to violate this stipulation.

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

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

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

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

---

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

**Conclusion**

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

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

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

Sincerely,

Scott Shepard

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

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

DIRECT DIAL
202-371-7233
DIRECT FAX
202-661-8280
EMAIL ADDRESS
MARC.GERBER@SKADDEN.COM

FIRM/AFFILIATE OFFICES
BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

**BY EMAIL** (shareholderproposals@sec.gov)

April 13, 2022

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

RE: BlackRock, Inc. – 2022 Annual Meeting
Response to Request for Reconsideration of
No-Action Letter Relating to Shareholder Proposal of
the National Center for Public Policy Research

Ladies and Gentlemen:

By letter dated April 4, 2022 (the "No-Action Letter"), the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") stated that it would not recommend enforcement action to the Commission if BlackRock, Inc., a Delaware corporation ("BlackRock"), were to omit the shareholder proposal and supporting statement (the "Proposal") submitted by the National Center for Public Policy Research (the "Proponent") from its proxy materials for the 2022 Annual Meeting of Shareholders (the "2022 Annual Meeting").

This letter is in response to the letter to the Staff, dated April 11, 2022, submitted by the Proponent requesting review and reconsideration by the Staff and the Commission of the No-Action Letter (the "Reconsideration Request"). A copy of this letter is also being sent to the Proponent.

BlackRock believes the Reconsideration Request should be denied as untimely and without merit. The Staff has routinely denied requests for reconsideration and Commission review when a company has already begun printing its proxy materials. *See, e.g.*, *The Goldman Sachs Group, Inc.* (Mar. 8, 2022, *recon. denied* Mar. 21, 2022); *Pfizer Inc.* (Dec. 22, 2014, *recon. denied* Mar. 10, 2015); *Wells Fargo & Co.* (Feb. 14, 2014, *recon. denied* Mar. 10, 2014, *appeal denied* May 22, 2014) (noting, in each case, that the request for reconsideration was submitted after the company had begun printing its definitive proxy materials); *see also* Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 34-12599 (July 7, 1976) (noting that the Staff's action on requests for reconsideration "giv[e] due consideration to the demands of the management's schedule for printing its proxy materials" and that requests for Commission review should be "received sufficiently far in advance of the scheduled printing date for management's definitive proxy materials to avoid a delay in the printing process").

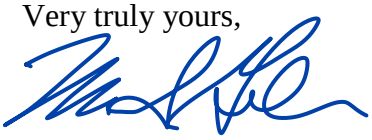
In this instance, BlackRock is currently in the process of printing its proxy materials for the 2022 Annual Meeting and already had begun the printing process when the Reconsideration Request was received. By way of background, the Proponent submitted the Proposal to BlackRock on December 14, 2021. Counsel for BlackRock submitted a no-action request to the Staff, with a copy to the Proponent, on January 24, 2022 (the "No-Action Request"). On February 22, 2022, the Proponent submitted a supplemental response letter to which BlackRock replied on March 9, 2022. The Proponent submitted another supplemental response letter on March 18, 2022. On April 4, 2022, BlackRock and the Proponent received the No-Action Letter from the Staff, concurring that BlackRock could exclude the Proposal under Rule 14a-8(i)(7) as relating to ordinary business matters.

Immediately upon receiving the No-Action Letter and in reliance on the Staff's response, BlackRock initiated the process of printing its proxy materials for the 2022 Annual Meeting, which did not include the Proposal. Even though BlackRock avails itself of the Commission's "notice and access" rules, BlackRock is printing and mailing approximately 11,250 copies of its proxy materials. BlackRock is planning to file its definitive proxy statement for the 2022 Annual Meeting with the Commission on April 14, 2022 and will begin mailing its proxy materials shortly thereafter, in accordance with its previously established schedule. The 2022 Annual Meeting is scheduled to take place on May 25, 2022. Managing the logistics for BlackRock's annual meeting is complex and must be set well in advance of the scheduled meeting date.

The Reconsideration Request, however, has not been received with adequate time for it to be feasibly taken into account for the 2022 Annual Meeting. As noted above, BlackRock already has begun the printing process for its proxy materials. Any decision to "stop the presses" now would result in an extraordinary waste of materials, would result in significant expense to BlackRock and its shareholders and would impact BlackRock's ability to comply with the 40-day notice period required by Rule 14a-16 to use "notice and access," thereby imposing even greater printing and mailing costs. Given this, as well as the uncertainty and expense potentially involved, it would be unfair and unduly burdensome for the Staff to reconsider its decision or the Commission to review the Staff's decision regarding the excludability of the Proposal at this time. Moreover, the Reconsideration Request does not provide any valid basis for the Commission to review the No-Action Letter. In this regard, the Reconsideration Request does not present any novel or highly complex issues. Rather, it presents the latest iteration of a long-standing line of no-action letters that find the matters presented by the Proposal relate to ordinary business.

In light of the considerations described above, BlackRock respectfully requests that the Staff render its decision on an expedited basis. If you have any questions or would like any additional information regarding the foregoing, please do not hesitate to contact me at (202) 371-7233. Thank you for your prompt attention to this matter.

Very truly yours,



Marc S. Gerber

cc: R. Andrew Dickson, III
Managing Director & Corporate Secretary
BlackRock, Inc.

Scott Shepard
National Center for Public Policy Research


April 13, 2022

**Via email: shareholderproposals@sec.gov**

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

**RE: Reply to April 13 BlackRock Response to NCPPR Request for Reconsideration of April 4, 2022 Decision Permitting BlackRock, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8**

Dear Ladies and Gentlemen,

On April 13, 2022 BlackRock, Inc. ("the Company") submitted its response to our April 11, 2022 Request for Reconsideration seeking the staff of the Division of Corporation of Finance ("the Staff") and the U.S. Securities and Exchange Commission's ("the Commission") review of the Staff's April 4, 2022 concurrence with the no-action request of BlackRock, Inc. ("the Company") regarding our Proposal that the Company issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity (EEO) policy. This reply is in response to the Company's April 13 response.

Within minutes of receiving the Staff's April 4, 2022 decision concurring with the Company's no-action request, we informed both the Staff and Company counsel, Mr. Gerber, via email of our intent to file a request for reconsideration. The Company therefore had actual notice not to start the printing process, and cannot by its own efforts cut off the substantive review to which we are entitled. For the Staff to accede to BlackRock's request in this instance would be to allow corporations to eliminate any possibility of substantive review of requests for reconsideration without regard to what proponents do, which would provide further proof of the illegally arbitrary and capricious nature of the no-action request review process.

If, as counsel asserts in its April 13 response, the Company "immediately" began printing its proxy materials "upon receiving the No-Action Letter and in reliance on the Staff's response," then it clearly did so either in complete disregard for our right to seek reconsideration or actively to foreclose that right. Neither strategy can be rewarded by a refusal to consider our request for reconsideration; however, that appears to be exactly what the Company did in this proceeding. As the Company states in its response:

> BlackRock believes the Reconsideration Request should be denied as untimely and without merit. The Staff has routinely denied requests for reconsideration and Commission review when a company has already begun printing its proxy materials. See, e.g., The Goldman Sachs Group, Inc. (Mar. 8, 2022, recon. denied Mar. 21, 2022); Pfizer Inc. (Dec. 22, 2014, recon. denied Mar. 10, 2015); Wells Fargo & Co. (Feb. 14, 2014, recon. denied Mar. 10, 2014, appeal denied May 22, 2014) (noting, in each case, that the request for reconsideration was submitted after the company had begun printing its definitive proxy materials)….

Laying bare its rationale for seeking a denial of our request – that Staff routinely denies requests for reconsideration and Commission review when a company has already begun printing its proxy materials – leaves us with no other conclusion than the Company deliberately began printing proxy materials upon receipt of the Staff's decision as a means of foreclosing our right to reconsideration.

To be sure, the Company's actions demonstrate that it always intended to foreclose our ability to reconsider. The Company argues that our request "should be denied as *untimely* and without merit," but if the Company began *immediately* printing its proxy materials upon receipt of the Staff's April 4 decision as it claims, then there was never any point at which we could have *timely* exercised our right to request reconsideration. (emphasis added).

The week we took in which to respond with a request for reconsideration can hardly be deemed an intentional or unreasonable delay on our part, particularly in light of the fact we put the Company on notice of our intent to file such a request within minutes of finding out the Staff's decision. We received the Staff's decision at 4:37pm and we subsequently emailed both Staff and counsel with our intent to file a request for reconsideration at 4:51pm. At that point, counsel had a responsibility to inform the Company that it must wait before incurring proxy-material expenses until a reasonable time had passed for us to consider whether to seek reconsideration and then to file our request. Counsel's failure to advise the Company of our right to seek reconsideration of the Staff's decision cannot now be used as a reason for denying us the substantive review to which we are entitled.

In light of the above, we respectfully request due consideration of our April 11, 2022 Request for Reconsideration of the Staff's April 4, 2022 decision. Should Staff refuse to consider our request and the blatant cutting off of guaranteed remedies as now sought by the Company is permitted, we will have no choice but to conclude that the whole process is definitively a farce.

Thank you to the Staff and the Commission for their time and consideration.

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

Sincerely,

Scott Shepard
Director

Sarah Rehberg
Free Enterprise Project
National Center for Public Policy Research

cc: Marc Gerber (marc.gerber@skadden.com)
SEC Chairman Gary Gensler (Chair@sec.gov)
Commissioner Allison Herren Lee (CommissionerLee@sec.gov)
Commissioner Hester M. Peirce (CommissionerPeirce@sec.gov)
Commissioner Caroline A. Crenshaw (CommissionerCrenshaw@sec.gov)