



DIVISION OF  
CORPORATION FINANCE

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

April 2, 2022

Michael Kaplan  
Davis Polk & Wardwell LLP

Re: Meta Platforms, Inc. (the "Company")  
Incoming letter dated January 18, 2022

Dear Mr. Kaplan:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by H.E.S.T. Australia Ltd., Trustee of Health Employees Superannuation Trust Australia, for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal asks that the board commission and disclose a report on (1) the risks created by Company business practices that prioritize internal financial return over healthy social and environmental systems and (2) the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(3). We are unable to conclude that the Proposal, taken as a whole, is so vague or indefinite that it is rendered materially misleading.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters.

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

Sincerely,

Rule 14a-8 Review Team

cc: Frederick H. Alexander  
The Shareholder Commons

January 18, 2022

Re: Shareholder Proposal of The Shareholder Commons on behalf of H.E.S.T  
Australia Ltd, Trustee of Health Employees Superannuation Trust Australia  
Pursuant to Rule 14a-8 of the Securities Exchange Act of 1934

U.S. Securities and Exchange Commission  
Office of Chief Counsel  
Division of Corporation Finance  
100 F. Street, N.E.  
Washington, D.C. 20549  
*Via email: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)*

Dear Sir or Madam:

On behalf of Meta Platforms, Inc., a Delaware corporation (the “**Company**” or “**Meta**”), and in accordance with Rule 14a-8 under the Securities Exchange Act of 1934, as amended, we are filing this letter with respect to the shareholder proposal submitted by The Shareholder Commons, on behalf of H.E.S.T. Australia Ltd, Trustee of Health Employees Superannuation Trust Australia (the “**Proponent**”), on December 2, 2021 (the “**Proposal**”) for inclusion in the proxy materials that the Company intends to distribute in connection with its 2022 Annual Meeting of Shareholders (the “**2022 Proxy Materials**”). We hereby request confirmation that the staff of the Office of Chief Counsel (the “**Staff**”) will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from its 2022 Proxy Materials.

Pursuant to Rule 14a-8(j), this letter is being filed with the Securities and Exchange Commission (the “**Commission**”) no later than 80 days before the Company files its definitive 2022 Proxy Materials. Pursuant to Staff Legal Bulletin No. 14D (CF), *Shareholder Proposals* (Nov. 7, 2008), question C, we have submitted this letter to the Commission via email to [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov).

Pursuant to Rule 14a-8(j), a copy of this submission is being sent simultaneously to the Proponent as notification of the Company’s intention to omit the Proposal from its 2022 Proxy Materials. This letter constitutes the Company’s statement of the reasons that it deems the omission of the Proposal to be proper. We have been advised by the Company as to the factual matters set forth herein.

A copy of the Proposal is attached to this letter as Exhibit A.

The Proposal sets forth the following resolution:

### **Report on External Costs of Misinformation**

**RESOLVED**, shareholders ask that the board commission and disclose a report on (1) the risks created by Company business practices that prioritize internal financial returns over healthy social and environmental systems and (2) the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios.

#### **Statement of Reasons to Exclude**

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

The Proposal may be omitted as it relates to the Company's ordinary business operations and does not raise a significant policy issue that transcends the Company's ordinary business operations.

##### **A. Background.**

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the company's ordinary business operations." The purpose of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." See Release No. 34-40018 (May 21, 1998) (the "1998 Release"). As explained by the Commission, the term "ordinary business" in this context refers to "matters that are not necessarily 'ordinary' in the common meaning of the word, and is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." *Id.*

The ordinary business exclusion is based on two central considerations. First, the Commission notes that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis" that they are not proper subjects for shareholder proposals." The Commission added, "[e]xamples 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." While "proposals . . . focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered excludable," the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not "transcend the day-to-day business matters" discussed in the proposals. *Id.* The second consideration "relates to the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *Id.*

A shareholder proposal being framed in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. See Exchange Act Release No. 20091 (Aug. 16, 1983). In addition, the Staff has indicated that "[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business. . . it may be excluded under [R]ule 14a-8(i)(7)." *Johnson Controls, Inc.* (Oct. 26, 1999).

**B. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Relates To The Company's Ordinary Business Operations And Focuses On The Company's General Business Strategy.**

The Proposal seeks a report on two things: (1) “the risks created by Company business practices that prioritize internal financial return over healthy social and environmental systems” and (2) “the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios.” The Supporting Statement suggests that the Company should prioritize the economic interests of its shareholders as investors in the broader market over the Company’s fiduciary obligation to maximize its shareholders’ interest through strong financial performance: “[w]e ask the Company for a report identifying and analyzing areas where the Company’s practice of maximizing its own financial returns is opposed to the interests of its diversified shareholders in a healthy economy.” The Proposal uses the term “diversified portfolio” in several places to represent the general investment market, and distinguishes the CEO of the Company as “not diversified” because of his significant holdings in the Company, and focuses on the alleged “economic costs” of the Company’s emphasis on its financial performance to the “diversified portfolio” of shareholders.

In short, the principal thrust of the Proposal is on the Company’s business strategy to generate financial returns through its business decisions. The Proposal requests a report on, and alternatives to, day-to-day strategic decisions management has made with respect to value-maximizing activities for its shareholders—one of the quintessential responsibilities of management of a public company. The Staff has consistently found that proposals that seek to affect the strategic decisions of management and implicate the Company’s general operations may be excluded as ordinary business matters. See *Amazon.com, Inc.* (Mar. 28, 2019) proposal seeking a societal risk oversight committee to offer guidance on strategic decisions and provide ongoing review of corporate policies and procedures to assess the potential societal consequences of the company’s products and services); *Medallion Finance Corp.* (May 11, 2004) (proposal requesting that the Company evaluate alternatives to “maximize shareholder value”). *Sears, Roebuck & Co.* (Feb. 7, 2000) (proposal seeking to change the company’s general business plans and strategy); *CVS Corporation* (Feb. 1, 2000) (proposal requesting that the company prepare an annual strategic plan report describing its goals, strategies, policies and programs); *Mobile Corp.* (Feb. 13, 1989) (proposal seeking to establish a stockholder committee to “review corporate objectives and their implementation”). Moreover, the Staff has also concurred with the exclusion of proposals that, like the Proposal, request that a company de-emphasize particular aspects of its business in favor of different alternatives. See *General Electric Company* (December 8, 2010) (proposal requesting the company de-emphasize the scope of its financial service offerings by cutting back certain business lines in order to promote “safe and reliable growth”).

Like the proposals cited above, the Proposal may be excluded under Rule 14-8(a)(i)(7) because it relates to the Company’s general business strategy—specifically, how it seeks financial returns for its investors. The Proposal asks the Company to re-evaluate its business decisions on how to achieve optimal financial return for the Company and instead prioritize broader economic stability that the Proposal suggests would help “diversified” shareholders (namely shareholders who hold a range of shares in the broader stock market) to rely on the overall economy for their investment portfolios. Strategic decisions regarding how a Company should run its business for strong financial performance which in turn would optimize shareholder value are part of the day-to-day responsibilities of, management, and management’s strategic decisions regarding ordinary business matters are not appropriate subjects for shareholder review. With significant access to information regarding the Company’s broader strategic objectives and goals, management is best positioned to determine how to allocate company resources internally and monitor and adjust objectives and strategies for financial returns that ultimately affect shareholder value after appropriately weighing and analyzing all applicable factors. The ability to implement these decisions without direct oversight from shareholders is integral to management’s ability to operate the Company on a day-to-day basis.

Because the proposal is focused on the Company’s general business strategy, it may be excluded pursuant to Rule 14a-8(i)(7).

**C. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Relates To Products And Services Offered By The Company.**

The Proposal refers to Company products, including Facebook and Instagram, which implicate management's decisions regarding its products and services that it makes available to generate ad revenue. The Company's decisions regarding the management of its products and services are ordinary business matters of a complex and strategic nature that should not be subject to direct management by shareholders. Nor would it be practical for the Company's shareholders to oversee such decisions given their scope, deliberative nature and speed of the Company's operations.

As the Company reported in its quarterly report on Form 10-Q for the quarter ended September 30, 2021, the Company's "Family" of products include Facebook, Instagram, Messenger and WhatsApp, and the Company had, on average 2.81 billion daily active people on its Family of products. The Staff has consistently agreed that proposals that seek to dictate how a company offers or designs its products or services implicate a company's ordinary business operations. See *American Airlines Group Inc.* (Mar. 23, 2018) (proposal requesting that the board of directors prepare a report on the "regulatory risk and discriminatory effects of small cabin seat sizes on overweight, obese, and tall passengers"); *The Home Depot, Inc.* (Mar. 21, 2018) (proposal requesting the company end its sale of glue traps may be excluded as it related to products and services offered by the company); *Dominion Resources, Inc.* (Feb. 14, 2014) (proposal requesting a report on alternative energy may be excluded because it related to the company's choice of technologies).

Like the precedents noted above, the Proposal may be found to relate to how the company offers its products and services, namely, its social media platform offerings. In such case, the Proposal is properly excludable under Rule 14a-8(i)(7).

**D. The Proposal Does Not Focus On Any Significant Policy Issue That Transcends The Company's Ordinary Business Operations.**

The Proposal does not present any significant policy issues (that transcend the day-to-day nature of the Company's business operations. See Staff Legal Bulletin No. 14K (Oct. 16, 2019) ("SLB 14K"). In determining whether a shareholder proposal raises significant policy issues, the Staff has noted that it is not sufficient that the topic may have "recently attracted increasing levels of public attention," but instead it must have "emerged as a consistent topic of widespread public debate." *Comcast Corp.* (avail. Feb. 15, 2011).

The principal thrust of the Proposal is on management's responsibilities related to generating strong financial returns that maximize shareholder value, and its decisions regarding products and services. Where the Proposal includes criticisms and allegations surrounding the Company's product offerings, the Proposal does not explicitly address or focus on a specific policy issue. Such generalized concerns do not implicate any specifically identifiable "policy issue," let alone a "significant" policy issue. Even the Proposal's use of the term "healthy social and environmental systems" is focused on how that could affect financial returns for shareholders who rely on a "productive economy" and have "investment portfolios." The Proposal does not implicate any social policy issues.

In any case, even if the Proposal touches on a social policy matter by relating to issues generally, the Staff has concurred with the exclusion of proposals where the primary focus was on ordinary business matters. See *Amazon.com, Inc.* (Mar. 28, 2019) (requesting that the board annually report to shareholders "its analysis of the community impacts of [the company's] operations, considering near- and long-term local economic and social outcomes, including risks, and the mitigation of those risks, and opportunities arising from its presence in communities"). See also *The TJX Companies, Inc.* (Apr. 9, 2021) (proposal requesting that a company prepare a report evaluating whether the company is supporting systemic racism through undetected use of prison labor in its supply chain was excludable because it pertained to oversight of supplier relationships); *Danaher Corporation* (Mar. 8, 2013) (proposal

requesting a report from the company's board of directors summarizing the company's policies and plans for eliminating the release of mercury from the company's products into the environment was so broad that a preponderance of the report was addressed at ordinary business matters).

The Proposal makes vague reference to "healthy social and environmental systems" and then cites to allegations of generalized harms related the Company's products and services. However, the Proposal focuses on the Company's business strategy related to financial performance and shareholder returns and product and services that are fundamental to the Company's social media platform offerings. Generalized references to "social and environmental systems" or to content on the Company's social media platforms, do not "transcend the day-to-day business matters" that the Proposal implicates and do not implicate any "significant policy issue."

## **II. The Proposal May Be Excluded Pursuant To 14a-8(i)(3) Because The Proposal Is Impermissibly Vague And Indefinite So As To Be Inherently Misleading.**

Rule 14a-8(i)(3) permits the exclusion of a shareholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules or regulations, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff has consistently taken the position that vague and indefinite shareholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (Sept. 15, 2004). *See also Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) ("[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail"). The Staff has recognized that ambiguity creates the risk that "any action ultimately taken by the [c]ompany upon implementation could be significantly different from the actions envisioned by shareholders voting on the proposal." *Fuqua Industries, Inc.* (Mar. 12, 1991).

The Proposal requests that the Company's board of directors commission a report on the "risks created by the Company's business practices that prioritize internal financial returns over *healthy social and environmental systems*" and asks the Company to evaluate how such risks threaten the interests of shareholders who rely on a *productive economy* (emphasis added). The Proposal does not define these terms, which are intrinsically subjective, rendering them impermissibly vague and indefinite. The Proposal does not specify what it means by "healthy social and environmental systems"—whether "healthy" is to be assessed as morally, economically, politically or by any other ascertainable criteria and whether "systems" mean the Company's platforms and businesses or as to a larger societal framework. The later use of similar words in "social and environmental systems that undergird our economy", "healthy economy" and "systemic risks" suggests the scope of "healthy social and environmental systems" is broader than the Company's products, though the remainder of the supporting statement focuses specifically on allegations against the Company.

The Proposal similarly fails to define the "productive economy," that is necessary to support shareholders' investment portfolios, as the report requested for assessing risks to this "productive economy" could be tied to the references regarding "financial returns," of the Company, shareholders' own overall returns given the multiple references to the "values of diversified portfolios" or general economic metrics such as GDP, which is also referred to in the supporting statement.

The Staff has consistently found that when, like here, the key terms in a proposal are indefinite, undefined or ambiguous, a company and its shareholders may have divergent interpretations of such terms, rendering the proposal inherently misleading. The Staff has repeatedly

concluded with the exclusion of shareholder proposals in this scenario. For example, in *Puget Energy, Inc.* (Mar. 7, 2002), the Staff concluded in exclusion of a shareholder proposal under Rule 14a-8(i)(3) where the proposal requested the company's board of directors implement "a policy of improved corporate governance" and included a wide-ranging array of unrelated topics that could be covered by such policy. See also *Phillip Morris International Inc.* (Nov. 26, 2020) (concluding that a proposal requesting that the company's "balance sheet be strengthened significantly" was impermissibly vague); *Apple Inc.* (Dec. 6, 2019) (concluding that a proposal requesting that the company "improve [the] guiding principles of executive compensation" may be excluded because it "lacked sufficient description about the changes, actions or ideas for the company and its shareholders to consider"); *Ebay, Inc.* (April 10, 2019) (concluding that a proposal requesting that the company "reform" executive compensation may be excluded from the company's proxy materials on the grounds that "neither the shareholders nor the company would be able to determine with any reasonable certainty the nature of the 'reform' the proposal was requesting"). Similar to the proposal in *Apple*, the Proposal lacks sufficient description about the changes, actions or ideas for the Company to consider implementing the Proposal, or for shareholders in deciding whether to vote in support of the Proposal, making it inevitable that the Company and its shareholders would have divergent and inconsistent views. As such, the Proposal is inherently misleading and is properly excludable from the Proxy Materials.

\* \* \*

The Company respectfully requests the Staff's concurrence with its decision to omit the Proposal from the 2022 Proxy Materials and further requests confirmation that the Staff will not recommend any enforcement action if it so omits the Proposal. Please call the undersigned at (212) 450-4111 if you should have any questions or need additional information or as soon as a Staff response is available.

Respectfully yours,



Michael Kaplan

Attachment: Exhibit A

cc: Sara E. Murphy., The Shareholder Commons, on behalf of H.E.S.T. Australia Ltd. Trustee of Health Employees Superannuation Trust Australia  
Katherine R. Kelly, Vice President, Deputy General Counsel and Secretary, Meta Platforms, Inc.

**Proposal**

ITEM 4\*: Report on external costs of misinformation

**RESOLVED**, shareholders ask that the board commission and disclose a report on (1) risks created by Company business practices that prioritize internal financial return over healthy social and environmental systems and (2) the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios.

**Supporting Statement:**

On October 5, 2021, Frances Haugen, a former Company data scientist, testified before the U.S. Senate. Her testimony highlighted the Company's prioritization of its profits over social and environmental systems that undergird our economy and the wellbeing of its users:

*I'm here today because I believe Facebook's products harm children, stoke division and weaken our democracy.<sup>1</sup>*

The Company reached 3,210,000,000 users in the third quarter of 2020.<sup>2</sup> Its platforms affects users' perceptions, and these perceptions affect social institutions and the ability of the global community to address potentially catastrophic threats. As one expert bluntly stated:

*Facebook is becoming the last bastion of climate denial.<sup>3</sup>*

Company personnel know its content is harmful:

- *We know that COVID vaccine hesitancy has the potential to cause severe societal harm.<sup>4</sup>*
- *We make body image issues worse for one in three teen girls.<sup>5</sup>*

But a former employee says the Company accepts those harms to increase its profits:

*The company's leadership knows how to make Facebook and Instagram safer, but won't make the necessary changes because they put their astronomical profits before people...<sup>6</sup>*

These harms matter to shareholders, most of whom diversify their investments to optimize return. Diversified shareholders lose when companies harm the economy, because the value of a diversified portfolio rises and falls with GDP.<sup>7</sup> While the Company may profit by inflicting social costs, its diversified shareholders pay the bill.

In contrast, our CEO is not diversified. His wealth is concentrated in Company shares: unlike most shareholders, his investments do not absorb the social costs the company creates.

We ask the Company for a report identifying and analyzing areas where the Company's practice of maximizing its own financial returns is opposed to the interests of its diversified shareholders in a healthy economy. This will help shareholders understand where the Company's prioritization of "astronomical profits before people" creates a financial risk to their portfolios. Such a report would not need to provide

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<sup>1</sup> <https://www.nytimes.com/2021/10/05/technology/haugen-facebook.html>

<sup>2</sup> <https://www.statista.com/statistics/947869/facebook-product-mau/>

<sup>3</sup> <https://www.commondreams.org/newswire/2021/09/16/new-facebook-study-99-percent-climate-disinformation-goes-unchecked>

<sup>4</sup> [https://www.wsj.com/articles/facebook-mark-zuckerberg-vaccinated-11631880296?mod=series\\_facebookfiles](https://www.wsj.com/articles/facebook-mark-zuckerberg-vaccinated-11631880296?mod=series_facebookfiles)

<sup>5</sup> [https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-1631620739?mod=article\\_inline](https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-1631620739?mod=article_inline)

<sup>6</sup> *Supra*, n.1.

<sup>7</sup> [https://www.unepfi.org/fileadmin/documents/universal\\_ownership\\_full.pdf](https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf); cf.

<https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).



precise numbers: identifying areas where the Company creates systemic risk—as internal Company documents already do-- and analyzing how those risks might manifest as economic costs that threaten diversified portfolios would highly useful to shareholders.



**Frederick H. Alexander**

[info@theshareholdercommons.com](mailto:info@theshareholdercommons.com)

+1.302.485.0497

February 18, 2022

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

*RE: Shareholder proposal of H.E.S.T. Australia Ltd, Trustee of Health Employees Superannuation Trust Australia to Meta Platforms, Inc. regarding business practices that threaten diversified shareholders*

Division of Corporate Finance Staff Members:

H.E.S.T. Australia Ltd, Trustee of Health Employees Superannuation Trust Australia (the “Proponent”) is the beneficial owner of Meta Platforms, Inc. (the “Company”) common stock and has submitted a shareholder proposal (the “Proposal”) to the Company. The Proponent has asked me to respond to the letter dated January 18, 2022 (“Company Letter”) that Michael Kaplan sent to the Securities and Exchange Commission (the “SEC”). In that letter, the Company contends the Proposal may be excluded from the Company’s 2022 proxy statement.

For the reasons discussed in this letter, we respectfully contend the Proposal is not excludable under Rule 14a-8 and must therefore be included in the Company’s 2022 proxy materials. A copy of this letter is being emailed concurrently to Mr. Kaplan.

**SUMMARY**

The Proposal requests a study of (1) risks created by Company business practices that prioritize internal financial return over healthy social and environmental systems and (2) the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios. The Company asserts the Proposal is excludable as relating to ordinary business (Rule 14a-8(i)(7)) or because it is vague and indefinite (Rule 14a-8(i)(3)).

The Proposal is not excludable pursuant to Rule 14a-8(i)(7) because it is solely directed to a significant policy issue posed by the Company’s ongoing business, namely *the question of how to address the social costs a corporation externalizes when it prioritizes internal financial returns over the health of critical social and environmental systems*. The Company Letter fails to acknowledge that this policy issue is at the heart

of the Proposal, and therefore fails to address the key question of whether that issue transcends the ordinary business question upon which the Proposal touches.

The Company asserts the Proposal is vague, yet reading the language of the Proposal, neither the Company nor shareholders would have difficulty ascertaining the core question at issue in the Proposal, even if the Board would have to exercise discretion and judgment in implementing it; thus, the Proposal is not vague within the meaning of Rule 14a-8(i)(3).

## ANALYSIS

### 1. The Proposal is not excludable pursuant to Rule 14a-8(i)(7)

#### A. Commission and Staff guidance

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

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

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

*The Division has noted many times that **the presence of widespread public debate regarding an issue is among the factors to be considered in determining whether proposals concerning that issue "transcend the day-to-day business matters."***<sup>1</sup>

<sup>1</sup> [https://www.sec.gov/interps/legal/cfslb14a.htm#P36\\_4602](https://www.sec.gov/interps/legal/cfslb14a.htm#P36_4602)

The Staff has also stated that shareholder proposals involve significant social policies if they **involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives.**<sup>2</sup>

Previously, the Staff required that a proposal permitted under the significant policy exception have a “nexus” to the Company’s business. The Staff recently announced its intention to refocus its analysis of the significant social policy exception on the policy in question, and not the nexus between the policy issue and the company. *Staff Legal Bulletin No. 14L* (November 3, 2021):

*Going forward, the staff will realign its approach for determining whether a proposal relates to “ordinary business” with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders’ right to bring important issues before other shareholders by means of the company’s proxy statement, while also recognizing the board’s authority over most day-to-day business matters. For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. **In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.***

*Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7). **For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.***

In addition to eliminating the nexus test, SLB L also limited the analysis as to whether a proposal related to a significant policy would “micromanage” the company. As one commentator described the change:

*The new bulletin resets the interpretation of micromanagement to focus on whether the granularity of the proposal is consistent with shareholders’ capacity to understand and deliberate; i.e., proponents are expected to*

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<sup>2</sup> JD Supra, *SEC Staff’s Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) (“In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.”)

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*tailor proposals to a level of inquiry that is consistent with the current state of investor discourse and knowledge.*<sup>3</sup>

As the quoted language from SLB L makes clear, the elimination of the extra hurdles would apply even if the proposal related to the otherwise ordinary business of “hiring, promotion and termination” described in the 1998 Release. Thus, an otherwise eligible proposal that relates to ordinary business can no longer be excluded if those issues have “a broad societal impact” and are consistent with shareholders’ capacity to deliberate.

The report on external risks and costs the Proposal requests relates to an underlying issue with broad societal impact: the appropriate way to address the social costs companies are likely to externalize if they choose to optimize their own financial returns, including any social costs resulting from content and platform management practices, and are highly appropriate for shareholder deliberation.

*B. Significant policy issue: externalizing costs to stakeholders*

*i. Company behavior: profits over people*

The Proposal is unambiguous about the underlying policy issue: the Company may be engaging in practices that raise the Company’s profits but harm society (and ultimately the diversified portfolios of most of its shareholders). Clear evidence of such practices at the Company has recently come to light, and the Proponent cited that evidence in the supporting statement, which we reiterate here.

On October 5, 2021, Frances Haugen, a former Company data scientist, testified before the U.S. Senate. Her testimony highlighted the Company’s prioritization of its profits over social and environmental systems that undergird our economy and the wellbeing of its users:

*I’m here today because I believe Facebook’s products harm children, stoke division and weaken our democracy.*<sup>4</sup>

The Company reached 3,210,000,000 users in the third quarter of 2020.<sup>5</sup> Its platforms affect users’ perceptions, and these perceptions affect social institutions and the ability of the global community to address potentially catastrophic threats. As one expert bluntly stated:

*Facebook is becoming the last bastion of climate denial.*<sup>6</sup>

Company personnel know its content is harmful:

- *We know that COVID vaccine hesitancy has the potential to cause severe societal harm.*<sup>7</sup>

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<sup>3</sup> Sanford Lewis, *SEC Resets the Shareholder Proposal Process*, Harvard Law School Forum on Corporate Governance (December 23, 2021).

<sup>4</sup> <https://www.nytimes.com/2021/10/05/technology/haugen-facebook.html>

<sup>5</sup> <https://www.statista.com/statistics/947869/facebook-product-mau/>

<sup>6</sup> <https://www.commondreams.org/newswire/2021/09/16/new-facebook-study-99-percent-climate-disinformation-goes-unchecked>

<sup>7</sup> [https://www.wsj.com/articles/facebook-mark-zuckerberg-vaccinated-11631880296?mod=series\\_facebookfiles](https://www.wsj.com/articles/facebook-mark-zuckerberg-vaccinated-11631880296?mod=series_facebookfiles)

- *We make body image issues worse for one in three teen girls.*<sup>8</sup>

But a former employee says the Company accepts those harms to increase its profits:

*The company's leadership knows how to make Facebook and Instagram safer, but won't make the necessary changes because they put their astronomical profits before people...*<sup>9</sup>

The supporting statement details how these negative social effects may be the result of the Company's seeking to increase its own profit margins and financial performance. This "trade" of company wealth for social harm has broad societal impact and has been the subject of legislation, regulation, and public debate, as shown below.

ii. Corporate law and shareholder primacy

The directors of U.S. corporations have long focused their efforts on improving the financial return of their corporation to its shareholders. While there has been a fierce, ongoing debate as to whether corporations should in fact be managed for the benefit of only shareholders or for a broader group of stakeholders,<sup>10</sup> the concept of shareholder primacy has dominated corporate law. This doctrine eschews consideration of the external costs of a business unless those costs affect the corporation's own financial return to its shareholders. A series of Delaware court decisions cemented the place of shareholder primacy in the United States.<sup>11</sup>

*eBay Domestic Holdings, Inc. v. Newmark*<sup>12</sup> is a recent example of the judicial focus on shareholder wealth maximization. The court embraced shareholder primacy, finding it was a violation of the directors' fiduciary duties to make decisions primarily for the benefit of users of the corporation's platform:

*Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. **Those standards include acting to promote the value of the corporation for the benefit of its stockholders.** The "Inc." after the company name has to mean at least that. Thus, **I cannot accept as valid... a corporate policy***

<sup>8</sup> [https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article\\_inline](https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline)

<sup>9</sup> *Supra*, n.1.

<sup>10</sup> Frederick Alexander, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE* (2018) at 21-26.

<sup>11</sup> See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, the directors' duty is to maximize the cash value to shareholders, regardless of the interests of other constituencies, because there is no long term for the shareholders); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [e.g., debtholders] . . . does not . . . constitute a breach of duty."); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1169, 1170 (2002) ("The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern."); Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 Seattle Univ. L. Rev. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")

<sup>12</sup> 16 A.3d 1 (Del. Ch. 2010) (emphasis added).

***that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.***<sup>13</sup>

The former Chief Justice of the Delaware Supreme Court has explained that the law clearly favors shareholders, stating, “a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.”<sup>14</sup> Toward the end of the twentieth century, many jurisdictions in the United States adopted “constituency statutes,” fully or partially opting out of shareholder primacy.<sup>15</sup> None of those states mandates stakeholder interest consideration, however.<sup>16</sup> Delaware, the jurisdiction in which the Company is incorporated, has not adopted such a statute.

Delaware’s common-law commitment to shareholder primacy has led to a reaction regarding the risk it poses to stakeholders and the public.<sup>17</sup> Legislatures have responded by creating an alternative: beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests. Legislatures have acted in 39 U.S. jurisdictions (including Delaware), the Canadian province of British Columbia, and the countries of Italy, Colombia, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in the U.S. Congress in both houses that would have imposed benefit corporation duties on the directors of all billion-dollar companies.<sup>18</sup> The issue even surfaced in the most recent U.S. presidential election, as one candidate decried “the era of shareholder capitalism.”<sup>19</sup> In response, critics argued that favoring shareholders was the best recipe for a successful economy:

*In reality, corporations do enormous social good precisely by seeking to generate returns for shareholders.*<sup>20</sup>

<sup>13</sup> *Id.* at 34-35 (referring to corporate justification for shareholder rights plan meant to forestall a change in control that might threaten platform users’ interests) (emphasis added).

<sup>14</sup> Leo Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law* 50 *WAKE FOREST LAW REVIEW* 761 (2015).

<sup>15</sup> Alexander, *supra* n. 3, at 135–148.

<sup>16</sup> *Id.*

<sup>17</sup> See generally, Lynn Stout, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC* (2012). Interestingly, there has been little discussion of the possibility that shareholder primacy may actually require a company with a diversified shareholder base to consider whether its own shareholders would benefit if the company deprioritized its internal financial returns in order to protect the systems that undergird the value of a diversified portfolio. We are not aware of any jurisprudence ruling out that possibility.

<sup>18</sup> Copies of the legislation are available here: <https://www.congress.gov/bill/116th-congress/senate-bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1> (Senate) and here: <https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2> (House)

<sup>19</sup> *Biden says investors ‘don’t need me,’ calls for end of ‘era of shareholder capitalism,’* (CNBC) (July 9, 2020), available at <https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html>.

<sup>20</sup> Andy Pudzer, *Biden’s Assault on ‘Shareholder Capitalism,’* (Wall Street Journal) (August 17, 2020), available at <https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153>.

iii. Unwinding the current understanding of shareholder primacy protects shareholders

Benefit corporation statutes are a legislative expression of the need to provide corporations with an unquestioned basis to account for non-shareholder interests with a priority equal to that given to shareholder interests. But there is also a strong argument that shareholders themselves are better served if a corporation deprioritizes its own financial returns. Lynn Stout, a leading academic opponent of shareholder primacy, explains that evolving arguments against shareholder primacy do not rely on a zero-sum calculus that protects stakeholders to the detriment of shareholders; instead, she explains that these arguments “focus not on how shareholder primacy hurts stakeholders or society *per se*, but on how shareholder primacy can hurt *shareholders*, both individually and immediately, and collectively and over time.”<sup>21</sup>

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

*[F]or widely held public corporations, most shareholders are broadly diversified investors who are dependent on a stable society and environment to support all of their investments and would be financially injured if some corporations create extra profits by externalizing social and environmental costs.<sup>22</sup>*

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

iv. Trust law

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

*In addition, Final Rules should also permit stewardship that discourages portfolio companies from engaging in behaviour that harms society and the environment, and consequently the value of shareholders’ diversified portfolios (For example, plan fiduciaries might vote to encourage all*

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<sup>21</sup> See n.17 at 59.

<sup>22</sup> Frederick Alexander, *How to Leverage Benefit Governance*, in Katayun Jaffari and Stephen Pike, *ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS* (American Bar Association, forthcoming).



*companies to lower their carbon footprint, not because it will necessarily increase return at each and every company, but because it will promote a strong economy and thus increase the return of their diversified portfolio).*<sup>23</sup>

Further evidencing the widespread debate around this issue, the President of the United States suspended those Final Rules by Executive Order on Inauguration Day<sup>24</sup> and put a new set of Proposed Rules in their place.<sup>25</sup>

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

*The Congress finds the following:*

*Fiduciaries for retirement plans should...*

*(D) consider the impact of plan investments on the stability and resilience of the financial system; ...*<sup>26</sup>

While the bill related to costs to the financial system, rather than content and platform management, it was clearly focused on the same policy concern: costs that a company's profit-seeking activities impose on stakeholders.<sup>27</sup>

#### v. The Business Roundtable (BRT) statement

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

***Americans*** *deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good*

<sup>23</sup> Frederick Alexander, *The Final DOL Rules Confirm That Fiduciary Duty Includes 'Beta Activism,'* RESPONSIBLE INVESTOR (December 15, 2020) available at <https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-beta-activism>.

<sup>24</sup> *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, (January 20, 2021), available at <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>

<sup>25</sup> Proposed Rule RIN 1210-AC03, 85 FR 57272 (2021).

<sup>26</sup> H.R. 8959 (116th): Retirees Sustainable Investment Policies Act of 2020

<sup>27</sup> See also Frederick Alexander, Holly Ensign-Barstow, Lenore Palladino, and Andrew Kassoy, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (arguing that fiduciary duties of trustees should incorporate external costs of individual companies that harm portfolios).

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*jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all...*

*While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:*

*Delivering value to our **customers**. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations...*

*Supporting the communities in which we work. We respect the **people in our communities** and protect the environment by embracing sustainable practices across our businesses...*

*Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and **our country**.<sup>28</sup>*

Thus, the Statement explains exactly why the Proposal is a critical policy question: because it asks the Company to report on the social costs of its business practices, which fall upon, among others, “Americans,” “customers,” “people in our community,” and “our country,” the very stakeholders to whom much of corporate America committed less than two years ago.

The reaction to the Statement’s issuance (as well as the number of companies signing on) in August 2019 demonstrated the policy significance of addressing external costs. One dubious commentator noted, “For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business.”<sup>29</sup> Others noted the importance of the change, but also that it was meaningless without ending shareholder primacy as currently practiced:

*Ensuring that our capitalist system is designed to create a shared and durable prosperity for all requires this culture shift. But it also requires corporations, and the investors who own them, to go beyond words and take action to upend the self-defeating doctrine of shareholder primacy.<sup>30</sup>*

Other commentators were worried the Statement did not go far enough:

*Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it’s a blueprint for ineffective and counterproductive public policy on the one hand,*

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<sup>28</sup> *Supra*, n. 1 (emphasis added).

<sup>29</sup> Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).

<sup>30</sup> Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don’t Believe the Business Roundtable Until It’s CEO’s Actions Match Their Words*, FAST COMPANY (August 22, 2019).

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*and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago – and one that all corporate stakeholders ignore today at their peril.*<sup>31</sup>

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

*The issue of which constituency – or “stakeholder” – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally) possible. That all changed on August 19, 2019.*<sup>32</sup>

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

*[T]he doctrine of ‘social responsibility’ taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book *Capitalism and Freedom*, I have called it a ‘fundamentally subversive doctrine’ in a free society, and have said that in such a society, ‘there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.’*<sup>33</sup>

Showing that the controversy is long-lived, the fiftieth anniversary of the essay in 2020 set off another round of commentary.<sup>34</sup>

- vi. [The Proposal addresses the policy issue of corporate cost externalization in pursuit of financial return](#)

The outpouring of legislative activity around benefit corporations, regulatory and legislative activity around trustee obligations to consider external corporate costs, and commentary around the Statement all focus on a critical policy issue: should corporations continue to prioritize financial return or should

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<sup>31</sup> Karl Smith *Corporations Can Shun Shareholders, But Not Profits*, BLOOMBERG OPINION (August 27, 2019).

<sup>32</sup> Christopher Carosa *Did Business Roundtable Just Break A Fiduciary Oath?*, [FiduciaryNews.com](http://fiduciarynews.com), August 27, 2019, available at <http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/>.

<sup>33</sup> Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (magazine).

<sup>34</sup> See, e.g., *Friedman 50 Years later*, PROMARKET (collecting 27 essays about Friedman’s article and its legacy) (Stigler Center for the Study of the Economy and the State).

they, at least in some instances, sacrifice financial return to reduce the social costs they would otherwise externalize?

The Proposal asks the Company to begin to address this question by identifying the risks created by the type of practices identified in the supporting statement.<sup>35</sup> An understanding of the nature of these risks, even if imperfect, can begin the process of addressing whether and where excessive external risks are being generated, and whether there are remedies the company could apply unilaterally, through industry coalitions or perhaps through public/private partnerships. Moreover, by linking the external risks to harm to the Company's diversified shareholder base, the Proposal also raises the possibility that there are remedies in which the interest of Company shareholders and other stakeholders converge, which may lead to decisions not to optimize financial return at the Company.

Such reports are not unprecedented. In the 2021 proxy season, YUM! Brands ("YUM") received a similar proposal regarding the presence of excessive antibiotics in its supply chain and agreed to prepare a report regarding costs it externalized in the form of increased antimicrobial resistance of pathogens that threaten human and animal health.<sup>36</sup> YUM agreed to prepare a report that, when ultimately issued, explained the areas where competitive pressures limited its ability to reduce the social costs the continued use of antibiotics in its supply chain creates. In other words, the report identified areas where financial return was being prioritized over public health and economic growth. The report went on to suggest the need for greater public/private cooperation:

*The challenge of individual costs and widely distributed societal benefits, a situation common in many sustainability issues, plays a key role in antimicrobial resistance. This may make it difficult to pursue AMR mitigation while remaining competitive on costs and highlights the need for strong collaboration between both the public and private sectors.<sup>37</sup>*

This was a tremendously important statement for a restaurant company to put on the public record as a step toward addressing the problem of companies feeling pressure to prioritize their own finances over the public good.

While the YUM report did not put specific numbers on the costs it externalized, financial analysts have begun to quantify the broad societal impact of various forms of externalized social costs. In a recent study (the "Schroders Report"), a leading asset manager determined that publicly listed companies

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<sup>35</sup> See *supra*, n. **Error! Bookmark not defined.**

<sup>36</sup> <https://www.prnewswire.com/news-releases/the-shareholder-commons-announces-withdrawal-of-shareholder-proposal-after-yum-brands-commits-to-disclose-systemic-costs-of-antibiotic-use-301239878.html>. Specifically, the withdrawn proposal read as follows:

*RESOLVED, shareholders ask that the board commission and disclose a study on the external environmental and public health costs created by the use of antibiotics in the supply chain of our company (the "Company") and the manner in which such costs affect the vast majority of its shareholders who rely on a healthy stock market.*

<sup>37</sup> <https://www.yum.com/wps/wcm/connect/yumbrands/41a69d9d-5f66-4a68-bdee-e60d138bd741/Antimicrobial+Resistance+Report+2021+11-4+-+final.pdf?MOD=AJPERES&CVID=nPMkceo>

imposed social and environmental costs on the economy with a value of \$2.2 trillion annually—more than 2.5 percent of global GDP and more than half the profits those companies earned.<sup>38</sup> These costs have many sources, including pollution, water withdrawal, climate change, and employee stress. The study shows exactly the areas where corporations are likely to ignore stakeholder interests, to the detriment of the global economy. The social costs arising from the practices identified in the supporting statement fall directly within this problematic paradigm.

The Proposal seeks to address the issue by leveraging areas in which the Company's diversified shareholders' interests converge with broad social interests in reducing the Company's cost externalization. As described above in subparagraph iii, the convergence arises from the fact that when a corporation prioritizes its financial returns above all stakeholder concerns, it can harm its own diversified shareholders, who often constitute the vast majority of a public company's shareholders.<sup>39</sup> Such shareholders and beneficial owners suffer when companies follow the current shareholder primacy model and impose costs on the economy that lower GDP, which reduces overall equity value.<sup>40</sup> Accordingly, Company shareholders (along with the world's population and economy) could benefit from a better understanding of whether the Company's financial interests are being prioritized over social costs generated by its content.

The Proposal will address this issue by asking the Company to describe the external risks created by its business practices, providing context to its shareholders and permitting them to understand whether the value proposition of the Company is truly sustainable, or whether its profits rely on the exploitation of common resources and vulnerable populations.

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

vii. The Proposal concerns a significant policy issue and should not be excluded because it involves products and services

The Company Letter argues for an exclusion under Rule 14a-8(i)(7) because the Proposal addresses products offered to customers. Where the focus of the Proposal is clearly on a significant policy issue, the fact that it may touch on issues related to products and services does not cause it to be excludable. Staff Legal Bulletin 14H, October 22, 2015, made this clear:

*[T]he Commission has stated that proposals focusing on a significant*

<sup>38</sup> <https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf>

<sup>39</sup> Indeed, the top three holders of Company shares are mutual fund companies Vanguard, BlackRock and Fidelity, whose clients are generally indexed or otherwise broadly diversified investors. <https://finance.yahoo.com/quote/FB/holders?p=FB>

<sup>40</sup> See Richard Mattison et al., *Universal Ownership: Why environmental externalities matter to institutional investors*, UNEP Finance Initiative and PRI (2011), available at [https://www.unepfi.org/fileadmin/documents/universal\\_ownership\\_full.pdf](https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf); <https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).

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*policy issue are not excludable under the ordinary business exception “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.” [Release No. 34-40018] Thus, a proposal may transcend a company’s ordinary business operations even if the significant policy issue relates to the “nitty-gritty of its core business.” [emphasis added]*

SLB L further emphasized that proposals that addressed significant policy issues and included a level of granularity consistent with shareholders’ capacity to understand and deliberate would not be excluded because they constituted “micromanagement.” This was part of a realignment, in which the Staff emphasized a focus on the question of whether a proposal had “broad societal impact” as essential in deciding whether a proposal otherwise related to ordinary business could be included in a company’s proxy material under the social policy rule. The Proposal’s level of detail—seeking a report on the risks created by prioritizing individual company value optimization over social and environmental impacts—meets that test.

Even before such realignment, the Staff recognized that the issue of corporate externalized costs that damage diversified portfolios satisfies the significant policy exception under Rule 14a-8(i)(7). See *PepsiCo, Inc.*, (March 12, 2021) (Staff declined to concur in exclusion under Rule 14a-8(i)(7) when proposal requested a study of public-health costs associated with the company’s business and the manner in which such costs affect diversified shareholders who rely on overall market returns); *CVS Health Corp.*, recon. denied (March 30, 2021) (“a proposal related to the external public health costs... may raise a significant policy issue that transcends a company’s ordinary business operations.”)

The proposals made in *PepsiCo* and *CVS* addressed the same public policy issue as the Proposal: prioritizing company return over social and environmental issues that impact diversified shareholders. The Staff declined to exclude the proposal at *PepsiCo* but not at *CVS Health*, and the only difference in the two situations was that the proposal related to almost all of *PepsiCo*’s sales, but less than 5 percent of *CVS*’s. The Staff did not concur in exclusion of the proposal at *PepsiCo* because it addressed a significant policy issue; the only distinguishing fact at *CVS Health* would have been the nexus requirement, which has been eliminated. See *Johnson & Johnson* (February 8, 2022) (declining to exclude as ordinary business a proposal seeking a report on external costs arising from the company’s policies concerning protection of COVID-19 technology and the effect of such costs on the company’s diversified shareholders; the company had argued that “the Proposal focuses primarily on decisions concerning how *Johnson & Johnson* chooses to sell its products” and “the macroeconomic effect of... intellectual property decisions... is not a significant policy issue.”)

There is no basis for an assertion that a proposal is excludable simply because it touches upon product mix. As prior Staff decisions and recent guidance demonstrate, the key question is whether the subject matter requiring a focus on products is related to a significant policy issue. The Proposal is compliant and therefore not excludable under Rule 14a-8(i)(7).

## 2. The Proposal is not excludable pursuant to Rule 14a-8(i)(3)

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

The Proposal is not vague under that standard. It asks the Company to report on the risks created by its prioritization of its own profits over critical social and environmental issues. As detailed in the supporting statement, its own personnel attest to this prioritization. While the underlying calculation to quantify such risks would be complex, the Proposal only asks for a report on the risks and "the manner" in which those risks might affect diversified shareholders.

The Company letter asserts that the references to "healthy social and environmental systems" and a "productive economy" are intrinsically subjective. The flaw in this argument is that it isolates these words and fails to account for the context established in the rest of the Proposal and supporting statement. It is not unusual for words to have multiple meanings—this does not make them vague, if, when read in context, the meaning becomes clear.

In this case, reading the two phrases in context clarifies their meaning. The Proposal asks for a report that will address threats to the financial returns received by diversified shareholders. The supporting statement explains that "the value of a diversified portfolio rises and falls with GDP." Clearly then, a "productive economy" can be understood as one in which GDP (or other appropriate indicator of economic health) grows over time so as to support the value of a diversified portfolio. Indeed, one recent law-review article quantified the GDP loss associated with social and environmental issues that could affect or had affected diversified shareholders:

*A particularly strong candidate for systematic stewardship is the risk associated with climate change associated with increasing levels of atmospheric CO<sup>2</sup>. ... A 2017 report in Science, for example, estimates a loss of 1.2% of GDP for each degree centigrade rise; without intervention, analysts predict up to a 4 degree increase; the GDP impact would exceed the recession associated with the Great Financial Crisis. ...*

*The Great Financial Crisis demonstrated the systematic impact of the distress of systemically important financial institution. ... The S&P 500 experienced a peak-to-trough loss of 57% over the October 2007 to March 2009 period, overall stock market losses of nearly \$8 trillion. This was associated with a comparable loss in GDP of 4.3% over the period...<sup>41</sup>*

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<sup>41</sup> Jeffrey N. Gordon, *Systematic Stewardship*, ECGI Working Paper No. 566/2021, pp. 27-29 (February 2021).



Nor should it be difficult to understand how those costs affect diversified shareholders. The supporting statement cites economic literature explaining how lowered GDP affects overall stock market value.<sup>42</sup> It is no mystery how overall market return affects a diversified investor, for whom the most important factor determining return will not be how the companies in their portfolio perform relative to other companies (“alpha”), but rather how the market performs as a whole (“beta”). As one work describes this, “According to widely accepted research, alpha is about one-tenth as important as beta. Beta drives some 91 percent of the average portfolio’s return.”<sup>43</sup> See *PepsiCo 2021* (declining to concur in exclusion on vagueness grounds of proposal seeking report on externalized public-health costs from a food and beverage business and effect of those costs on diversified shareholders).

Of course, compilation of such a report will require discretion and business judgment on the part of the Company because it will have to make decisions as to appropriate methodologies to describe such costs, but that is an entirely appropriate role for the board and management. YUM’s management was able to create just such a report, which provided critical information to its shareholders regarding the trade-offs between optimizing financial return and addressing certain social costs created by the corporation’s business practices.

No doubt these are hard questions. Reporting on them may be uncomfortable for the Company’s board and management, but the Company will not have difficulty discerning the action required.

## CONCLUSION

The Proposal clearly addresses a significant policy issue: the risks of the Company’s continuing to prioritize its profits over the health of social and environmental systems and the threats such prioritization poses to the Company’s diversified shareholders. As such, we respectfully request that the Staff deny the Company’s no-action letter request. If you have any questions, please contact me at [rick@theshareholdercommons.com](mailto:rick@theshareholdercommons.com) or 302-485-0497.

Sincerely,



Frederick Alexander  
CEO

cc: Katherine R. Kelly  
Michael Kaplan

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<sup>42</sup> See, e.g., *See Universal Ownership: Why Environmental Externalities Matter to Institutional Investors*, Appendix IV (demonstrating linear relationship between GDP and a diversified portfolio) available at [https://www.unepfi.org/fileadmin/documents/universal\\_ownership\\_full.pdf](https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf); cf. <https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP “is probably the best single measure of where valuations stand at any given moment”) (quoting Warren Buffet).

<sup>43</sup> Steven Davis, Jon Lukmonik and David Pitt-Watson, *WHAT THEY DO WITH YOUR MONEY*, p. 50 (2016).



## THE PROPOSAL

**RESOLVED**, shareholders ask that the board commission and disclose a report on (1) risks created by Company business practices that prioritize internal financial return over healthy social and environmental systems and (2) the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios.

### **Supporting Statement:**

On October 5, 2021, Frances Haugen, a former Company data scientist, testified before the U.S. Senate. Her testimony highlighted the Company's prioritization of its profits over social and environmental systems that undergird our economy and the wellbeing of its users:

*I'm here today because I believe Facebook's products harm children, stoke division and weaken our democracy.<sup>44</sup>*

The Company reached 3,210,000,000 users in the third quarter of 2020.<sup>45</sup> Its platforms affects users' perceptions, and these perceptions affect social institutions and the ability of the global community to address potentially catastrophic threats. As one expert bluntly stated:

*Facebook is becoming the last bastion of climate denial.<sup>46</sup>*

Company personnel know its content is harmful:

- *We know that COVID vaccine hesitancy has the potential to cause severe societal harm.<sup>47</sup>*
- *We make body image issues worse for one in three teen girls.<sup>48</sup>*

But a former employee says the Company accepts those harms to increase its profits:

*The company's leadership knows how to make Facebook and Instagram safer, but won't make the necessary changes because they put their astronomical profits before people...<sup>49</sup>*

These harms matter to shareholders, most of whom diversify their investments to optimize return. Diversified shareholders lose when companies harm the economy, because the value of a diversified

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<sup>44</sup><https://www.nytimes.com/2021/10/05/technology/haugen-facebook.html>

<sup>45</sup> <https://www.statista.com/statistics/947869/facebook-product-mau/>

<sup>46</sup> <https://www.commondreams.org/newswire/2021/09/16/new-facebook-study-99-percent-climate-disinformation-goes-unchecked>

<sup>47</sup> [https://www.wsj.com/articles/facebook-mark-zuckerberg-vaccinated-11631880296?mod=series\\_facebookfiles](https://www.wsj.com/articles/facebook-mark-zuckerberg-vaccinated-11631880296?mod=series_facebookfiles)

<sup>48</sup> [https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article\\_inline](https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline)

<sup>49</sup> *Supra*, n.1.

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portfolio rises and falls with GDP.<sup>50</sup> While the Company may profit by inflicting social costs, its diversified shareholders pay the bill.

In contrast, our CEO is not diversified. His wealth is concentrated in Company shares: unlike most shareholders, his investments do not absorb the social costs the company creates.

We ask the Company for a report identifying and analyzing areas where the Company's practice of maximizing its own financial returns is opposed to the interests of its diversified shareholders in a healthy economy. This will help shareholders understand where the Company's prioritization of "astronomical profits before people" creates a financial risk to their portfolios. Such a report would not need to provide precise numbers: identifying areas where the Company creates systemic risk—as internal Company documents already do— and analyzing how those risks might manifest as economic costs that threaten diversified portfolios would highly useful to shareholders.

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<sup>50</sup> [https://www.unepfi.org/fileadmin/documents/universal\\_ownership\\_full.pdf](https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf); cf. <https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).