March 21, 2023

Brian V. Breheny  
Skadden, Arps, Slate, Meagher & Flom LLP  

Re: JPMorgan Chase & Co. (the “Company”)  
Incoming letter dated January 13, 2023  

Dear Brian V. Breheny:  

This letter is in response to your correspondence concerning the shareholder proposal (the “Proposal”) submitted to the Company by The Bahnsen Family Trust Dated July 15th 2003 for inclusion in the Company’s proxy materials for its upcoming annual meeting of security holders.  

The Proposal requests that the board conduct an evaluation and issue a report within the next year evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals’ exercise of their constitutionally protected civil rights.  

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/2022-2023-shareholder-proposals-no-action.  

Sincerely,  

Rule 14a-8 Review Team  

cc: David Bahnsen  
The Bahnsen Family Trust Dated July 15th 2003
January 13, 2023

BY EMAIL (shareholderproposals@sec.gov)

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

Re: Shareholder Proposal Submitted by
David Bahnsen

Ladies and Gentlemen:

This letter is submitted on behalf of JPMorgan Chase & Co., a Delaware corporation (the “Company”), pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The Company requests that the staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) not recommend enforcement action if the Company omits from its proxy materials for the Company’s 2023 Annual Meeting of Shareholders (the “2023 Annual Meeting”) the shareholder proposal and supporting statement (the “Proposal”) submitted by David Bahnsen (the “Proponent”).

This letter provides an explanation of why the Company believes it may exclude the Proposal and includes the attachments required by Rule 14a-8(j). In accordance with Section C of Staff Legal Bulletin 14D (Nov. 7, 2008) (“SLB 14D”), this letter is being submitted by email to shareholderproposals@sec.gov. A copy of this letter also is being sent to the Proponent as notice of the Company’s intent to omit the Proposal from the Company’s proxy materials for the 2023 Annual Meeting.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder
proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the Company.

Background

The Company received an initial version of the Proposal on December 2, 2022, along with a cover letter from the Proponent. On December 13, 2022, the Company sent a letter, via email, to the Proponent requesting a written statement verifying that the Proponent owned the requisite number of shares of the Company’s common stock continuously for at least the requisite period preceding and including the date of submission of the Proposal. On December 26, 2022, the Company received an email with a revised version of the Proposal and a copy of a letter from Fidelity Investments (the “Fidelity Letter”) that purported to demonstrate the Proponent’s eligibility to submit the Proposal. However, the Fidelity Letter did not represent that the Proponent continuously held the Company’s common stock for the requisite period. On December 28, 2022, the Company sent another letter, via email, to the Proponent requesting a written statement verifying that the Proponent continuously owned the requisite number of shares of the Company’s common stock for the requisite period. On January 10, 2023, the Company received an email with an updated letter from Fidelity Investments verifying the Proponent’s continuous ownership of at least the requisite amount of the Company’s common stock for at least the requisite period preceding and including the date of submission of the Proposal. Copies of the Proposal, cover letter and related correspondence are attached hereto as Exhibit A.

Summary of the Proposal

The text of the resolution contained in the Proposal follows:

Resolved: Shareholders request the Board of Directors of JPMorgan Chase & Co. conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals’ exercise of their constitutionally protected civil rights.

Basis for Exclusion

We hereby respectfully request that the Staff concur in the Company’s view
that it may exclude the Proposal from the proxy materials for the 2023 Annual Meeting pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company’s ordinary business operations.

Analysis

A. The Proposal relates to the Company’s ordinary business matters.

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.” In Exchange Act Release No. 34-40018 (May 21, 1998) (the “1998 Release”), the Commission stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that 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. 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.

The Commission has stated that a proposal requesting the dissemination of a report is excludable under Rule 14a-8(i)(7) if the substance of the proposal is within the ordinary business of the company. See Exchange Act Release No. 34-20091 (Aug. 16, 1983) (“[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).”). Moreover, in Staff Legal Bulletin 14E (Oct. 27, 2009) (“SLB 14E”), the Staff noted that if a proposal relates to management of risks or liabilities that a company faces as a result of its operations, the Staff will focus on the “subject matter to which the risk pertains or that gives rise to the risk” in making a decision regarding whether a proposal can be properly excluded pursuant to Rule 14a-8(i)(7). Pursuant to SLB 14E, the Staff has consistently permitted exclusion of shareholder proposals under Rule 14a-8(i)(7) requesting an assessment of risks when the underlying subject matter concerns the ordinary business of the company. See, e.g., Netflix, Inc. (Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report “describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk assessment results into company policies and decision-making,” noting that the proposal related to the ordinary business matter of the “nature, presentation and content of programming and film production”); Sempra Energy (Jan. 12, 2012, recon. denied Jan. 23, 2012) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that asked the board “to conduct an independent
oversight review” of the company’s management of risks posed by the company’s operations in certain countries, noting that the proposal related to the company’s ordinary business matters).

In this instance, the Proposal’s resolved clause requests a report on how the Company oversees risks related to “discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals’ exercise of their constitutionally protected civil rights.” While it is facially unclear precisely who these “individuals” are, the Proposal’s supporting statement focuses on the Company’s customers, which clearly relates to the Company’s ordinary business matters. Specifically, the supporting statement addresses laws that prohibit discrimination “when providing financial services to the public” along with “discrimination in the provision of services” and “serving diverse consumers.” The Proposal’s supporting statement further references the “Statement on Debanking and Free Speech,” which relates to the alleged denial of services to some bank customers and includes specific allegations that the Company has denied service to certain politically conservative account holders. The Proposal also alleges that ambiguities in internal Company policies allow the Company’s employees to “deny or restrict service for arbitrary or discriminatory reasons.” Thus, the Proposal relates to risks in the offering of the Company’s products and services to customers, in its relationships with its customers, and in the application of internal workforce policies. Each of these matters have specifically been recognized by the Staff as ordinary business matters upon which a proposal may be excluded pursuant to Rule 14a-8(i)(7).

1. **Products and services.**

In accordance with the policy considerations underlying the ordinary business exclusion, the Staff consistently has permitted exclusion under Rule 14a-8(i)(7) of shareholder proposals relating to the products and services offered to customers by a company. See, e.g., JPMorgan Chase & Co. (Mar. 26, 2021) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a study on the costs created by the Company in underwriting multi-class equity offerings); JPMorgan Chase & Co. (Mar. 19, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report examining the “politics, economics and engineering for the construction of a sea-based canal through the Tehuantepec isthmus of Mexico,” noting that the proposal “relates to the products and services offered for sale by the Company”); Wells Fargo & Co. (Jan. 28, 2013, recon. denied Mar. 4, 2013) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company report on the adequacy of the company’s policies in addressing the social and financial impacts of its direct deposit advance lending service, noting that the proposal “relates to the products and services offered for sale by the company” and that “[p]roposals concerning the sale of particular products and services are generally
excludable under rule 14a-8(i)(7)’’); JPMorgan Chase & Co. (Mar. 16, 2010) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board implement a policy mandating that the Company cease its current practice of issuing refund anticipation loans, noting that the proposal “relate[s] to [the Company’s] decision to issue refund anticipation loans” and that “[p]roposals concerning the sale of particular services are generally excludable under rule 14a-8(i)(7)”); Bank of America Corp. (Feb. 21, 2007) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on policies against providing financial services that enable capital flight and result in tax avoidance, noting that the proposal “relat[es] to [the company’s] ordinary business operations (i.e., sale of particular services”).

In this instance, the Proposal focuses on the products and services offered to customers by the Company, which is an ordinary business matter. In this regard, the supporting statement refers to laws that prohibit discrimination “when providing financial services to the public” as well as “discrimination in the provision of services,” “the ability of individuals, groups, and businesses to access and equally participate in the marketplace” and “serving diverse consumers without regard to their beliefs or other factors.” Overall, the Proposal exhibits a general concern with alleged discrimination in the provision of services by the Company to certain customers. Accordingly, consistent with the precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).

2. **Relationships with customers.**

In addition, the Staff has permitted exclusion under Rule 14a-8(i)(7) of proposals relating to a company’s customer relationships, including decisions with regard to the offering of services to particular types of customers. See, e.g., JPMorgan Chase & Co. (Feb. 21, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board complete a report on the impact to customers of the Company’s overdraft policies); Ford Motor Co. (Feb. 13, 2013) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting removal of dealers that provided poor customer service); Anchor BanCorp Wisconsin Inc. (May 13, 2009) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board adopt a new policy for the lending of funds to borrowers and the investment of assets after taking preliminary actions specified in the proposal, noting that the proposal related to the company’s “ordinary business operations (i.e., credit policies, loan underwriting and customer relations)”); JPMorgan Chase & Co. (Feb. 21, 2006) (permitting exclusion under Rule 14a-8(i)(7) of a proposal recommending that the Company not issue first mortgage home loans, except as required by law, greater than four times a borrower’s gross income, noting that the proposal related to the Company’s “ordinary business operations (i.e., credit policies, loan underwriting and customer relations)”);
In particular, the Staff has permitted exclusion under Rule 14a-8(i)(7) of proposals relating to a company’s decisions with regard to the handling of customer accounts. In Comcast Corp. (Apr. 13, 2022), for example, the excluded proposal requested that the company notify a customer in advance of any termination, suspension or cancellation of service to the customer. The company argued, in part, that the proposal related to ordinary business matters because how the company “handles its customer accounts and customer relations implicates routine management decisions encompassing legal, regulatory, operational, and financial considerations, among others.” In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that “the [p]roposal relates to, and does not transcend, ordinary business matters.” See also, e.g., PayPal Holdings, Inc. (Apr. 2, 2021) *(permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested that the company not freeze or terminate customer accounts without first providing the company’s rationale to customers); TD Ameritrade Holding Corp. (Nov. 20, 2017) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested that the company’s shareholders have the right to be clients of the company, noting that “the [p]roposal relates to the [c]ompany’s policies and procedures for opening and maintaining customer accounts”).

In this case, the Proposal focuses on the Company’s customer relationships, including the Company’s decisions regarding the handling of customer accounts, which is an ordinary business matter. This focus is demonstrated by the statements described above regarding alleged discrimination in the provision of services by the Company to certain customers, as well as the references to the “Statement on Debanking and Free Speech,” which alleges that certain companies “allow employees to deny or restrict services for arbitrary or discriminatory reasons.” In particular, the Statement on Debanking and Free Speech alleges that the Company has denied service to, and closed the accounts of, certain conservative political organizations. These statements and references make clear the Proposal’s focus on the Company’s handling of customer accounts, including when, how and why to close accounts, which is a core component of the Company’s ordinary business as a global financial services company providing commercial banking services. Accordingly, consistent with the precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).


The Staff also has permitted exclusion under Rule 14a-8(i)(7) of proposals that relate to management of a company’s workforce, including its workforce policies. See 1998 Release (excludable matters “include the management of the workforce, such as the hiring, promotion, and termination of employees”); see also,
In addition to the matters described above, the Proposal focuses on the Company’s management of its workforce, which is an ordinary business matter. In this regard, the Proposal’s supporting statement notes that certain companies in the financial services industry have “vague and subjective standards in their policies” that “allow employees to deny or restrict service for arbitrary or discriminatory reasons.” This indicates a concern with how the Company manages its workforce through its internal employee policies. Decisions with respect to the Company’s policies for managing employees are at the heart of the Company’s business as a global financial services company and are so fundamental to the Company’s day-to-day operations that they cannot, as a practical matter, be subject to shareholder oversight. Therefore, consistent with the precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).

B.  **The Proposal does not focus on a significant policy issue.**

A proposal may not be excluded under Rule 14a-8(i)(7) if it is determined to focus on a significant policy issue. The fact that a proposal may touch upon a significant policy issue, however, does not preclude exclusion under Rule 14a-8(i)(7). Instead, the question is whether the proposal focuses primarily on a matter of broad public policy versus matters related to the company’s ordinary business operations. *See* 1998 Release; SLB 14E. The Staff has consistently permitted exclusion of shareholder proposals where the proposal focused on ordinary business matters, even though it also related to a potential significant policy issue. As discussed above, in *Comcast Corp.* (Apr. 13, 2022), the excluded proposal requested, among other things, that the Company adopt a policy of notifying a customer in advance of any termination, suspension or cancellation of service to the customer. In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that “the [p]roposal relates to, and does not transcend, ordinary business matters.” *See also,* *e.g.*, *PetSmart, Inc.* (Mar. 24, 2011) (permitting exclusion under Rule 14a-8(i)(7)
when, although the proposal addressed the potential significant policy issue of the humane treatment of animals, the proposal covered a broad scope of laws ranging “from serious violations such as animal abuse to violations of administrative matters such as record keeping”); *CIGNA Corp.* (Feb. 23, 2011) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the potential significant policy issue of access to affordable health care, it also asked CIGNA to report on expense management, an ordinary business matter); *Capital One Financial Corp.* (Feb. 3, 2005) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

In this instance, the Proposal does not appear to focus on a significant policy issue that has been recognized by the Staff. Although the Proposal’s resolved clause purports to raise the issue of discrimination based on individuals’ “race, color, religion (including religious views), sex, national origin, or political views,” the Proposal’s supporting statement indicates that the proposal is “particularly concerned about recent evidence of religious and political discrimination,” which, to our knowledge, the Staff has not determined to be significant policy issues. Notably, in *BlackRock, Inc.* (Apr. 4, 2022, recon. denied May 2, 2022), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal that requested a report detailing the potential risks associated with omitting “viewpoint” and “ideology” from the company’s written equal employment opportunity (EEO) policy, where the supporting statement claimed that company employees were at risk of political discrimination. In permitting exclusion, the Staff noted that “the [p]roposal relates to, and does not transcend, ordinary business matters.” *See also Duke Energy Corp.* (Feb. 23, 2017) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on risks and costs to the company caused by discrimination against “religious individuals and those with deeply held beliefs”); *PG&E Corporation* (Feb. 27, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting the company include in all employment and related policies “the right of employees to freely express their personal religious and political thoughts,” noting that “the proposal relates to [the company’s] policies concerning its employees”).

Moreover, in this case even if the Proposal were viewed to touch on a potential significant policy issue, the Proposal’s overwhelming concern with the Company’s products and services offered to customers, customer relationships and workforce management demonstrates that the Proposal’s focus is on ordinary business matters. Therefore, even if the Proposal could be viewed as touching upon a significant policy issue, its focus is on ordinary business matters.
Accordingly, consistent with the precedent described above, the Proposal may be excluded under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations.

Conclusion

On the basis of the foregoing, the Company respectfully requests the concurrence of the Staff that the Proposal may be excluded from the Company’s proxy materials for the 2023 Annual Meeting. If you have any questions or would like any additional information regarding the foregoing, please do not hesitate to contact me at (202) 371-7180. Thank you for your prompt attention to this matter.

Very truly yours,

Brian V. Breheny

Enclosures

cc: John H. Tribolati
    Corporate Secretary
    JPMorgan Chase & Co.

    David Bahnsen
EXHIBIT A

(see attached)
December 1st, 2022

Secretary at JPMorgan Chase & Co.
Office of the Secretary
4 New York Plaza, New York, NY 10004-2413
corporate.secretary@jpmchase.com

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the JPMorgan Chase & Co. (the "Company") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14a-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission’s proxy regulations. I submit the Proposal as DAVID BAHNSEN, TRUSTEE of THE BAHNSEN FAMILY TRUST DATED JULY 15TH 2003, which has continuously owned Company stock with a value exceeding $25,000 for at least one year prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company’s 2023 annual meeting of shareholders. Pursuant to interpretations of Rule 14(a)-8 by the U.S. Securities and Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal THURSDAY, DECEMBER 8th 2022, 2 PM EST. If that proves inconvenient, please suggest some other times to speak. Feel free to contact me at DBAHNSEN@THEBAHNSENGROUP.COM so that we can determine the mode and method of that discussion.

A Proof of Ownership letter is forthcoming and will be delivered to the Company. Copies of correspondence or a request for a "no-action" letter should be sent to DBAHNSEN@THEBAHNSENGROUP.COM emailed to

Sincerely,

DAVID BAHNSEN

Enclosure: Shareholder Proposal
Supporting Statement:

Companies that provide banking or financial services are essential pillars of the marketplace. On account of their unique and pivotal role in America’s economy, many federal and state laws already prohibit them from discriminating when providing financial services to the public. And the UN Declaration of Human Rights, consistent with many other laws and the U.S. Constitution, recognizes that “everyone has the right to freedom of thought, conscience, and religion.”¹ Financial institutions should respect these freedoms.

As shareholders of [Company Name] ("[short name]"), we believe it is of great import that the company respect civil rights by identifying potential factors that may contribute to discrimination in the provision of services based on race, color, religion, sex, national origin, or social, political, or religious views.

We are particularly concerned with recent evidence of religious and political discrimination by companies in the financial services industry, as detailed in the Statement on Debanking and Free Speech.²

When companies engage in this kind of discrimination, they hinder the ability of individuals, groups, and businesses to access and equally participate in the marketplace and instead skew it to their own ends.

The Statement on Debanking and Free Speech identified many companies in the financial services industry that frequently include vague and subjective standards in their policies like “hate speech” or promoting “intolerance” that allow employees to deny or restrict service for arbitrary or discriminatory reasons. The 2022 edition of the Viewpoint Diversity Business Index³ also identified numerous examples of this in many companies’ terms of service. The inclusion of vague and arbitrary terms risks impacting clients’ exercise of their constitutionally protected civil rights, by creating the potential that such persons or groups will be denied access to essential services as a consequence of their speech or political activity. Moreover, they risk giving fringe activists and governments a foothold to demand that private financial institutions deny service under the sweeping, unfettered discretion that such policies provide.

These actions and policies are an affront to public trust, destabilize the market, and threaten the ability of American citizens to live freely and do business according to their deeply held convictions.

³ https://viewpointdiversityscore.org/business-index.
[Company] also maintains that it promotes good social policy and diversity, equity, and inclusion practices. It is important for the shareholders to know that [company] is adhering to its own standards by serving diverse consumers without regard to their beliefs or other factors above.

Resolved: Shareholders request the Board of Directors conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals’ exercise of their constitutionally protected civil rights.

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4 [link to relevant ESG report or other policy]
Dear Mr. Tribolati,

I’m writing on behalf of Mr. David Bahnsen to address the issues in your deficiency letter dated December 13, 2022.

Please find attached the following:

1. A letter from the record holder of JPMC shares held by the BAHNSEN FAMILY TRUST DATED JULY 15th 2003, verifying that the Trust beneficially held the requisite number of shares of JPMC common stock for the required holding period including December 2, 2022.

2. A revised Proposal (Report on Ensuring Respect for Civil Liberties) and Supporting Statement, clarifying that JPMC is the proper recipient of the Proposal.

Sincerely,

Susan Bowyer
Bowyer Research
Report on Ensuring Respect for Civil Liberties

Supporting Statement:

Companies that provide banking or financial services are essential pillars of the marketplace. Because of their unique and pivotal role in America’s economy, many federal and state laws already prohibit them from discriminating when providing financial services to the public. And the UN Declaration of Human Rights, consistent with many other laws and the U.S. Constitution, recognizes that “everyone has the right to freedom of thought, conscience, and religion.”¹ Financial institutions should respect these freedoms.

As shareholders of JPMorgan Chase & Co., (“JPMC” or “the Company”) we believe it is of great import that the Company respect civil rights by identifying potential factors that may contribute to discrimination in the provision of services based on race, color, religion, sex, national origin, or social, political, or religious views.

We are particularly concerned about recent evidence of religious and political discrimination by companies in the financial services industry, as detailed in the Statement on Debanning and Free Speech.²

When companies engage in this kind of discrimination, they hinder the ability of individuals, groups, and businesses to access and equally participate in the marketplace and instead skew it to their own ends.

The Statement on Debanning and Free Speech identified many companies in the financial services industry that frequently include vague and subjective standards in their policies like “hate speech” or promoting “intolerance” that allow employees to deny or restrict service for arbitrary or discriminatory reasons. The 2022 edition of the Viewpoint Diversity Business Index³ also identified numerous examples of this in many companies’ terms of service. The inclusion of vague and arbitrary terms risks impacting clients’ exercise of their constitutionally protected civil rights, by creating the potential that such persons or groups will be denied access to essential services as a consequence of their speech or political activity. Moreover, they risk giving fringe activists and governments a foothold to demand that private financial institutions deny service under the sweeping, unfettered discretion that such policies provide.

These actions and policies are an affront to public trust, destabilize the market, and threaten the ability of American citizens to live freely and do business according to their deeply held convictions.

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³ https://viewpointdiversityscore.org/business-index
JPMC also maintains that it promotes good social policy and diversity, equity, and inclusion practices. It is important for the shareholders to know that the Company is adhering to its own standards by serving diverse consumers without regard to their beliefs or other factors above.

**Resolved:** Shareholders request the Board of Directors of JPMorgan Chase & Co. conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights.

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February 10, 2023  
Via electronic mail  
shareholderproposals@sec.gov

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


Ladies and Gentlemen:

This letter is submitted in response to the letter of Brian V. Breheny on behalf of JPMorgan Chase & Co., (the “Company”) dated January 13, 2023 (the “Company Letter”), requesting that the staff of the Division of Corporation Finance (“the Staff”) of the United States Securities and Exchange Commission (“the Commission”) concur with its view and issue relief to the Company on the basis that Mr. Bahnsen (the “Proponent”)’s shareholder proposal (“the Proposal”) is excludable from the Company’s proxy materials for its 2023 Annual Meeting of Stockholders under Rule 14a-8(i)(7) promulgated under the Securities Exchange Act of 1934 (the “Exchange Act”). 17 C.F.R. § 240a-8 (“Rule 14a-8”). Mr. Bahnsen has asked that we respond to the Company Letter.

The Proposal

The Proposal provides as follows:

Resolved: Shareholders request the Board of Directors of JPMorgan Chase & Co. conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals’ exercise of their constitutionally protected civil rights.

The Company seeks permission from the Staff to exclude the Proposal under Rule 14a-8(i)(7) as a proposal relating to ordinary business operations. The Company bears the burden of demonstrating it is entitled to exclude the Proposal. Rule 14a-8(g). But it cannot do this because the proposal deals with high-level risk management and focuses on civil rights discrimination, which is a significant social policy issue.
Argument

The Proposal is a typical civil-rights shareholder proposal. Its focus is on the societal risks that come from civil rights discrimination against individuals—whether based on race, color, religion, sex, national origin, or political views—and applies to emerging issues in the financial services and banking sectors. This kind of proposal has a long pedigree in the Staff’s Rule 14a-8 precedent. Under the Staff’s consistent precedent supporting the admissibility of civil rights proposals, the Proposal is clearly not excludable. But even considering the Proposal outside of the Staff’s precedent, under the plain language of the Commission’s and Staff’s guidance, it relates to a matter of immense social significance in both our country’s history and current public debates. As such, this is an easy case. If the Staff decides to issue relief anyway, it could only be in a manner that raises significant constitutional and administrative law concerns.

I. The Proposal is not excludable under Rule 14a-8(i)(7) because the proposal unambiguously focuses on a significant social policy issue that transcends the company’s ordinary business operations.

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company’s proxy materials if the proposal “deals with a matter relating to the company’s ordinary business operations.” According to the Staff, even proposals that deal with ordinary business operations are not excludable under Rule 14a-8(i)(7) if they “focus on sufficiently significant social policy issues.” This is because they “transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” Exchange Act Release No. 40018, 63 Fed. Reg. 29106, 29108 (May 21, 1998) (the “1998 Release”). Addressing discrimination is precisely such an issue, as the Staff have repeatedly recognized in previous no-action decisions. Accordingly, the Proposal may not be excluded under Rule 14a-8(i)(7) because it focuses on the significant social policy issue of discrimination in civil rights matters, and it transcends and does not relate to ordinary business matters.

A. The Proposal fits well within the Commission’s and Staff’s consistent recognition that discrimination in civil rights matters is a significant social policy issue.

Proposals that “focus on sufficiently significant social policy issues” that “transcend the ordinary business operations” of the company are not excludable under Rule 14a-8(i)(7). 1998 Release, supra; Division of Corporation Finance, Staff Legal Bulletin No. 14L (Nov. 3, 2021). As the Staff reiterated just over one year ago in Staff Legal Bulletin No. 14L, in determining whether a proposal focuses on a matter of significant social policy, the Staff focuses on the “broad societal impact” of the issue raised by the proposal. Further, the Staff’s longstanding position is that “the presence of widespread public debate” must be considered in determining whether the issue transcends ordinary business operations. Division of Corporation Finance, Staff Legal Bulletin No. 14A (July 12, 2002).

The Commission’s and Staff’s interpretations of the “significant social policy exception” repeatedly cite discrimination in civil rights matters as the prototypical examples of significant social policy issues that transcend ordinary business matters. For example, the Commission’s 1998 Release explained that proposals “focusing on sufficiently significant social policy issues (e.g., significant
discrimination matters) generally would not be considered to be excludable.” 1998 Release, supra (emphasis added). Issues like “significant discrimination matters” would not be excludable precisely “because the proposals would transcend the day-to-day business matters.” Id. (emphasis added). And in Staff Legal Bulletin No. 14L, the Staff reiterated this position by citing “[m]atters related to employment discrimination” as an example of an issue that “may rise to the level of transcending the company’s ordinary business operations.” Staff Legal Bulletin No. 14L, supra at n.5. Neither the Commission nor the Staff have since repudiated these positions.

Consistent with this well-established guidance, the Staff have consistently denied relief requests from companies seeking to exclude proposals that relate to discrimination in civil rights matters. See, e.g., Levi Strauss & Co. (Feb. 10, 2022) (audit analyzing the company’s impact on civil rights and non-discrimination); McDonald’s Corporation (Apr. 5, 2022) (audit analyzing the “adverse impact” of the company’s policies and practices on the civil rights of “company stakeholders”); Amazon.com, Inc. (New York State Common Retirement Fund) (Apr. 7, 2021). The Staff have also regularly denied relief for proposals focusing on the issue of discrimination in the context of human rights. See, e.g., Abercrombie & Fitch Co. (Apr. 12, 2010) (disclosure based on certain worker and human rights standards, including non-discrimination principles expressed in the International Labor Organization Conventions); General Motors (Apr. 18, 2022) (report on child labor outside the United States); Alphabet, Inc. (Apr. 12, 2022) (evaluation of existing policies and practices to address the human rights impacts of the company’s content management policies).

The Staff’s precedent covers a wide range of protected characteristics. The Staff have in recent years denied relief for proposals requesting reports on racial discrimination, e.g., Amazon.com, Inc. (Mar. 14, 2017) (report on the risk of racial discrimination resulting from the use of criminal background checks); sex discrimination, e.g., CBRE Group, Inc. (Mar. 6, 2019) (report on the impact of the company's mandatory arbitration policy on sexual harassment claims); discrimination against homosexuals, e.g., The Proctor & Gamble Co. (Aug. 16, 2016) (risks arising from engagement with the issue of discrimination against homosexuals); and discrimination on protected characteristics in general, e.g., Alphabet, Inc. (Apr. 15, 2022) (proposal that, according to the Staff, “raise[d] the issue of discriminatory effects of the Company’s algorithmic systems”).

This is where the analysis of the Company’s request for relief should begin and end. Under the Commission’s and Staff’s guidance and existing precedent, the Proposal unambiguously raises and focuses on an issue of significant social policy concern. The Proposal raises the issues of “discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views,” and “whether such discrimination may impact individuals’ exercise of their constitutionally protected civil rights.”

As the Commission and Staff have recognized in a wide range of contexts, civil rights issues, even (and perhaps especially) in general, are not “day-to-day” routine matters of business, but are fundamental questions of social policy that have “broad societal impact.” So it is with the Proposal. The Supporting Statement cites as the

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1 See also Apple, Inc. (Dec. 20, 2021) (proposal requesting a report assessing the risks with the use of concealment clauses “in the context of harassment, discrimination and other unlawful acts”).
motivation for the Proposal’s concern risks related to “an affront to the public trust,” “destabiliz[ing] the market,” and the ability of the “banking or financial services” sectors to protect rights declared in the United States Constitution and United Nations Declaration of Human Rights. The Supporting Statement also references its concern for consistency with the Company’s commitment to “good social policy” and “diversity, equity, and inclusion.” Finally, the Supporting Statement references the existence of widespread public debate over the issue of de-banking. The Supporting Statement notes ongoing attempts by “fringe activists and governments” to “demand that private financial institutions deny service” to individuals based on protected characteristics. The Proposal’s concern is not with the Company’s ordinary business activities, but with the Company’s contribution to emerging and fundamental societal problems related to the de-banking of individuals on arbitrary and discriminatory grounds.

The Company Letter whistles past the Proposal’s social significance and fails to cite to or distinguish the Proposal from any of the Staff’s numerous denials of relief for civil rights discrimination proposals. Instead, the Company argues the Proposal’s identification of “religious and political discrimination” from within a broader list of protected classes, including “race, color, religion (including religious views), sex, national origin, or political views” renders the Proposal excludable by touching on issues not previously “recognized by Staff.” Company Letter at 8. In other words, according to the Company’s logic, while a proposal regarding race, color, national origin, or sex would transcend ordinary business operations, the addition of religion or political views to the list somehow fundamentally changes the proposal’s focus into a quotidian matter of no particular social importance. This is incorrect and amounts to an invitation that the Staff either reverse itself, discriminate between shareholder proposals based on viewpoint, or both. The Staff should not accept this invitation for at least three reasons.

First, religion and political identity are protected characteristics in civil rights laws. The civil right of religious exercise has a long history in our country. The free exercise of religion is the first civil right protected by the Bill of Rights. U.S. Const. amend. I. Religion—like race, color, sex, and national origin—is one of the characteristics protected by the United States’s most significant federal non-discrimination law, the Civil Rights Act of 1964. 42 U.S.C. §§ 2000a, 2000e–2. Many states and cities similarly prohibit religious discrimination in a wide variety of contexts. For example, both Washington D.C. and New York prohibit religious discrimination in housing, employment, public accommodations, and educational institutions. D.C. Code § 2-1401 et seq.; N.Y. Exec. § 296. And New York’s Human Rights Law also prohibits religious discrimination in providing credit services. N.Y. Exec. § 296(2). Like other civil rights, religion is a protected characteristic under laws the Company is no doubt subject to.

Contrary to the Company’s assertions, the Staff have previously recognized that religious discrimination is a matter of sufficiently significant social policy concern. See, e.g., Toys “R” Us (Apr. 8, 1999) (denying relief for a proposal requesting a company adopt a resolution providing for religious non-discrimination in Northern Ireland); General Electric (Feb. 10, 2015) (proposal requesting adoption of the “Holy Land” principles, including religious non-discrimination). More recently, the Staff have supported the social significance of discrimination on religious views by denying relief to proposals that addressed a company’s commitment to “religious freedom.” In CorVel, (June 5, 2019), the Staff denied relief for a proposal which specifically noted in its supporting statement that a company’s effort to “balance religious freedom with LGBT non-discrimination” “open[ed] itself and shareholders
to concerns regarding inclusiveness and discrimination.” The Staff stated that “[i]n our view, the Proposal transcends ordinary business matters.” Thus, the Staff concluded that the company’s commitment to not discriminating against its stakeholders’ religious views about homosexuality was a matter of significant social concern. It would be inconsistent for the Staff to recognize that religious non-discrimination is a matter of significant social policy concern when a proposal seeks to diminish it, as in CorVel, but not when a proposal seeks to protect it, as with the Proposal.

Barring discrimination against Americans based on their political views likewise has a pedigree in civil rights law. Though political views remain an emerging field in federal nondiscrimination law, the civil rights laws of numerous states already treat political affiliation or political activities as protected characteristics. See, e.g., D.C. Code § 2-1402.11; N.Y. Lab. Law § 201-d; Wash. Rev. Code. Ann. § 42.17A.495(2). Accordingly, both religious and political views are well within the scope of established civil rights and are socially significant, as evidenced by their codification in law.

Second, the Company’s principal authority doesn’t line up with its argument that discrimination based on political views is not socially significant. In BlackRock, Inc. (NCPPR) (Apr. 4, 2022, recon. denied May 2, 2022), the proponents sought an inquiry into the risks that arise from viewpoint discrimination in one of BlackRock’s employment policies. The Proposal differs in two key respects. First, where the proposal in BlackRock, Inc. sought a change in the company’s employment policies, the Proposal focuses on the effect of the Company’s policies on society generally—not only with respect to their interaction with the Company, but outside of the Company as well. Second, the proposal in BlackRock, Inc. focused only on viewpoint discrimination. By contrast, the Proposal raises the more specifically socially significant concern of discrimination based on political views, and connects it to a larger inquiry related directly to all types of invidious discrimination, which ultimately asks the Company to consider the ways in which discrimination may negatively impact Americans’ constitutional rights. This is a distinct and profoundly significant policy question.

Third, even if the Staff considers discrimination based on religious and political views to be insignificant, the Staff may not use the inclusion of those views in a more general non-discrimination inquiry to find the entire request excludable. The inclusion of insignificant components in a proposal does not render the entire proposal excludable. As the Staff indicated in Staff Legal Bulletin No. 14B, in determining whether a Proposal raises an issue of significant social policy concern, the Staff reviews the Proposal “as a whole”—not its component parts in isolation. Division of Corporation Finance, Staff Legal Bulletin No. 14B (Sept. 15, 2004). The Proposal’s concern for the de-banking of individuals based on their religious and political views is inherently connected to other protected grounds—none of which the Company contests.

B. The Proposal focuses on an objectively significant social policy concern and is not excludable under the plain language of the Commission’s and Staff’s interpretations of Rule 14a-8(i)(7).

Even outside of the Staff’s precedent, the Staff’s interpretations of Rule 14a-8(i)(7) and the 1998 Release plainly allow for the consideration of shareholder proposals that are objectively significant matters of social policy. As the Staff stated in Staff Legal Bulletin No. 14L the Staff’s focus in determining whether an issue is
sufficiently significant is on the “broad societal impact” of the issue raised by the proposal. Staff Legal Bulletin No. 14L, *supra*. One of the significant facts that can establish such an impact is “the presence of widespread public debate.” Staff Legal Bulletin No. 14A, *supra*. Together, these interpretations form an objective test for whether an issue is significant social policy concern.

Under the Staff’s interpretations, the Proposal is clearly significant. Perhaps no social issue in our Nation’s history is as significant as the struggle against invidious discrimination, not only on race and ethnicity, but also on the basis of sex, religion, and political belief. While the business and financial sectors have produced some inspiring examples of leadership on these issues, there are also many instances where companies and banks have worked to perpetuate and deepen wrongful discrimination, not only within the ranks of employees, but in society at large.

Religious discrimination is rising in our country and is becoming increasingly relevant to corporate America—and especially the financial services sector. As but one example, corporations are grappling with how they should deal with rising anti-Semitism. See, e.g., Wilhelmine Preussen, *Adidas scraps deal with Kanye West over anti-Semitic remarks*, Politico (Oct. 25, 2022) https://www.politico.eu/article/german-sportswear-giant-adidas-ends-cooperation-with-kanye-west-after-rappers-antisemitic-remarks/. Corporations also face increasing public blowback from decisions that affect religious groups that, in the past, may have gone relatively unnoticed. See, e.g., Ian M. Giatti, *Religious nonprofit group led by former US Amb. Sam Brownback says Chase closed its bank account*, Christian Post (Oct. 11, 2022) https://www.christianpost.com/news/religious-nonprofit-group-says-chase-closed-its-bank-account.html. In a business environment in which religious diversity is increasingly relevant, risks related to discrimination on the basis of religion are also becoming more relevant. See Brian J. Grim, *Corporates often forget religious diversity. Here’s why they should not*, World Economic Forum, (Jan. 16, 2020) https://www.weforum.org/agenda/2020/01/religion-diversity-business-inclusion/. As these recent examples reveal, religious identity cuts to the heart of some of the most significant and volatile relationships in America—and the world—today.


The Proposal takes no position on the proper balance of these risks. But it is undeniable that they are significant—and are growing in their significance—in our society today. A straightforward and objective approach would recognize the Proposal addresses a matter of immense social significance.
C. The Proposal transcends and does not relate to ordinary business matters because it focuses on the societal issue of discrimination.

The Proposal's undeniable social policy significance makes this an easy case. If a proposal focuses on an issue of sufficient social significance or “broad societal impact,” then it “transcend[s] the ordinary business operations” of the company and is not excludable under Rule 14a-8(i)(7). 1998 Release, supra; Staff Legal Bulletin No. 14L, supra.

But the Company argues that even if the Proposal is on a matter social policy significance, the Proposal may be excluded because it relates to matters of ordinary business. This argument is both an incorrect statement of law and an inaccurate characterization of the Proposal. After the Staff determines that the subject matter of a proposal transcends ordinary business matters, that is the end of the inquiry. The Staff does not then assess whether the proposal merely “touches upon” or “primarily focuses” on ordinary business matters.

Put another way, a proposal transcends ordinary business matters because it focuses on significant social policy issues. As the 1998 Release makes clear, proposals focused on discrimination are generally of sufficient social significance to transcend ordinary business matters even if they, in some way, relate to ordinary business matters. See Staff Legal Bulletin No. 14A, supra (“[P]roposals relating to ordinary business matters but focusing on sufficiently significant social policy issues generally would not be considered to be excludable.”) (cleaned up). Under the Company’s reading, all proposals would always fall into the ordinary-business exception insofar as all proposals have to be about some aspect of business activity. This is an obviously not consistent with Staff guidance, previous no-action letters, and the Staff’s interpretation of the 1998 Release.

The Proposal does not relate to matters of ordinary business because it focuses on an issue of social policy significance that transcends them—full stop. Discrimination that impinges on constitutional rights is the root and core of the Proposal. But even setting aside the social policy significance of de-banking, the Proposal still does not relate to matters of ordinary business. None of the Company’s arguments here stick.

1. The Proposal does not relate to the Company’s products or services.

The Company argues that the Proposal is excludable under Rule 14a-8(i)(7) because it “focuses on the products and services offered to customers by the Company.” This argument is both incorrect and inapplicable. The Proposal does not relate to—let alone “focus on”—the Company’s products and services. Even if it did, the Proposal would still not be excludable in light of the Proposal’s focus on the Company’s policies in general.

First, the Proposal does not relate to the products and services offered by the Company. The Proposal focuses on discrimination as a societal issue that transcends all of the Company’s activities. For this reason, the Company does not—and could not possibly—point to any specific product or service on which the Proposal focuses. The Company stretches for examples of products the Proposal might affect, but cannot achieve anything more specific than “the provision of services” (mere repetition of the general rule), “serving diverse consumers” (true of nearly any of the Company’s activities) and “providing financial services to the
Contrast these generalities with the examples of relief the Company cites in JPMorgan Chase & Co. (Mar. 19, 2019), which focused on “the construction of a sea-based canal through the Tehuantepec isthmus of Mexico,” or Wells Fargo & Co. (Jan. 28, 2013, recon. denied Mar. 4, 2013), which focused on the bank’s “direct deposit advance lending service.” These are specific products and services. “[T]he provision of services” is not. The Proposal is not excludable on this “products and services” argument.

Second, even if the Proposal related to the Company’s products and services, the Proposal’s focus on the effectiveness of the Company’s policies renders it non-excludable. The Staff have denied relief where the Proposal focuses on the effectiveness of policies rather than directing relations with particular suppliers or customers. See The TJX Companies (April 9, 2020) (proposal requesting analysis of risks of failing to have a companywide policy on animal cruelty); see also MasterCard Incorporated (Feb. 4, 2022) (report on how company intends to reduce the risk of processing payments for untraceable firearms). Like this precedent, the Proposal focuses the Company’s policies because it requests a report that addresses how the Company “oversees” risks related to discrimination. In turn, the way that the Company oversees risks is a Company policy. That is the Proposal’s focus, not any given product or service it sells.

2. The Proposal does not relate to the Company’s relationships with its customers.

The Company next argues that the proposal relates to the Company’s customer relationships. But here as well, the Proposal transcends any specific matter of customer relations.

The Company points to a series of cases in which the issue raised by the proposals related to commercial customer-relations issues, such as “poor customer service,” Ford Motor Co. (Feb. 13, 2013), or related to specific products used by a defined set of customers, such as “overdraft policies,” JPMorgan Chase & Co. (Feb. 21, 2019), or declining to issue “first mortgage home loans” to borrowers meeting certain characteristics of financial risk, JPMorgan Chase & Co. (Feb. 21, 2006). Likewise, the proposals in Comcast Corp. (Apr. 13, 2022), PayPal Holdings, Inc. (Apr. 2, 2021), and TD Ameritrade Holding Corp. (Nov. 20, 2017) cited by the Company each specifically related to the management of customer accounts.

The Proposal’s focus—not on the petty irritations of ordinary transactions, but on systemic discrimination—puts it in a different class than the precedents the Company cites. The only precedent raised by the Company that contains even a glancing reference to issues of discrimination against protected categories is JPMorgan Chase & Co. (Feb. 21, 2019), which sought an analysis of ways in which overdraft fees hurt customers. And even there, the discriminatory implications were not the central fact of the proposal, but were only alluded to by a single word (the effects of overdraft fees on “non-white” patrons). In the Proposal, by contrast, the question of discrimination on grounds including race, color, sex, and religion is the central issue and clear focus. Discrimination is not and cannot be treated as the ordinary business of a company, a fact that has been established in many proceedings, including Levi Strauss & Co. (Feb. 10, 2022), The Walt Disney Co. (January 19, 2022), Amazon.com, Inc. (April 7, 2021).
The Proposal doesn’t ask anything about normal transactions or client relationships. Indeed, the Proposal makes no mention of “customers” at all. Instead, the Proposal requests a review to determine whether and to what extent the Company’s broader policies create a risk of discrimination against “individuals” that impact their exercise of constitutionally protected civil rights. These individuals need not be “customers.” To the contrary, the Supporting Statement notes how the Company’s policies on discrimination affect “the public trust” and “the market”—the society at large. To the extent that affected individuals are or were previously customers of the Company, the Proposal relates to them as “individuals” and “American citizens,” not as “customers.” In other words, to the extent the Proposal addresses the Company’s client stakeholders, it does so with regard to their constitutionally protected civil rights in general, not exclusively their customer relationship with the Company, much less any particular aspect of that relationship.

Perhaps for this reason, the Staff has regularly denied relief for proposals that deal with broader civil rights audits, even if they affect customer relations. See Alphabet Inc. (Apr. 12, 2022) (denying relief for a report on how the company’s policies supporting “military and militarized policing” agency activities impact “stakeholders, user communities, and the Company’s reputation and finances”); The TJX Companies, Inc. (Apr. 15, 2022) (report detailing “any known and any potential risks and costs,” including loss of customers and harm to employees, because of “enacted or proposed state policies severely restricting reproductive rights”). Like these proposals, the Proposal focuses on the outward expressions of civil rights by individuals who are affected by the Company’s policies, whether or not those individuals are customers.

3. The Proposal does not relate to the management of the Company’s workforce.

The Company finally argues that the Proposal relates to ordinary business matters because it relates to the Company’ management of its workforce. Specifically, the Company argues that by highlighting how financial services companies “allow employees to deny or restrict service” to individuals, the Proposal “indicates a concern with how the Company manages its workforce through its internal employee policies.” Company Letter at 7. As with the Company’s other ordinary-business arguments, this argument fails because the Proposal transcends internal employee-management policies.

The Proposal focuses on any “risks” related to de-banking discrimination, not risks related to employee management. Compare with BlackRock, Inc., supra. The Supporting Statement, in the course of commenting on the financial services sector, provides numerous examples of how “vague” company policies on the matter of discrimination allow for wrongful behavior. The Supporting Statement notes that “vague and subjective standards in their policies” “allow employees to deny or restrict service for arbitrary or discriminatory reasons,” but also that these policies were found “in many companies’ terms of service” and other “policies.” Viewed in context, the Supporting Statement’s mention of “employees” was just one illustration of the Proposal’s concern for “risks” in general. These policies need not necessarily relate to employees. Indeed, the Proposal makes its request to the Board of Directors, which may itself be a source of such policies, and which the Staff have recognized uniquely relate to the management of socially significant policies.
Unlike the proposal in *BlackRock, Inc., supra* the Proposal makes no request for any specific action relating to the Company’s employees. And unlike the proposals cited by the Company in *Walmart, Inc.* (Apr. 8, 2019) and *Yum! Brands, Inc.* (Mar. 6, 2019), which focused on alleged discrimination by companies against their employees, the Proposal focuses on the discrimination across all of the Company’s policies and in society at-large. There is no employee-management basis to exclude the Proposal.

II. Issuing Relief to the Company Would Raise Serious Constitutional and Administrative Law Concerns.

For the reasons discussed above, the Proposals’ merits under Commission and Staff rules, interpretations, guidance, and precedent require that Staff deny the Company’s request for relief. If the Staff elects to issue relief to the Company despite its clear merits, the Staff’s decision would raise a host of constitutional and administrative law issues.

A. The Company is asking the Staff to discriminate on the basis of viewpoint in violation of the First Amendment.

The Proposal relates to the protection of civil rights in the financial services and banking sectors—a matter of clear, preceded, and objectively significant social policy concern. By urging the Staff to issue relief for the Proposal regardless, the Company invites the Staff to discriminate based on viewpoint.


Here, the Company invites the Staff to engage in viewpoint discrimination by issuing relief on the Proposal. The Proposal requests an audit of how the Company’s policies and practices affect individuals’ civil rights. The Staff has routinely denied no-action relief to similar requests affecting civil rights. See *supra* Part I; e.g., *McDonald’s Corp.*, (Apr. 5, 2022) (third-party audit analyzing the adverse impact of the Company’s policies and practices on the civil rights of Company stakeholders); *The TJX Companies* (Apr. 15 2022) (report on risks presented by state laws “severely restricting reproductive rights”); *General Motors* (Apr. 18, 2022) (report on how its business plans for electric vehicles rely or depend on child labor outside the United States). And as discussed *supra* Part I, religion and political views are quintessential civil rights protected by both federal and state laws. So if the Staff opts to issue relief to exclude the Proposal, one might reasonably conclude that it could only do so because of its opinion of the political (or religious) views expressed...
by the Proposal. Here, that would be the supporting statement’s focus on political views and free exercise of religion.

The Staff—and the Commission—needs a principled basis for such a distinction. The Company proposes none. As the Supreme Court has explained, to avoid viewpoint discrimination the government must have “narrow, objective, and definite” standards to prevent officials from covertly discriminating based on viewpoint through subjective and unclear terms. Forsyth Cnty., Ga., 505 U.S. at 131. And here, the Staff has complete discretion to determine what “issues” are significant and even to censor on the same issue when they are presented by speakers with certain political or religious views.

The easiest course would be for the Staff to deny relief to the Company, and avoid making such a weighty decision. But if the Staff chooses to discriminate against the viewpoint expressed by the Proposal, that would highlight a new and significant issue with Staff Legal Bulletin 14L, and indeed, the 1998 Release. It would provide a clear demonstration of how the Staff’s open-ended discretion in determining which views count as “socially significant” may be facially invalid under the First Amendment.

B. The Company is asking the Staff to take arbitrary and capricious action under the Administrative Procedure Act.

The Company identifies no reasonable basis for distinguishing between the Proposal and other civil rights-related anti-discrimination proposals. As a result, the Company’s request for relief invites the Staff to take arbitrary and capricious action.

Under the Administrative Procedure Act (APA), agency action that is “arbitrary and capricious” may be set aside. 5 U.S.C. § 706(2)(A). The Supreme Court has succinctly explained that “[t]he APA’s arbitrary and capricious standard requires that agency action be reasonable and reasonably explained.” FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); see also Motor Vehicle Mfs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983). Under this precedent, in order for action to be reasonable and reasonably explained, the agency must at least consider the record before it and rationally explain its decision. See FCC, 141 S. Ct. at 1160.

Additionally, where an agency seeks to change its position from a prior regime, it must “display awareness that it is changing position,” “show that there are good reasons for the new policy” and provide an even “more detailed justification” when the “new policy rests upon factual findings that contradict those which underlay its prior policy,” and “take[ ] into account” “reliance interests” on the prior policy. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

Given the Staff’s longstanding precedent permitting the consideration of shareholder proposals relating to civil rights matters, issuing relief to the Company would undoubtedly be a change in its position. Yet if the Staff issued relief for the Proposal, it would allow a proposal that focuses on civil rights discrimination to be excluded. At a bare minimum, the Staff—or the Commission—would have to explain its reasoning for the reversal in position to comply with the APA.

For the above reasons and others, the Staff’s decision on the Proposal is an important action. Most often, the Staff’s decision to issue relief is the final action by
the Commission in dealing with a particular shareholder proposal. While the Commission may also affirm the Staff’s decision to issue relief, the vast majority of relief decisions are made by the Staff without formal review. Significant legal consequences also flow from these decisions because they help determine whether or not the Company will be able to exclude the proposal. It is undeniable that companies treat the no-action process as a safe harbor. And the reality is that by issuing relief, the Staff provides companies with a legal defense in any potential court action. What’s more, issuing relief is at the core of the Commission’s complex regulatory scheme, and the authority of the Commission and Staff to issue relief is expressly indicated by Rule 14a-8. See Rule 14a-8(j).

In sum, the Company is asking the Staff to tread in precarious waters by issuing relief to a well-supported Proposal given the APA’s requirements for reasoned decisionmaking. The safer and more prudent course would be for the Staff to deny the Company’s request.

C. The Company is requesting relief the Staff lacks statutory authority to issue.

If the Staff elects to issue relief for the Proposal, it would raise significant concerns that the Staff is acting beyond its statutory authority. The Proposal is a permissible subject for stockholder concern under state law. If the Staff acted to block the Proposal, the Staff would be reaching beyond what they are authorized to do.

Section 14(a) of the Exchange Act prohibits anyone from “solicit[ing] any proxy” “in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78n(a)(1). While this authority might be read “broadly,” “it is not seriously disputed that Congress’s central concern [in enacting § 14(a)] was with disclosure.” Business Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990). The purpose of Section 14(a) was to ensure that investors had “adequate knowledge” about the “financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders’ meetings.” S. Rep. No. 792, at 12 (1934).

While Section 14(a) gave the Commission authority to compel investor-useful disclosures, the substantive regulation of stockholder meetings was left to the “firmly established” state-law jurisdiction over corporate governance. Business Roundtable, 905 F.2d at 413 (internal citation omitted). Recognizing that state law provides the “confining principle” to Section 14(a)’s otherwise “vague ‘public interest’ standard,” the United States Court of Appeals for the District of Columbia Circuit has held that “the Exchange Act cannot be understood to include regulation of” “the substantive allocation” of corporate governance that is “traditionally left to the states.” Business Roundtable v. SEC, 905 F.2d at 407, 413 (internal citation omitted). Issuing relief under Rule 14a-8 would exceed this limit by regulating the substantive considerations and outcomes of corporate stockholder meetings, which are properly matters for state law.

1. Substantive regulation of corporations’ proxy statements.

Issuing relief under Rule 14a-8 would regulate the substance of corporate governance because it would regulate the substantive matters that a corporation is required to include in its proxy statement. Under state law, corporate directors tasked with soliciting proxies have “a fiduciary duty to disclose all facts germane” to
items presented for stockholders’ consideration. *Smith v. VanGorkom*, 488 A.2d 858, 890 (Del. 1986). For an annual meeting, this duty requires that a corporation include a shareholder proposal in its proxy statement if the shareholder proposal will be presented for consideration at the corporation’s annual meeting. In turn, a shareholder proposal may be presented for consideration at the corporation’s annual meeting if the proposal is a proper subject for action by the corporation’s stockholders. See *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 277 (Del. 2008). A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders’ power to adopt, *id.* at 232, but stockholders do not have the power to adopt proposals that would cause the board of directors to breach its fiduciary duties, see *Paramount Commc’ns Inc. v. Time Inc.*, 1989 WL 79880, at *30 (Del. Ch. July 14, 1989), aff’d, 571 A.2d 1140, (Del. 1990) (“The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares.”).

Issuing relief under Rule 14a-8 would displace this system of state law by subjecting the Proposal to additional requirements to be included in the corporation’s proxy statement. The current Rule 14a-8 goes far further. Specifically, Rule 14a-8 provides that a corporation may exclude proposals that relate to the company’s “ordinary business operations,” *id.* at (i)(7), discussed supra Part I. And the SEC has further interpreted Rule 14a-8, via sub-regulatory guidance, to permit the exclusion of proposals that do not “transcend the day-to-day business matters” of the corporation, 1998 Release, or which insufficiently “raise[] issues with a broad societal impact,” Division of Corporation Finance, Staff Legal Bulletin No. 14L, supra.

These additional limits go beyond the limits of the state law proper-subject requirement. A proposal that fails to sufficiently raise an issue “with a broad societal impact” may nonetheless be within stockholders’ power to adopt and consistent with the board of directors’ fiduciary duties. But issuing relief under Rule 14a-8 would authorize the Company to exclude such a proposal, even though state law would allow it to be considered. That is not what Congress gave the Commission power to do under Section 14(a).

2. Substantive regulation of stockholder meetings.

Issuing relief under Rule 14a-8 would also regulate the substance of corporate governance because it would regulate the substantive issues that a corporation considers at its stockholder meetings. The matters that may be validly brought before stockholders at a corporation’s meetings of stockholders are exclusively governed by state law. “Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.” *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (emphasis in original). Section 14(a) makes no such express requirement. Section 14(a) provides general language that Congress understood to merely authorize disclosure requirements that ensures

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2 To be sure, one provision of the current Rule 14a-8, (i)(1), mirrors the state law requirement that a shareholder proposal must be a proper subject for action by stockholders. But that is not what the Company has raised here.
investors have “adequate knowledge” of the “major questions of policy . . . decided at stockholders’ meetings.” S. Rep. No. 792, supra. It does not provide the authority for the SEC to regulate which questions must be decided at a corporation’s stockholder meetings. Yet issuing relief under Rule 14a-8 would regulate the substantive aspects of stockholder meetings in at least two ways.

First, even though Rule 14a-8 applies primarily to the content of a corporation’s proxy statement, its regulation of the proxy statement has the eminently predictable effect of regulating the stockholder meeting for which proxies are solicited. Today, substantially all stockholder voting is conducted by proxy. “Because most shareholders do not attend public company shareholder meetings in person, voting occurs almost entirely by the use of proxies that are solicited before the shareholder meeting, thereby resulting in the corporate proxy becoming ‘the forum for shareholder suffrage.’” Concept Release on the Proxy System, SEC Release No. 34-62495 (July 24, 2010) (quoting Roosevelt v. E.I duPont de Nemours & Co., 958 F.2d 416, 422 (D.C. Cir. 1992)). As a practical matter, if a stockholder proposal is excluded from the corporation’s proxy statement, it is functionally unavailable for consideration at a stockholder meeting. Not many stockholders would be aware of the proposal, nor would many be able to vote on it. To be sure, a stockholder proponent could pay for his own proxy forms to be distributed. But that is hardly a remedy given the complex realities of the modern proxy system. With Rule 14a-8, the Commission has clearly put its thumb on the scale, allowing some stockholders to access the corporate proxy statement, but not others, on bases untethered to state law. By permitting the exclusion from corporate proxy statements of proposals otherwise valid for consideration under state law, Rule 14a-8 not only regulates the content of the proxy statement—it regulates which proposals are considered by the vast majority of stockholders, and therefore the content and outcomes of corporations’ stockholder meetings.

Second, Rule 14a-8 goes beyond the regulation of proxy statements to directly regulate what stockholders may consider at stockholder meetings. Specifically, Rule 14a-8 compels the consideration of its permissible proposals by compelling their inclusion in the corporation’s form of proxy. If a proposal meets the Rule’s requirements, Rule 14a–8(a) provides that “a company must include a shareholder’s proposal in its proxy statement and . . . its form of proxy” for a stockholder meeting. Rule 14a-8 (emphasis added). In turn, if a proposal is on the form of proxy, it must be considered at the relevant stockholder meeting. Under federal law, a corporation’s “form of proxy” must include the matters to be voted on at the meeting. See, e.g., 17 C.F.R. § 240a-4(a) (“[T]he form of proxy . . . shall identify clearly and impartially each separate matter intended to be acted upon”). By requiring the inclusion of a proposal on the proxy card, Rule 14a-8 compels consideration of the proposal at a stockholder meeting. If the corporation were to put a proposal on its form of proxy, but not consider the proposal at the meeting, its form of proxy may be unlawfully misleading. Rule 14a-8 therefore requires a corporation to consider a shareholder proposal at its annual meeting even if it could lawfully exclude the shareholder proposal under state law. See SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947) (stating that, assuming a corporate bylaw excluding shareholder proposals was valid under state law, Rule 14a-8 would invalidate the bylaw).

By intruding upon the substantive affairs of corporate governance “traditionally left to the states,” issuing relief under Rule 14a-8 would exceed the Commission’s—and the Staff’s—lawful authority under Section 14(a). As a result, issuing relief to the Company would raise serious concerns about the validity of the Staff’s action.
D. The Company is asking the Staff to discriminate on the basis of religion in violation of the Religious Freedom Restoration Act.

The Religious Freedom Restoration Act states that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

The SEC has a long track record of protecting race, sex, and other statuses commonly protected from discrimination. Religion receives just as much, if not more protection under antidiscrimination laws. See supra Sec. I.A. But if the SEC grants no-action relief, it will necessarily agree with the Company's argument that protecting religious beliefs and exercise is not a significant social policy issue.

This would substantially burden the shareholder's exercise of religion. Mr. Bahnsen is passionate about the integration of faith and economics and believes that religious persons should have equal access and opportunities in the marketplace and in employment. The SEC cannot protect shareholders who feel strongly about protecting from other wrongful forms of discrimination while excluding religious shareholders like Mr. Bahnsen who feel just as strongly about religious discrimination. Separately and independently, denying the proposal would also burden Mr. Bahnsen's religion because it would fail to address the risk that Mr. Bahnsen, as a stakeholder in the Company, could be subject to religious discrimination or otherwise have his religious exercise substantially burdened because of the Company's policies.

Conclusion

The Proposal seeks only an assessment and report about discrimination in civil rights against protected classes, and the effect of such discrimination on individuals' constitutional rights. The Company has clearly failed to meet its burden that it may exclude the Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, Mr. Bahnsen respectfully requests that the Staff reject the Company's request for relief concerning the Proposal.

If the Staff nonetheless decides to issue relief to the Company, that action would raise significant constitutional and administrative law concerns that "involve matters of substantial importance and where the issues are novel or highly complex" invoking requiring Commission review under 17 C.F.R. § 202.1(d).

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to contact me.

Sincerely,

Michael Ross

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