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

DIVISION OF
CORPORATION FINANCE

March 15, 2023

Thomas J. Kim
Gibson, Dunn & Crutcher

Re: AT&T Inc. (the "Company")
Incoming letter dated January 3, 2023

Dear Thomas J. Kim:

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

The Proposal requests that the board commission and disclose a report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform.

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

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Sarah Rehberg
National Center for Public Policy Research

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January 3, 2023

VIA E-MAIL

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

Re: *AT&T Inc.*
Stockholder Proposal of the National Center for Public Policy Research
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, AT&T Inc. (the "Company"), intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Stockholders (collectively, the "2023 Proxy Materials") a stockholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") received from the National Center for Public Policy Research (the "Proponent").

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

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that stockholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal states:

> **Resolved:** Shareholders ask that the Board commission and disclose a report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform.

The Supporting Statement clarifies that the Proposal, and the report it requests, is specifically targeted at the decision by DIRECTV not to renew its affiliation agreement with the One America News Network ("OAN") upon its expiration in April 2022, which the Proponent implies was due to "a concerted campaign by liberal activists demanding AT&T shutdown [sic] the conservative news network."

A copy of the Proposal, including the Supporting Statement, as well as related correspondence with the Proponent, is attached to this letter as Exhibit A.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2023 Proxy Materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business operations, specifically the products and services that the Company offers and the Company's business relationships; and
- Rule 14a-8(i)(7) because the Proposal relates to the Company's litigation strategy and the conduct of litigation to which the Company is a party.

BACKGROUND

In July 2021, the Company contributed its U.S. video business unit, consisting at the time of DIRECTV, AT&T TV and U-verse, to a newly formed, separately-managed limited liability company, DIRECTV Entertainment Holdings LLC ("DIRECTV"), as part of a transaction with an entity associated with TPG Capital ("TPG"). As a result of the transaction, the Company, through a wholly-owned subsidiary, owns preferred units and a 70% interest in the common units of DIRECTV, and TPG owns preferred units and a 30% interest in the common units of DIRECTV. DIRECTV's board of managers consists of two designees of the Company, two designees of TPG and DIRECTV's chief executive officer. Through contractual arrangements, the Company's customers continue to have access to DIRECTV's services bundled with the Company's broadband and other services.

ANALYSIS

I. The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Involves Matters Related To The Company's Ordinary Business Operations, Specifically the Products and Services that the Company Offers and the Company's Business Relationships.

A. Background

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a stockholder proposal that relates to the company's "ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept [of] providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. The first was that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples of the tasks cited by the Commission include "management of the workforce, such as the hiring, promotion, and termination of employees, *decisions on production quality and quantity*, and the retention of suppliers" (emphasis added). 1998 Release.

A stockholder 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 proposed report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983); *Johnson Controls, Inc.* (avail. Oct. 26, 1999) ("[Where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under [R]ule 14a-8(i)(7)."); *see also Ford Motor Co.* (avail. Mar. 2, 2004) (concurring with the exclusion of a proposal requesting that the company publish a report about global warming/cooling, where the report was required to include details of indirect environmental consequences of its primary automobile manufacturing business).

In the instant case, the Proposal relates to the Company's products and services it offers, procedures and policies related to such products and services, as well as business relationships. As such, similar to the well-established precedent described in greater detail below and consistent with the Commission and Staff guidance cited above, the Proposal involves matters related to the Company's ordinary business and, along with the Supporting Statement, may be excluded under Rule 14a-8(i)(7).

We note that, although the Staff recently issued new guidance specifically relating to its approach to evaluating certain aspects of the ordinary business exclusion, such guidance does not impact the arguments made herein. *See* Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"). Although SLB 14L, among other things, reverses prior Staff guidance regarding the company-specific approach to evaluating the significance of a policy issue that is the subject of a stockholder proposal for purposes of the ordinary business exclusion, this no-action request does not rely on a company-specific approach to evaluating significance and relies on precedent preceding, or not involving, the reversed prior Staff guidance. Therefore, SLB 14L is not applicable to this Proposal.

B. The Proposal May Be Excluded Because Its Subject Matter Relates To The Products And Services That The Company Offers

The Proposal seeks to require that the Company disclose "the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform." The Supporting Statement also requests disclosure of the same information "in determining which content and programming to promote" and expresses concern for the Company's reasoning as it relates to "decisions as to which networks and programming to carry." The Company's decisions relating to the policies and procedures regarding the products and services that it offers implicate routine management decisions encompassing legal, regulatory, operational, and financial considerations, among others. For example, as a provider of communications services, the Company must constantly make decisions regarding the products and services offered to television subscribers, including which networks to offer on the DIRECTV platform, to the extent the Company has influence over such decisions given the management structure of DIRECTV. These decisions involve complex evaluations related to consumer preferences, demand for particular types of programming, and marketing strategy, among others. The Proposal impermissibly seeks to override the Company's ordinary business decisions in this respect.

The Staff has consistently determined that proposals relating to the products and services that a company offers as well as associated policies and procedures can be excluded pursuant to Rule 14a-8(i)(7) as relating to the company's ordinary business operations. For example, the Staff recently concurred with the exclusion under Rule 14a-8(i)(7) of two

proposals requesting that the boards of financial services companies complete a report evaluating each company's overdraft policies and practices and the impacts those have on customers. In each case, the proposal raised concerns that overdraft fees allegedly impacted certain customers more than others and that the provision of such services exposed the companies to increased litigation and reputational risks. The Staff nonetheless concurred that the proposals related to "ordinary business operations," and specifically, "the products and services offered for sale" by those companies. *See Bank of America Corp.* (*Worcester County Food Bank and Plymouth Congregational Church of Seattle)* (avail. Feb. 21, 2019); *JPMorgan Chase & Co.* (avail. Feb. 21, 2019). Similarly, in *Lowe's Companies, Inc.* (avail. Mar. 8, 2017), a proposal sought a report on the "risks and opportunities that the issue of human lead exposures from unsafe practices pose to the company, its employees, contractors, and customers." The company noted that it had "carefully assessed and implemented a lead-safety compliance program" and that "decisions regarding changing or expanding [its] policies [regarding lead-safe practices] will require a careful analysis of many factors" and such analysis "is a proper function for management and far exceeds the scope of shareholder expertise." The Staff concurred with the proposal's exclusion, noting it related to the company's "ordinary business operations." *See also FMC Corp.* (avail. Feb. 25, 2011, *recon. denied* Mar. 16, 2011) (concurring with the exclusion of a proposal recommending that the company establish a "product stewardship program" for certain of its pesticides, noting that the proposal related to "products offered for sale by the company"); *The Walt Disney Co.* (avail. Dec. 22, 2010) (concurring with the exclusion of a proposal that would require the company to implement a policy preventing children from entering designated smoking areas at the company's theme parks, noting that the proposal related to "the policies and procedures regarding the products and services that the company offers"); *JPMorgan Chase & Co.* (avail. Mar. 16, 2010) (concurring with the exclusion of a proposal regarding the company's decision to issue refund anticipation loans to customers, noting that "proposals concerning the sale of particular services are generally excludable under Rule 14a-8(i)(7)"); *Bank of America Corp.* (avail. Jan. 6, 2010) (concurring with the exclusion of a proposal requiring the company to stop accepting matricula consular cards as a form of identification, which effectively sought "to limit the banking services the [company could] provide to individuals the [p]roponent believe[d] [we]re illegal immigrants," because the proposal sought to control the company's "customer relations or the sale of particular services"); *J.P. Morgan Chase & Co.* (avail. Feb. 26, 2007) (concurring with the exclusion of a proposal requesting a report about company policies to safeguard against the provision of financial services to clients that enabled capital flight and resulted in tax avoidance as relating to the "sale of particular services"); *General Electric Co. (Balch)* (avail. Jan. 28, 1997) (concurring with the exclusion of a proposal recommending that the company adopt a policy of recalling and refunding defective products, noting that the proposal related to the company's "recall and refund procedures"); *Banc One Corp.* (avail. Feb. 25, 1993) (concurring with the exclusion of a proposal requesting that the corporation publish "a report reviewing the [c]ompany's lending practices" as they pertained to specifically identified

groups of people, noting that the proposal involved "a description of special technical assistance and advertising programs[,] lending strategies and data collection procedures").

As discussed above, and consistent with the foregoing precedent, the Proposal likewise involves the Company's policies and procedures relating to the products and services the Company offers, and may therefore be excluded pursuant to Rule 14a-8(i)(7). Like the policy assessments and reviews requested in *Lowe's Companies*, the Proposal directly addresses policies regarding products the Company offers to consumers. In particular, the Proposal asks that the Company "report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform." The Supporting Statement questions the Company's policies and procedures involved in making "decisions as to which networks and programming to carry" and in "determining which content and programming to promote" and suggests that making these decisions based on "any reason other than the pecuniary interest of the Company … harms the Company's bottom line by reducing diversity of programming and the Company's attraction to a wide array of audiences." As in *Lowe's*, this focus on how the Company manages its products clearly relates to an ordinary business matter, properly excludable pursuant to Rule 14a-8(i)(7). By seeking to intervene in decisions regarding the policies the Company adopts with respect to the products it chooses to sell, the Proposal would interfere with management's ability to manage the Company's products and services. Because the Proposal relates to the policies regarding the Company's products and services, the Proposal may be excluded under Rule 14a-8(i)(7), consistent with the precedents discussed above.

C. The Proposal May Be Excluded Because Its Subject Matter Relates To The Company's Business Relationships

The Proposal seeks to require that the Company report on "risks and consequences to the Company associated with … establishing, rejecting, or failing to continue network relationships." The Supporting Statement specifically expresses concern with the Company's "refusal to renew the [One America News] network's contract," including that the decision followed a "pressure campaign" from "leftwing groups" and that the Company might have been "[m]aking decisions on the basis of viewpoint discrimination" or for "any reason other than the pecuniary interest of the Company." The Supporting Statement further argues that the way that the Company handles its contracts with networks implicates the "Company's fiduciary duty to its shareholders" and "harms the Company's bottom line . . ., while placing the Company at great reputational, financial, and legislative and related risk."

DIRECTV has business relationships with networks. Importantly, the Staff has consistently concurred with the exclusion of proposals relating to a company's business relationships and day-to-day financial operations. *See, e.g., Rogers Corp.* (avail. Jan. 18,

1991) (concurring with the exclusion of a proposal under the predecessor to Rule 14a-8(i)(7) and noting that the "day-to-day financial operations" of the company constituted ordinary business matters where the proposal asked the company's board of directors to adopt certain financial performance standards). In *Westinghouse Electric Corp.* (avail. Jan. 28, 1997), the proposal requested the Board to "refrain from any business relationship with any non-management director for which the non-management director directly or indirectly receives compensation beyond the director fee." The company successfully argued that business relationships are within the province of the company and its management when it stated,

> In the ordinary course of its business, the Company enters into transactions with hundreds of other companies, both as supplier and customer. These transactions are entered into on an arms-length basis with such other companies and are designed to serve the best interests of the Company. [The proponent's] proposal would impact the manner in which the Company conducts its business because it could preclude the Company from entering into transactions with other companies in the ordinary course of business. . . [Further], [h]is proposal could result in the loss of business for the Company that it would have otherwise obtained in the ordinary course.

The Staff concurred in its excludability because it related to the company's "business relationships" and thus, was excludable under a predecessor to Rule 14a-8(i)(7). *See also Mirage Resorts, Inc.* (avail. Feb. 18, 1997) (Staff concurred that a proposal amending the company's business relationship with its clients "is directed at matters relating to the conduct of the company's ordinary business operations (i.e., business relationships)").

Here, like the precedent cited above, the Proposal relates to the Company's business relationships. In particular, the Proposal asks that the Company report on the factors the Company considers when "establishing, rejecting, or failing to continue network relationships." Decisions regarding any the Company's business relationships, including decisions regarding whether to enter into or renew contracts with certain networks, are a fundamental responsibility of management, requiring consideration of a number of factors. Such considerations involve complex evaluations about which stockholders are not in a position to make an informed judgment. Balancing such considerations is a complex matter and is "so fundamental to management's ability to run a company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight." 1998 Release. Consistent with Staff precedent, the Proposal, by attempting to dictate the management of the Company's business relationships, addresses issues that are ordinary business matters for the Company. As such, the Proposal (including the Supporting Statement) 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 well-established precedent set forth above demonstrates that the Proposal squarely addresses ordinary business matters and, therefore, is excludable under Rule 14a-8(i)(7). The 1998 Release distinguishes proposals pertaining to ordinary business matters from those involving "significant social policy issues." *Id*. (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While "proposals . . . focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered to be 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. 1998 Release. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers "both the proposal and the supporting statement as a whole." Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005). Moreover, as Staff precedent has established, merely referencing topics in passing that might raise significant policy issues, but which do not define the scope of actions addressed in a proposal and which have only tangential implications for the issues that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business.

In SLB 14L, the Staff stated that it "will realign its approach for determining whether a proposal relates to 'ordinary business' with the standard the Commission initially articulated in [the 1976 Release], which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release." As such, the Staff stated that it will focus on the issue that is the subject of the stockholder proposal and determine whether it has "a broad societal impact, such that [it] transcend[s] the ordinary business of the company," and noted that proposals "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)."

Here, the Proposal does not transcend the Company's ordinary business operations, and nothing in the Supporting Statement or the Proposal can be viewed as potentially implicating significant policy issues. Rather, as discussed above, the Proposal's principal focus is on the policies and procedures relating to the Company's offerings of products and services as well as management of its business relationships. Furthermore, while the Supporting Statement raises concerns about activist pressure and viewpoint discrimination, the central focus of the proposal is on the Company's policies and rationale for deciding which programming to offer to consumers and how to handle contracts and relations in connection with doing so. Thus, neither the Proposal nor the Supporting Statement implicate any significant policy issue. *See, e.g.*, *PayPal Holdings, Inc. (James A. Heagy)* (avail. Apr. 2, 2021) (concurring with the exclusion of a proposal requesting that the company ensure

"that [the company's] users do not have accounts frozen or the use of [company] services terminated without giving specific, good and substantial reasons to the user for so doing" when the supporting statement briefly alleged that the company's fraud modeling system was "unethical and un-American" because it "put[] people out of business to save the company money by not using proper human oversight"); *JPMorgan Chase & Co.* (avail. Feb. 21, 2019) (concurring with the exclusion of a proposal requesting that the company's board complete a report evaluating each company's overdraft policies and practices and the impacts those have on customers where the proponent argued that "[o]verdraft fees have been a matter of widespread public attention and discussion"); *FMC Corp.* (avail. Feb. 25, 2011, *recon. denied* Mar. 16, 2011) (concurring with the exclusion of a proposal recommending that the company establish a "product stewardship program" for certain of its pesticides, noting that the proposal "does not focus on a significant social policy issue" despite the proponent's assertion that the proposal related to "wildlife poisonings, possible extinction and human equality principles"); *JPMorgan Chase & Co.* (avail. Mar. 16, 2010) (concurring with the exclusion of a proposal regarding the company's decision to issue refund anticipation loans to customers despite the proposal's characterization of refund anticipation loans as predatory and allegations that these loans "do not constitute responsible lending" and have been "subject to successful lawsuits for false and deceptive lending practices").

Accordingly, because the text of the Proposal makes clear that it is primarily focused on the Company's ordinary business operations (specifically, the services and products offered by the Company and its procedures and policies around such services and products, as well as its business relationships), the Proposal does not transcend the Company's ordinary business operations and does not focus on any significant policy issue. As such, similar to the proposals in the precedent discussed above, the Proposal (including the Supporting Statement) may be excluded under Rule 14a-8(i)(7).

II. The Proposal May Be Excluded Because It Relates To The Company's Litigation Strategy and the Conduct of Litigation To Which The Company Is A Party.

A. Background

The Staff regularly concurs with the exclusion under Rule 14a-8(i)(7) of stockholder proposals when the subject matter of the proposal is the same as or similar to the subject matter of litigation in which a company is then involved, and, importantly, has consistently concurred with such exclusion when the implementation of the proposal could be construed as an admission by the company that would contradict or preempt its position in ongoing litigation. For example, in *Chevron Corp.* (avail. Mar 30, 2021), the Staff concurred in the exclusion under Rule 14a-8(i)(7) of a proposal that requested a report analyzing "how Chevron's policies, practices and the impacts of its business, perpetrate racial injustice and

inflict harm on communities of color," where the company was involved in litigation seeking to hold the company liable for alleged harmful impacts of its business practices on climate change and in turn on communities of color, and the company's position in the litigation was to contest the existence of such impacts. Likewise, in *Walmart Inc.* (avail. Apr. 13, 2018), the Staff concurred with the exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on risks associated with emerging public policies on the gender pay gap, where the company was involved in numerous pending lawsuits regarding gender-based pay discrimination and related claims before the U.S. Equal Employment Opportunity Commission, and the proposal "would obligate the [c]ompany to take a public position, outside the context of pending litigation and the discovery process" with respect to the existence or otherwise of a gender pay gap at the company); *See also General Electric Co.* (avail. Feb. 3, 2016) (concurring with the exclusion of proposal requesting a report assessing all potential sources of liability related to PCB discharges in the Hudson River while the company was defending multiple pending lawsuits related to its alleged past release of chemicals into the Hudson River); *Chevron Corp.* (avail. Mar. 19, 2013) (concurring with the exclusion of proposal requesting that the company review its "legal initiatives against investors" because "[p]roposals that would affect the conduct of ongoing litigation to which the company is a party are generally excludable"); *Johnson & Johnson* (avail. Feb. 14, 2012) (concurring with the exclusion of a proposal where implementation would have required the company to report on any new initiatives instituted by management to address the health and social welfare concerns of people harmed by LEVAQUIN®, thereby taking a position on the existence and nature of any such harms, a central issue in ongoing litigation, outside the context of the litigation); *Reynolds American Inc.* (avail. Mar. 7, 2007) (concurring with the exclusion of proposal requesting that the company provide information on the health hazards of secondhand smoke, including legal options available to minors to ensure their environments are smoke free, while the company was defending several cases alleging injury as a result of exposure to secondhand smoke and a principal issue concerned the health hazards of secondhand smoke); *AT&T Inc.* (avail. Feb. 9, 2007) (concurring with the exclusion of proposal requesting that the company issue a report containing specified information regarding the alleged disclosure of customer records to governmental agencies, while the company was defending multiple pending lawsuits alleging unlawful acts related to such disclosures); *Reynolds American Inc.* (avail. Feb. 10, 2006) (concurring with the exclusion of proposal requesting that the company notify African Americans of the unique health hazards to them associated with smoking menthol cigarettes, which would be inconsistent with the company's pending litigation position of denying such health hazards); *R.J. Reynolds Tobacco Holdings, Inc.* (avail. Feb. 6, 2004) (concurring with the exclusion of a proposal that directed the company to stop using the terms "light," "ultralight," "mild" and similar words in marketing cigarettes until shareholders could be assured through independent research that light and ultralight brands actually reduce the risk of smoking-related diseases. At the time the proposal was submitted, the company was a defendant in multiple lawsuits in which the plaintiffs were alleging that the terms "light" and "ultralight"

were deceptive. The company argued that implementing the proposal while the lawsuits were pending "would be a de facto admission by the Company that 'light' and 'ultralight' cigarettes do not pose reduced health risks as compared to regular cigarettes").

B. The Herring Litigation

The Company is presently involved in litigation stemming from DIRECTV's decision to not renew its contract with Herring Networks, Inc. ("Herring"), the parent company of OAN, in which Herring alleges, in part, that the Company breached AT&T Services' and DIRECTV's contract with Herring and improperly influenced DIRECTV not to renew its relationship with Herring. Herring's complaint alleges that the purported breaches and interference were due, in part, to the Company's acquiescence to lobbying by left-wing activist groups and/or to personal considerations on the part of the Company's Chairman of the Board of Directors, William Kennard.

The report requested by the Proposal requires an assessment of "the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform." The first three paragraphs of the Supporting Statement focus exclusively on the Company's and DIRECTV's relationship with OAN, and voice a number of the allegations that are also present in the Herring complaint:

> In early 2022, it was announced that AT&T's DirecTV would not be renewing its contract with One America News (OAN). The announcement came only a few short months following a concerted campaign by liberal activists demanding AT&T shutdown the conservative news network.
>
> These demands came from leftwing groups such as Greenpeace, GLADD, Media Matters, and the NAACP. AT&T execs even met with NAACP leadership at its Washington, DC office to discuss AT&T's relationship with OAN. The pressure campaign was prompted by a Reuters report alleging AT&T played an outsized role in the inception and rise of OAN and was responsible for funding it.
>
> But OAN was not a struggling news network. To the contrary, it was gaining prominence amongst conservative viewers. In fact, just months prior to AT&T's refusal to renew the network's contract, a Rasmussen Reports survey found that nearly 10 percent of conservatives viewed OAN most often, and that conservatives were increasingly looking for alternatives, such as OAN, to already established right-of-center news outlets.

Similar to the precedents described in Section II.A. above, the report requested by the Resolved clause of the Proposal, supplemented by the Supporting Statement's singular focus on the Company's and DIRECTV's relationship with OAN, (1) involves the same subject matter as the litigation between Herring and the Company, and (2) would require the creation and disclosure of a report that would adversely affect the litigation strategy of the Company in its ongoing lawsuit with Herring. Specifically, the preparation and disclosure of this report would require the Company to take a position on the following matters that are currently being contested in the ongoing Herring litigation, but outside the context of and contrary to its strategy in such litigation:

(a) the extent, if any, to which the Company has a role in "establishing, rejecting, or failing to continue network relationships" on the part of DIRECTV;

(b) the extent, if any, to which non-pecuniary factors play a role in any such decisions either by the Company or DIRECTV, and

(c) the extent, if any, to which it is appropriate to characterize DIRECTV, a separately-managed entity, as "[the Company's] DirecTV platform."

Allegations regarding each of these matters are central elements of Herring's complaint. For example, addressing both (a) and (c), the complaint alleges:

> [W]hile AT&T publicly claimed on the one hand that it was not affiliated with DIRECTV and did not participate in programming decisions made by DIRECTV, AT&T took meetings . . . suggesting that AT&T in fact had the authority and ability to influence DIRECTV's programming decisions. *Herring Networks, Inc. v. AT&T, Inc.. et al.*, No. 37-2022-00008623-CU-BC-CTL, Compl. ¶ 58 (Cal. Super. Ct. March 7, 2022).

Addressing (a) and (b), the complaint further alleges:

> "[DIRECTV Senior Vice President of Content Rob] Thun informed [OAN president] Charles [Herring] that the decision [not to renew the agreement] was made at the board level and was "political," implying that outside forces, such as AT&T and/or [William] Kennard . . . had influenced the decision." *Id.* at ¶ 64.

Importantly, the Company contests and denies Herring's allegations in the litigation. As a result, the creation and disclosure of the report requested by the Proposal, which presumes that the Company plays the role in DIRECTV's decisions that is the premise of the Proposal,

would contradict, pre-empt or otherwise harm the Company's litigation strategy. This is because Herring relies on these allegations to support the theory that the Company exercised control or influence with respect to DIRECTV's decision not to renew its relationship with Herring, and that the Company exercised this alleged control or influence for an improper purpose.

The Herring litigation remains ongoing and, to date, there has been no adverse judgment against the Company on any of these matters. The Company's management has a responsibility to defend the Company's interests against unwarranted litigation, which it is committed to doing in this case. A stockholder proposal that interferes with this obligation is inappropriate, particularly when the very issues at stake in the litigation are the issues that form the basis for the proposal; here, the Proposal would obligate the Company, as in *Chevron*, *Wal-Mart* and others in which the Staff has concurred with the exclusion of the proposal under Rule 14a-8(i)(7), to take a public position outside the context of the pending litigation and the discovery process with respect to these issues, which the Company has not admitted, or is actively contesting, in such litigation.

In summary, the Proposal requests that the Company take action that would directly undermine the Company's position in pending litigation against the Company. In this regard, the Proposal seeks to substitute the judgment of stockholders for that of the Company with respect to the ordinary business of the company by pre-empting or contradicting the Company's litigation strategy and requiring the Company to take action that could harm its legal defense. Thus, implementing the Proposal would intrude upon Company management's exercise of its day-to-day business judgment with respect to pending litigation in the ordinary course of its business operations. Accordingly, we believe that the Proposal may be properly excluded from the Company's 2023 Proxy Materials under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal (including the Supporting Statement) from its 2023 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 887-3550.

Sincerely,

/s/ Thomas J. Kim

Thomas J. Kim

Enclosures

cc: Bryan Hough, AT&T Inc.
Moni DeWalt, AT&T Inc.
Sarah Rehberg, National Center for Public Policy Research

EXHIBIT A

Report on Non-Pecuniary Factors in Network Relationships

Resolved: Shareholders ask that the Board commission and disclose a report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform.

Supporting Statement: In early 2022, it was announced that AT&T's DirecTV would not be renewing its contract with One America News (OAN).[1] The announcement came only a few short months following a concerted campaign by liberal activists demanding AT&T shutdown the conservative news network.[2]

These demands came from leftwing groups such as Greenpeace, GLADD, Media Matters, and the NAACP.[3] AT&T execs even met with NAACP leadership at its Washington, DC office to discuss AT&T's relationship with OAN.[4] The pressure campaign was prompted by a *Reuters* report alleging AT&T played an outsized role in the inception and rise of OAN and was responsible for funding it.[5]

But OAN was not a struggling news network. To the contrary, it was gaining prominence amongst conservative viewers. In fact, just months prior to AT&T's refusal to renew the network's contract, a Rasmussen Reports survey found that nearly 10 percent of conservatives viewed OAN most often, and that conservatives were increasingly looking for alternatives, such as OAN, to already established right-of-center news outlets.[6]

We therefore ask that the Board commission and disclose a report on the potential risks and consequences to the Company associated with the prioritization of considering factors other than pecuniary advantage when it comes to establishing, rejecting, or failing to continue relationships with networks and in determining which content and programming to promote.

The Company's fiduciary duty to its shareholders demands that decisions as to which networks and programming to carry should not be the result of activist pressure or any reason other than the pecuniary interest of the Company. Making decisions on the basis of viewpoint discrimination harms the Company's bottom line by reducing diversity of programing and the Company's attraction to a wide array of audiences, while placing the Company at great reputational, financial, and legislative and related risk.

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[1] https://www.nationalreview.com/news/directv-says-it-will-not-renew-contract-with-oann/; https://www.npr.org/2022/01/15/1073407803/directv-to-drop-one-america-news-network

[2] https://dailycaller.com/2022/01/17/att-cnn-one-america-news-network/; https://www.freepress.net/sites/default/files/2021-11/coalition_letter_to_att_directv_about_oann_support.pdf

[3] https://www.freepress.net/sites/default/files/2021-11/coalition_letter_to_att_directv_about_oann_support.pdf

[4] https://thehill.com/homenews/media/577669-naacp-att-to-meet-to-discuss-oann/

[5] https://www.reuters.com/investigates/special-report/usa-oneamerica-att/; https://www.cnn.com/2021/10/06/media/att-oan

[6] https://www.rasmussenreports.com/public_content/politics/current_events/media/fox_news_still_tops_with_conservatives_but_newsmax_oan_make_gains; https://thenewamerican.com/fox-viewership-continues-to-plummet-viewers-moving-to-oann-newsmax/

February 3, 2023

<u>Via email: shareholderproposals@sec.gov</u>

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen,

This correspondence is in response to the letter of Thomas J. Kim on behalf of AT&T (the "Company") dated January 3, 2023, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2023 proxy materials for its 2023 annual shareholder meeting.

RESPONSE TO AT&T'S CLAIMS

Our Proposal asks the Company's Board of Directors to:

> commission and disclose a report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform.

The Company seeks to exclude the Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because it claims the Proposal concerns the Company's ordinary business operations.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Additionally, if the Staff nonetheless determines to issue the Company relief, that act would raise significant constitutional and administrative law issues.

Should the Staff nonetheless find our Proposal omissible, we intend to seek reconsideration of that decision from the SEC Commissioners. We mention this now to avoid any possibility of a reprise of the developments in *BlackRock, Inc.* (avail. April 4, 2022; *reconsideration denied* May 4, 2022) in which proceeding we indicated to BlackRock and to the Staff our intention to seek reconsideration within approximately 15 minutes of receiving the Staff's decision that our proposal in that proceeding was omissible, and yet by some set of events still not fully clear to us, the Staff allowed BlackRock to unilaterally block our request for reconsideration. The Staff did this by delaying its omissibility decision for an inordinate time, long enough for BlackRock purportedly to have been able to begin its printing process within the 15-odd minutes between the issuance of the Staff's letter and our indication of our intent to seek reconsideration, and then agreeing with BlackRock that this unilateral act by BlackRock barred Commission reconsideration of the Staff's omissibility determination. We think the behavior of the Staff last year, whatever the specific details, demonstrated the arbitrariness, capriciousness and bias of its processes and determinations, and underscored the structural flaws that characterize the entire no-action review process. Relatedly, we ask that any information pertinent to this proceeding, conveyed between the Company and the Staff by any means whatever, promptly be conveyed to us as well, as required by section G.9 of SLB No. 14.[1] This particularly applies to any communications by the Company or any representative of the Company to the Staff of its plans or schedule for printing proxy materials.

Finally, we ask the Staff to render its no-action determination in light of our stated intention to seek reconsideration, and to issue it with sufficient timeliness to avoid functionally denying us a reconsideration opportunity that is facially a part of this review system.

Analysis

Part I. Rule 14a-8(i)(7).

The Company seeks to prevent action on our Proposal via Rule 14a-8(i)(7), the ordinary business exception. The exception, in its entirety, permits exclusion of a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[2]

The initial rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Legal Bulletin (SLB) in 2002. There the Staff explained that:

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[1] https://www.sec.gov/pdf/cfslb14.pdf; https://www.sec.gov/corpfin/staff-legal-bulletin-14d-shareholder-proposals
[2] 17 C.F.R. § 240.14a-8(i)(7).

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. …[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues … would not be considered to be excludable because the proposals would transcend the day-to-day business matters.'[3]

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

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. **However, proposals relating to such matters but focusing on sufficiently significant social policy issues (*e.g., significant discrimination matters*) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.**[4]

There matters stood until 2017. That fall, Staff issued a bulletin ("SLB 14I") recognizing that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[5] It therefore invited corporations, in arguing for an ordinary business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of those proposals.[6] Staff expanded this guidance further in 2018 ("SLB 14J") and suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications

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

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

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

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

with the Staff.[7] In doing so, Staff welcomed details about particulars such whether the company had already addressed the issue in some manner, including the difference – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presented a significant policy issue for the company.[8] Additional Staff guidance appeared again in the fall of 2019 ("SLB 14K"), wherein Staff underscored the value of the 2018 "delta analysis."[9]

Then most recently, on November 3, 2021, Staff reverted to the aforementioned 1998 guidance by rescinding SLB 14I, SLB 14J, and SLB 14K following "a review of staff experience applying the guidance in them."[10] Relevantly, of the rescinded bulletins, Staff said an "undue emphasis was placed on evaluating the significance of a policy issue to a particular company at the expense of whether the proposal focuses on a significant social policy…." Staff went on to explain that it was prospectively realigning its "approach for determining whether a proposal relates to 'ordinary business' with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release."[11]

Part II. The Proposal does not relate to the Company's ordinary business operations.

A. The consideration of non-pecuniary factors is inherently outside of the Company's ordinary business operations.

The Company argues our Proposal should be omitted because it relates to the Company's ordinary business operations, but our Proposal does just the opposite. As previously noted, our Proposal seeks a report on the "potential risks and consequences to the Company associated with the prioritization of *non-pecuniary* factors" when it comes to determining which networks the Company carries on its DirecTV platform. (emphasis added). The prioritization of any non-pecuniary factor in network-related determinations—and therefore any factor beyond the pecuniary or financial interest of the Company—is by its very nature *outside* of the ordinary business of the Company.

Pecuniary is generally defined as "relating to money."[12] And the necessarily central aim of any corporation, except perhaps for public-benefit corporations, is (or at least is legally required to

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

[8] *Id.*

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

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

[11] *Id.*

[12] https://dictionary.cambridge.org/us/dictionary/english/pecuniary; https://www.merriam-webster.com/dictionary/pecuniary

be) to make money by advancing the objectively established best financial interests of the companies. When making decisions, normal business corporations such as the Company must therefore prioritize *pecuniary* factors that will increase the Company's reasonably foreseeable *financial* sustainability and growth; this constitutes its ordinary business operations. But ordinary business operations and the pecuniary factors that drive them is not what our Proposal is about. Our Proposal seeks an analysis of risks and consequences to the Company of prioritizing *non-pecuniary* or non-financially motivated factors.

In the context of the Company's DirecTV platform, considerations such as the ideology or point of view espoused by a network is an example of a non-pecuniary factor that appears to be contemplated by the Company when determining its network lineup. Other examples might include a network's commitment to lowering its carbon footprint or donations to certain so-called social-justice initiatives. Decisions based on such extrinsic, non-pecuniary factors is exactly the opposite of an ordinary business decision. Indeed, how the Company prioritizes such non-pecuniary factors is not an ordinary business decision at all; it falls squarely outside of that purview. Our Proposal should therefore be found non-omissible as it does not relate to the ordinary business of the Company.

B. Our Proposal does not tell the Company which products and services to offer.

The Company nonetheless claims that our Proposal relates to its ordinary business and that our Proposal should be excluded because it relates to the products and services that the Company offers. The proceedings the Company cites in support of this argument precede SLB 14L's pronouncement regarding the significant social policy exception (*see* discussion in Part III below) and are nevertheless also distinguishable. For instance, the Company cites to *Bank of America Corp.* (*Worcester County Food Bank and Plymouth Congregational Church of Seattle*) (avail. Feb. 21, 2019) as evidence of our Proposal's excludability, yet this proceeding is inapplicable. The proposal in *Bank of America* would have required the Board to complete a report to shareholders evaluating overdraft policies and practices and the impacts they have on customers. In that proceeding, SEC Staff found Bank of America could exclude the proposal under rule 14a-8(i)(7), as relating to the Company's ordinary business operations. In doing so, Staff "note[d] that the Proposal relates to the products and services offered for sale by the Company." But whether a financial institution charges a fee to cover monies in an account that is in arrears is exactly the type of proposal that one might expect to be related to the ordinary business operation of a company, in this instance, a bank. Indeed, whether a customer has funds in his or her account to pay for a transaction and whether or how the related financial institution covers that transaction and therefore provides an overdraft service to the customer, seems to be a core ordinary business of a bank.

This is completely distinguishable from our Proposal. Unlike the proposal in *Bank of America*, ours has nothing to do with the ordinary activities of the Company, or, as seen above, with the normal pecuniary considerations of the Company, except insofar as it seeks an explanation for the Company's apparent failure to attend to those considerations. Of course it is a business decision whether or not to charge clients a fee for a service, as was the case in *Bank of America*.

But our Proposal doesn't have anything to do with whether or not the Company charges its customers for a product or service. Our Proposal addresses the risks and consequences of the Company's digital satellite service platform, DirecTV, using non-pecuniary, and therefore facially non-business-related, factors in its decisions of which networks to carry. If our Proposal had to do with whether to charge customers a late fee when missing a payment for the DirecTV service, or say a surcharge for particular programming, then the analogy between the proposals might make sense. But our Proposal looks at strictly *non-financial* decision making, and with regard not to a day-to-day business transaction, but to one of the most significant types of determinations that a satellite television provider can make. The two are hardly similar, as non-pecuniary factors are by their very nature factors that do not relate to the financial performance of the networks the Company offers.

Another proceeding cited by the Company, *The Walt Disney Co.* (avail. Dec. 22, 2010), is similarly inapplicable. The proposal in that proceeding requested that Disney's Board of Directors direct its management to modify the Company's "current smoking policy to not allow children within the designated smoking areas of its theme parks…." SEC Staff determined that Disney could exclude the proposal from its proxy under rule 14a-8(i)(7), as relating to Disney's ordinary business operations and "note[d] that the proposal relates to the policies and procedures regarding the products and services that the company offers." The proposal in that proceeding unambiguously requested the company change its smoking policy in regards to designated smoking areas offered by Disney, and provided no evidence that Disney was making decisions about this detail of park maintenance with regard to any considerations than those that fit snuggly within the Company's fiduciary duty. Our Proposal makes no such request regarding the Company's policies or services. We simply ask the Company to consider the impact to it of prioritizing considerations unrelated to turning a profit. Nothing about our Proposal directs the Company to make any changes to how it does business, though following such a review, the Company may determine it is in the Company's best interest to do so. But what the Company elects to do (or not do) with the results of its report is outside the scope of our Proposal and has nothing to do with the pecuniary interests of the Company.

C. Our Proposal does not dictate the Company's business relationships.

The Company also claims that our Proposal should be excluded because its subject matter relates to the Company's business relationships, but this argument is without merit. In making this argument, the Company relies on proceedings that are more than 25 years old, citing two proceedings from 1997 and one from 1991. According to the Company, proposals in those proceedings were found excludable under the predecessor to Rule 14a-8(i)(7). These proceedings hardly seem convincing or relevant to our Proposal. Beyond preceding both the relevant rule established in 1998 and SLB 14L, the proposals in the proceedings cited by the Company—*Rogers Corp.* (avail. Jan. 18, 1991), *Westinghouse Electric Corp.* (avail. Jan. 28, 1997), and *Mirage Resorts, Inc.* (avail. Feb. 18, 1997)—all make requests for specific and affirmative action to the respective companies. As the Company asserts, the proposal in *Westinghouse* urged that Board "to refrain from any business relationship with any non-management director for which the non-management director directly or indirectly receives compensation beyond the director

fee." Our Proposal makes no such analogous request. It does not set any parameters for the Company to enter into or cease any particular network relationship. The Company is free to enter into any business relationship it likes under our Proposal. Our Proposal merely requests the Company report on its employment of non-pecuniary factors in its decision-making.

D. Our Proposal does not interfere with the Company's litigation strategy or its conduct of litigation.

Finally, the Company asserts our Proposal should be precluded under 14a-8(i)(7) because it relates to the Company's litigation strategy and the conduct of litigation to which the Company is a party. However, a proposal sharing similar subject matter as pending litigation does not automatically deem it omissible.

For instance, in *Johnson & Johnson* (avail. Mar. 3, 2022), SEC Staff found a proposal concerning talc-based baby powder to be non-omissible despite its baby powder being the subject of a myriad of lawsuits to which Johnson & Johnson was a party. The proposal in that proceeding recommended the company cease selling its talc-based baby powder "in recognition of the social justice and public health issues" surrounding the product. The proposal in that proceeding even mentioned how the company was "inundated with personal injury lawsuits linking the use of its talc-based Baby Powder to cancer, including *thousands* filed by women who used the product and later developed ovarian cancer." (emphasis added). Yet, despite the proposal in *Johnson & Johnson* dealing with the exact same subject matter as litigation to which the company was a party (talc-based baby powder) for apparently the exact same reasons for the litigation (public health issues), the proposal was found non-omissible. According to SEC Staff, the proposal "d[id] not deal with the Company's litigation strategy or the conduct of litigation to which the Company is a party." *See also The Travelers Companies, Inc.* (avail. Mar. 31, 2022) (Staff found the proposal non-omissible for several reasons, including that it "transcends ordinary business matters," despite the company claiming the proposal interfered with its active litigation and regulatory proceedings).

Our Proposal is far less relevant to any litigation than the proposal that was found non-omissible in *Johnson & Johnson*. While we discuss the Company's cancellation of its contract with OAN in our Supporting Statement as an example of why our Proposal is needed, whether or not the Company renegotiates a contract with OAN is far from the subject of our Proposal. Our Proposal only seeks a report on the risks and consequences of using non-pecuniary factors in determining its network lineup; the fact that litigation may be one potential consequence of using non-pecuniary factors in its decision-making should not preclude our Proposal. Additionally, as recent events, discussed in more detail below, indicate, the Company's non-pecuniary decision making appears not to be limited to the single instance of OAN. Instead, it appears that the Company may be applying a unique set of rules to decisions about whether to carry conservative news outlets, a standard under which it makes itself the arbiter on non-pecuniary grounds of the sorts of content and coverage it will allow conservative news networks (but not leftwing news networks) to carry. Our Proposal thus does not directly or indirectly focus on a single decision-making process and

action that happens to be the subject of a lawsuit. Rather, it seeks to look at a whole pattern and practice of behavior by the Company that extends well beyond any instant piece of legislation.

On the other hand, the proposal in *Johnson & Johnson* couldn't have been clearer in both its Resolution and Supporting Statement that it sought to have the company in that proceeding cease selling its talc-based baby powder *because of* the litigation surrounding its purported deleterious health effects. And the company in that proceeding was, at least according to the proponent, entangled in "thousands" of lawsuits surrounding the subject of its proposal. And the inquiry sought by that proposal, and any results likely to flow from that inquiry, were certainly no *less* likely to have a relationship to the matter of the lawsuits than ours to the suit the Company cites.

Nonetheless, SEC Staff found the proposal in that proceeding to be non-omissible. Because our Proposal is less directly related to only a single lawsuit which relates to only a single instance of the Company behavior at issue in the Proposal, while the *Johnson & Johnson* proposal related directly and explicitly to the central question at issue in thousands of lawsuits, the Staff cannot now without bias allow the Company to omit our Proposal.

Part. III. Our Proposal concerns a non-omissible Significant Social Policy issue that transcends ordinary business.

Even if the Staff were to conclude our Proposal relates to the Company's ordinary business matters, our Proposal clearly concerns a significant social policy issue and is therefore non-omissible.

The Staff has previously denied relief for proposals addressing misinformation in the media and the consideration of non-pecuniary factors. First, the Staff have identified misinformation as a matter of significant social policy concern that transcends ordinary business. In *Alphabet Inc. (W. Andrew Mims Trust)* (avail. Apr. 12, 2022), the Staff found to "transcend[] ordinary business matters" a proposal that sought to address "misinformation and disinformation across [the company's] platforms." The proposal stated the shareholder's concern with "misinformation and disinformation" that "significantly shape our information environment and have profound impacts on society." The Staff rejected the company's claim for exclusion under Rule 14a-8(i)(7), finding that the proposal's focus on the informational content of the company's programming in general "transcend[ed] ordinary business matters." Second, the Staff have identified a focus on non-pecuniary company policies to transcend ordinary business matters. In *Alphabet Inc.* (avail. Apr. 16, 2021), *Broadridge Financial Solutions, Inc.* (avail. Sept. 22, 2021), *Tractor Supply Company* (avail. Mar. 9, 2021), and *3M Company* (avail. Mar. 9, 2021), the Staff denied relief under Rule 14a-8(i)(7) for proposals requesting the companies become "benefit" or "public benefit" corporations that would "rather than focusing solely on economic returns," "balance the interests of stakeholders," including "anyone materially affected by the corporation." In other words, the Staff permitted proposals to be included that focused on company policies that favor non-pecuniary factors like stakeholder interests.

Our Proposal is well within these precedents. Our Proposal focuses on censorship and viewpoint discrimination, which is both caused by companies' efforts to address "misinformation" or "disinformation," and, alternatively, itself causes misinformation by misleading the public as to Americans' views on important issues. Our Proposal also focuses on how the Company's non-pecuniary focus contributes to these risks. It would be highly inconsistent for the Staff to rule out our Proposal's *concern* for the Company's non-pecuniary approach to social matters when it has so recently allowed proposals that *endorse* a non-pecuniary approach to social matters, as it did in 2021.

The use of non-pecuniary factors by corporations to censor speech and engage in viewpoint discrimination is undoubtedly a significant social policy issue, an issue that is only growing in concern.[13] In fact, a Pew Research Center survey conducted in June 2020 found that "roughly three-quarters of U.S. adults say it is very (37%) or somewhat (36%) likely that social media sites intentionally censor political viewpoints that they find objectionable. Just 25% believe this is not likely the case."[14] According to the survey, "Majorities in both major parties believe censorship is likely occurring, but this belief is especially common – *and growing* – among Republicans. Nine-in-ten Republicans and independents who lean toward the Republican Party say it's at least somewhat likely that social media platforms censor political viewpoints they find objectionable."[15] (emphasis added).

Take, for instance, the ongoing concern regarding censorship of right-of-center news outlets for reporting stories that could be perceived as damaging to certain political parties or politicians.[16] It's no secret that Twitter and Facebook took unprecedented steps to censor the *New York Post* due to its reporting of the Hunter Biden laptop story, falsely labeling it "misinformation," an action that former Twitter CEO Jack Dorsey has since called a mistake.[17]

Given that context, it is certainly a significant social policy issue whether the Company uses non-pecuniary factors—such as viewpoint—to determine its network lineup. As we point to in our Proposal, there is legitimate concern that the Company relied on non-pecuniary factors with regard to its decision to cancel its contract with OAN. As discussed in our Proposal, there appears to be no pecuniary reason, and therefore no reason related to the Company's ordinary business operations, not to renew its contract with OAN. As discussed in our Proposal, OAN was not a struggling news network. It was gaining prominence amongst conservative viewers. Just months prior to AT&T's refusal to renew the network's contract, a Rasmussen Reports survey

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[13] https://www.foxnews.com/media/twitter-facebook-google-censored-conservatives-big-tech-suspension; https://www.heritage.org/technology/commentary/big-techs-conservative-censorship-inescapable-and-irrefutable
[14] https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/
[15] https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/
[16] https://www.washingtontimes.com/news/2021/sep/21/big-techs-conservative-censorship-inescapable-and-/; https://nypost.com/2022/10/23/lawsuit-reveals-vast-censorship-scheme-by-big-tech-and-the-federal-government/
[17] https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden; https://nypost.com/2020/10/14/facebook-twitter-block-the-post-from-posting/; https://nypost.com/2021/03/25/dorsey-says-blocking-posts-hunter-biden-story-was-total-mistake/

found that nearly 10 percent of conservatives viewed OAN most often, and that conservatives were increasingly looking for alternatives, such as OAN, to already established right-of-center news outlets.[18]

Adding to the social policy significance of our Proposal, the exact same scenario appears to have repeated itself recently when the Company's DirecTV cut Newsmax, another right-of-center news outlet, from its lineup. The Company did so despite Newsmax being even more popular than OAN. The Rasmussen Reports survey cited above found that nearly twice as many conservative news viewers (or 17 percent) watch Newsmax most often.[19] In fact, Newsmax boasts that it is the nation's fourth highest-rated cable news channel and is watched by 25 million Americans.[20]

The Company has claimed that Newsmax's carriage fee is to blame for the Company ending its relationship, but carriage fees are common and the Company already pays them to carry other lower performing networks. According to Newsmax, "DirecTV pays cable license fees to all top 75 cable channels and to all 22 liberal news and information channels it carries.[21] Almost all of these channels are paid hefty license fees significantly more than Newsmax was seeking — and despite the fact that most of the channels have much lower ratings than Newsmax."[22]

The Company has dismissed concerns over the nixing of Newsmax by directing viewers to Fox News. "If Newsmax ceases to authorize our carriage of their channel, our customers will still have access to their clearly preferred conservative news channel, Fox News, which has more viewers than MSNBC, CNN and Newsmax combined."[23] But the Company's tone-deaf response that conservative viewers can just watch Fox News instead ignores surveys like the aforementioned Rasmussen survey that shows some conservatives prefer some networks over others. In other words, not all conservatives watch only Fox News. The Company treats all right-of-center customers as a monolithic group, dismissing concerns over the Company's lack of programming for tens of millions of Americans and in spite of the fact that more Americans identify as conservative than liberal. [24] Notably, the Company has not dropped MSNBC, for instance, to save on carriage fees, and then condescendingly told viewers that they can get all the leftwing information they want from CNN, ABC, CBS, NBC, PBS and a sweeping host of other

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[18] https://web.archive.org/web/20210523183716/https://www.rasmussenreports.com/public_content/politics/current_events/media/fox_news_still_tops_with_conservatives_but_newsmax_oan_make_gains?utm_campaign=RR05232021DN&utm_source=criticalimpact&utm_medium=email
[19] https://web.archive.org/web/20210523183716/https://www.rasmussenreports.com/public_content/politics/current_events/media/fox_news_still_tops_with_conservatives_but_newsmax_oan_make_gains?utm_campaign=RR05232021DN&utm_source=criticalimpact&utm_medium=email
[20] https://www.newsmax.com/politics/facebook-directv-cancel/2023/01/29/id/1106386/
[21] https://www.newsmax.com/newsfront/newsmax-at-t-directv/2023/01/24/id/1105756/;
https://www.theepochtimes.com/newsmax-dropped-by-directv-decries-anti-conservative-censorship_5009689.html
[22] https://www.newsmax.com/newsfront/newsmax-at-t-directv/2023/01/24/id/1105756/;
https://www.washingtontimes.com/news/2023/jan/25/outrage-erupts-right-directv-pulls-plug-conservati/
https://www.theepochtimes.com/newsmax-dropped-by-directv-decries-anti-conservative-censorship_5009689.html
[23] https://www.newsweek.com/newsmax-ratings-compared-vice-raise-questions-directv-fairness-1776808
[24] https://news.gallup.com/poll/328367/americans-political-ideology-held-steady-2020.aspx

leftwing media outlets. This underscores that the Company is using non-pecuniary factors in a biased way to eliminate popular television options at the expense of the Company's reputation and bottom line – exactly what our Proposal seeks to force the Company to address, and very definitely not an "ordinary business" decision.

Concerns over the Company's refusal to carry these conservative networks have since taken center-stage on Capitol Hill. House Speaker Kevin McCarthy has expressed concern over the deplatforming of conservative networks by the Company and has promised the U.S. House of Representatives will hold hearings on the issue, a promise that the House Oversight Committee Chairman has already committed to uphold.[25] GOP Members of the House of Representatives have even given floor speeches over the growing concern over what they perceive to be "a clear case of free speech infringement and viewpoint discrimination."[26] And several U.S. Senators have written to the Company regarding concerns over its censorship of conservative news networks.[27]

It is therefore clear, regardless of what ideological opinion one holds, that the issue of censorship of certain right-of-center news outlets is a significant social policy issue. This is indisputable and backed up by nationwide polls by regarded survey research firms such as Pew and Rasmussen; any finding to the contrary is, simply put, overt bias on the part of the SEC Staff.

Part IV. Issuing relief to the Company would raise serious constitutional and administrative law concerns.

For the reasons discussed above, the Proposal's 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 significant social policy concern of the use of non-pecuniary factors by corporations to censor speech and engage in viewpoint discrimination, especially against conservatives and Republicans. By urging the Staff issue relief for the Proposal regardless, the Company invites the Staff to itself discriminate based on viewpoint.

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[25] https://www.newsmax.com/newsmax-tv/mccarthy/2023/01/30/id/1106562/?ns_mail_uid=09385351-17c2-4ecf-8312-f46ec40e0776&ns_mail_job=DM429818_01312023&s=acs&dkt_nbr=010104q4i8ng
[26] https://www.newsmax.com/us/directv-censorship-house/2023/01/31/id/1106745/
[27] https://www.commerce.senate.gov/2023/2/sens-cruz-graham-lee-cotton-raise-political-censorship-concerns-with-directv-s-decision-to-drop-conservative-news-network-newsmax;
https://www.cruz.senate.gov/imo/media/doc/senscruzgrahamleecottonlettertodirectvattandtpgrenewsmax.pdf

It is well-established that the government cannot engage in viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019). This principle prevents governments from regulating speech "because of the speaker's specific motivating ideology, opinion, or perspective." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995). And the Supreme Court defines "the term 'viewpoint' discrimination in a broad sense." *Matal*, 137 S. Ct. at 1763. This is because "[v]iewpoint discrimination is a poison to a free society." *Iancu*, 139 S. Ct. at 2302 (Alito, J., concurring).

The rule against viewpoint discrimination prevents allowing speech based on one "political, economic, or social viewpoint" while disallowing other views on those same topics. *Id.* at 831. It also prohibits excluding views that the government deems "unpopular," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), or because of a perceived hostile reaction to the views expressed, *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

Here, the Company invites the Staff to engage in viewpoint discrimination by issuing relief on our Proposal. Our Proposal requests that the Company's Board "commission and disclose a report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors when it comes to establishing, rejecting, or failing to continue network relationships on its DirecTV platform." The Staff has routinely denied no-action relief to similar requests in *Alphabet Inc. (W. Andrew Mims Trust)* (Apr. 12, 2022) (focusing on misinformation and disinformation" in media); *Alphabet Inc.* (Apr. 16, 2021) (focusing on non-pecuniary "public benefit" company policy); *Broadridge Financial Solutions, Inc.* (Sept. 22, 2021) (same); *Tractor Supply Company* (Mar. 9, 2021) (same); *3M Company* (Mar. 9, 2021), (same); *see supra* Part III. If the Staff opts to exclude our Proposal, one might reasonably conclude that it could only do so because of its opinion of the political *views* expressed by our Proposal. Here, that would be our Proposal's concern for censorship of conservative political views and how non-pecuniary factors create these risks. In effect, the Staff would have determined to be significant proposals that *request* censorship of conservatives and the consideration of non-pecuniary factors, but determined *in*significant proposals that express *concern* over the very same issues.

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. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). 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 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 SLB 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 recent precedent permitting the consideration of shareholder proposals relating to misinformation, disinformation, and non-pecuniary factors, *see supra* Part III, 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, in practice, they 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 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 decision-making. 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, 73d Cong. 2d Sess. 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.

i. 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.[28] The current Rule 14a-8 goes far further. Specifically, Rule 14a-8 provides that a corporation may exclude proposals that relate to a 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).

ii. 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 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

[28] 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.

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 a corporation did 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.

Conclusion

Our Proposal seeks only report on the potential risks and consequences to the Company associated with the prioritization of non-pecuniary factors, not in any way interference in the Company's ordinary business operations, and it does so about issues that is indisputably of

significant social policy interest. Moreover, the whole no-action review process is fundamentally illegitimate.

The Company has clearly failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our 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 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 call us at (202) 507-6398 or email us at sshepard@nationalcenter.org and at srehberg@nationalcenter.org.

Sincerely,

Scott Shepard
FEP Director

Sarah Rehberg
National Center for Public Policy Research

cc: Thomas J. Kim, AT&T (TKim@gibsondunn.com)

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February 15, 2023

VIA E-MAIL
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *AT&T Inc.*
Stockholder Proposal of the National Center for Public Policy Research (“Proponent”)
Securities Exchange Act of 1934—Rule 14a-8

Response to February 3, 2023 Submission by Proponent

Ladies and Gentlemen:

On behalf of our client, AT&T Inc. (the “Company”), we submit this letter to respond to the Proponent’s February 3, 2023 letter (the “Proponent Letter”). Terms not defined herein have the same meanings as used in our January 3, 2023 no-action request to exclude the Proposal (the “Initial Request”).

Our Initial Request sets forth our arguments as to why we believe the Proposal is excludable under Exchange Act Rule 14a-8(i)(7) pursuant to well-established precedents, and we do not intend to repeat those arguments here. Rather, we write this letter to make the following points:

First, the Proponent Letter asserts that the Proposal is outside the ordinary business of the Company because it seeks a report on non-pecuniary factors, which the letter claims “is by its very nature *outside* of the ordinary business of the Company” (emphasis in original).[1] The Proponent Letter explains that: “When making decisions, normal business corporations such as the Company must therefore prioritize *pecuniary* factors that will increase the Company’s reasonably foreseeable *financial* sustainability and growth; this constitutes its ordinary business operations” (emphasis in original).[2]

The Proponent Letter does not cite to any precedent in support of its argument because there is none. This distinction has no relevance to the ordinary business exclusion because a corporation’s conduct of its ordinary business operations frequently involves

[1] Proponent Letter at 4.

[2] *Id*. at 5.

management's consideration of non-pecuniary factors. For example, in deciding which products and services to offer, management must oftentimes consider factors such as (1) health and safety, (2) customer preferences, (3) compliance with law, (4) environmental impact, and (5) human resources, among others – all of which are non-pecuniary.

Second, as we noted in the Initial Request, while the Proposal's

> "Supporting Statement raises concerns about activist pressure and viewpoint discrimination, the central focus of the proposal is on the Company's policies and rationale for deciding which programming to offer to consumers and how to handle contracts and relations in connection with doing so. Thus, neither the Proposal nor the Supporting Statement implicate any significant policy issue."[3]

The Proponent argues that the Proposal concerns a significant social policy issue because it "focuses on censorship and viewpoint discrimination."[4] Yet this conflicts with the many assertions in its letter to the contrary:

- "Our Proposal merely requests the Company report on its employment of non-pecuniary factors in its decision-making."[5]
- "We simply ask the Company to consider the impact to it of prioritizing considerations unrelated to turning a profit."[6]
- "But our Proposal looks at strictly *non-financial* decision making, and with regard not to a day-to-day business transaction, but to one of the most significant types of determinations that a satellite television provider can make", *i.e.*, "which networks to carry" (emphasis in original).[7]

Third, and most importantly: we strongly object to the Proponent's attempt to strong-arm the Staff into denying our routine no-action request. The Proponent goes so far as to claim there would be "significant constitutional and administrative law issues" if the no-

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[3] Initial Request at 8.

[4] Proponent Letter at 9.

[5] *Id*. at 7.

[6] *Id.* at 6.

[7] *Id.* at 6.

action request is granted.[8] The Proponent encourages the Staff to "take the easiest course...to avoid making such a weighty decision."[9]

These arguments have no substantive basis. We disagree with the Proponent Letter's characterization of a grant of no-action relief to the Company here as amounting to a violation of the U.S. Constitution, the Administrative Procedure Act or outside the authority of the Staff and the power of the Commission. Granting relief here would be an absolutely appropriate exercise of the Staff's Rule 14a-8 authority, and we are confident that the Staff does not determine these questions by considering what is the "easiest" course of action, but gives each decision its full consideration on the merits.

CONCLUSION

We respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal (including the Supporting Statement) from its 2023 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 887-3550.

Sincerely,

/s/ Thomas J. Kim

Thomas J. Kim

cc: Bryan Hough, AT&T Inc.
Moni DeWalt, AT&T Inc.
Sarah Rehberg, National Center for Public Policy Research

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[8] *Id.* at 2.

[9] *Id.* at 12.

February 24, 2023

Via email: shareholderproposals@sec.gov

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen,

This correspondence is in response to the supplemental letter of Thomas J. Kim on behalf of AT&T (the "Company") dated February 15, 2023, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2023 proxy materials for its 2023 annual shareholder meeting.

RESPONSE TO AT&T'S SUPPLEMENTAL CLAIMS

The Company's supplemental no-action letter was instructive in making our point for us. The leaders of AT&T and their counsel consider it impermissible "strong arming" for people who disagree with their personal policy preferences to attempt to seek all of the redress that is available to them, and to be treated in an objective, fair and unbiased manner – just like people who agree with them. It is this profound lack of objectivity in outlook and procedure that our proposal seeks an analysis of, because the extent to which it infects Company actions, as it appears to, is the extent to which the Company is being mismanaged in fundamental and systemic ways.

Aside from that useful demonstration, though, the supplemental letter services no value. In our no-action reply letter we established beyond cavil that our letter addresses a matter of significant social policy concern and does so in a way that, by clearly applicable recent Staff precedent,

cannot be excluded on the other grounds raised by the Company. That ends the analysis. When issues of significant social policy have been raised, per SLB 14L, whether a proposal also implicates an issue of ordinary business (which, as we have demonstrated, is only incidentally the case in this proceeding) is not relevant. As a result, nothing in the Company's supplemental letter can have any bearing on the outcome of this proceeding.

In its February 15, 2023 supplemental letter, the Company addresses, however fleetingly, three issues raised in our February 3 reply to its no-action request.

First, the Company complains that our reply letter "does not cite to any precedent in support" of our argument that non-pecuniary factors are outside of the course of ordinary business. In doing so, the Company attempts to reassign its burden of persuading the Staff that it may omit our Proposal; however, under Rule 14a-8(g), the "burden is on the company to demonstrate that it is entitled to exclude a proposal." As such, the issue is whether the Company has demonstrated that our Proposal relates to its ordinary business, which, as we lay out in our February 3 reply, the Company has failed to do. Whether we cite to specific precedent in our reply – or even reply at all – is wholly irrelevant to the Staff's analysis.

Furthermore, whether a previous proposal that addresses the same issue as our Proposal has been decided on by the SEC is not a ground for exclusion. Therefore, the existence of applicable precedent, despite the Company's complaint that "there is none," is similarly irrelevant to the Staff's analysis. The novel nature of a proposal should not be used as a means to exclude it. Doing so would lead to the absurd result of permitting shareholders to introduce only proposals from a closed universe in which the same type of proposal must have been previously introduced, challenged via the SEC no-action process, and then survived SEC Staff review.

Second, the Company claims that three statements in our reply contradict our assertion that our Proposal concerns a significant social policy issue, but such a claim completely misrepresents our work by taking our statements out of context. Each of the three statements cited by the Company were included in our reply as a means to compare our Proposal to proposals in inapplicable precedent cited by the Company (*i.e.*, *Westinghouse Electric Corp.* (avail. Jan. 28, 1997); *The Walt Disney Co.* (avail. Dec. 22, 2010); and *Bank of America Corp.* (*Worcester County Food Bank and Plymouth Congregational Church of Seattle*) (avail. Feb. 21, 2019)). These statements each appear as part of a larger argument demonstrating the ways in which our proposal does *not* relate to the Company's ordinary business; more specifically, that our Proposal does not dictate the Company's business relationships, unlike the proposal in *Westinghouse*, and that our Proposal does not tell the Company which products and services to offer, unlike the proposals in *Disney* and *Bank of America*. They can hardly be used, as the Company implies, as a means to demonstrate an admission on our part that our Proposal does not actually concern a significant social policy issue. To focus solely on these statements would be to completely ignore an entire section consisting of several pages of our reply that explains the very significant social policy nature of our Proposal. We incorporate those arguments herein by reference (*see* Part III of our reply titled, "Our Proposal concerns a non-omissible Significant Social Policy issue that

transcends ordinary business"), and believe our reply fully demonstrates the non-omissibility of our Proposal on significant social policy grounds.

Nonetheless, even if the Company's claim that our reply somehow contradicts itself is true, such a contradiction would be completely irrelevant to the Staff's analysis in determining whether a proposal concerns an issue of social policy significance. Following the issuance of SLB 14L, SEC Staff will "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."[1] This is the standard that SEC Staff set and therefore must apply. Had we failed to submit a reply, or replied with a letter that was completely silent to the significant social policy exception, the analysis would still not change. While a well-drafted reply letter is certainly helpful in the no-action process, it is by no means a requirement for SEC Staff to faithfully execute the process.

Third, aside from the bias-revealing claim that we are somehow an inappropriate party to seek all the review this process formally offers and to question the propriety of this proposal-review process under law, we have that standing and have made those arguments – and the Company has nothing substantive to say in reply to them. Whatever it may wish, it cannot relieve the Staff of taking them seriously by sneering at them.

Therefore, based upon the analysis set forth above and contained in our February 3 no-action reply, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

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[1] https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals

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 call us at (202) 507-6398 or email us at sshepard@nationalcenter.org and at srehberg@nationalcenter.org.

Sincerely,

Scott Shepard
FEP Director

Sarah Rehberg
National Center for Public Policy Research

cc: Thomas J. Kim, AT&T (TKim@gibsondunn.com)