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

DIVISION OF
CORPORATION FINANCE

April 3, 2023

Scott Shepard
National Center for Public Policy Research

Re: JPMorgan Chase & Co. (the "Company")
Incoming letter dated March 30, 2023

Dear Scott Shepard:

This letter is in response to your correspondence dated March 30, 2023 concerning the shareholder proposal (the "Proposal") submitted to the Company by the National Center for Public Policy Research (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. On March 21, 2023, we issued a no-action response expressing our informal view that the Company could exclude the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7). You have asked us to reconsider our position. After reviewing the information contained in your correspondence, we find no basis to reconsider our position.

Under Part 202.1(d) of Section 17 of the Code of the Federal Regulations, the Division may present a request for Commission review of a Division no-action response relating to Rule 14a-8 under the Exchange Act if it concludes that the request involves "matters of substantial importance and where the issues are novel or highly complex." We have applied this standard to your request and determined not to present your request to the Commission.

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,

Erik Gerding
Director, Division of
Corporation Finance

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

March 30, 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: Request for Staff Reconsideration and Presentation to Commission for Review of March 21, 2023 Decision Permitting JPMorgan Chase & Co. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Dear Ladies and Gentlemen,

By the letter dated March 21, 2023 (the "No-Action Decision"), the staff of the Division of Corporation Finance (the "Staff") stated it would not recommend enforcement action to the Securities and Exchange Commission (the "Commission") if JPMorgan Chase & Co. (the "Company") were to omit our shareholder proposal (the "Proposal") from its 2023 proxy materials in reliance on Rule 14a-8(i)(7). We at the National Center for Public Policy Research respectfully request that the Staff reconsider the No-Action Decision and present it to the Commission for the Commission's review. We make this request for the following reasons:

First, reconsideration by the Staff is appropriate because there is new precedent by which the Staff should evaluate the Proposal.

Second, the No-Action Decision involves matters of substantial importance that warrant review by the Commission. These matters include viewpoint discrimination by the Staff under the First Amendment of the United States Constitution, arbitrary and capricious agency action, action in excess of the Commission's statutory authority under the Exchange Act, and incorrect application of Rule 14a-8(i)(7) by the Staff.

We submit that the Commission should reverse the No-Action Decision and provide the Commission's views on the lawfulness of Rule 14a-8(i)(7) and any currently applicable Commission or Staff interpretation or guidance under Rule 14a-8(i)(7) as it relates to our Proposal.

Finally, if the Staff were to fail to present the No-Action Decision to the Commission, that would be an independent basis for finding arbitrary and capricious or otherwise unlawful action.

We respectfully request that the Division of Corporation Finance forward to the Commission this petition for review.

I. The Staff should reconsider the No-Action Decision in light of new precedent that provides new material information.

The Commission has stated that the Staff will consider requests for reconsideration "[w]hen such requests are accompanied by material information that has not been previously furnished." *Statement of Informal Procedures for the Rendering of Staff Advice With Respect to Shareholder Proposals*, Release No. 34-12599 (the "1976 Interpretative Release"), 41 Fed. Reg. 29989, 29991 (July 20, 1976).

On March 21, 2023, the Staff denied no-action relief to JPMorgan Chase & Co. for a proposal that requests a report evaluating risks including political viewpoint discrimination. *See JPMorgan Chase & Co. (David Bahnsen)* (avail. Mar. 21, 2023). In that proceeding, JPMorgan Chase & Co. argued that the proposal was "particularly concerned about recent evidence of religious and political discrimination, which, to our knowledge, the Staff has not determined to be significant policy issues." *JPMorgan Chase & Co. (David Bahnsen)* (Mar. 21, 2023) at 9 (internal quotation omitted). The Staff determined otherwise, stating that the proposal "transcends ordinary business matters." *Id*. at 1.

The Staff's decision in *JPMorgan Chase & Co. (David Bahnsen)* creates new precedent that should cause the Staff to reconsider the No-Action Decision. Here, the Proposal and the Company's arguments against it are materially similar to that in *JPMorgan Chase & Co. (David Bahnsen)*. Like the viewpoint-discrimination proposal in *JPMorgan Chase & Co. (David Bahnsen)*, the Proposal here raises concerns over the Company "[d]ebanking customers based on political, religious, or any other opinion or characteristic other than pecuniary advantage." Here, the Proposal's focus is on the Company's "prioritiz[ation] [of] non-pecuniary factors" to "cancel[] the accounts of those who hold opinions and political views that deviate from hard-left political orthodoxy," just as the *JPMorgan Chase & Co. (David Bahnsen)* proposal focused on the denial of banking services based on political viewpoint. Under the Staff's new precedent, (which also happens to be precedent that involves the exact same company), the Proposal is evidently a matter of significant social policy and must not be excluded on the basis of Rule 14a-8(i)(7).

Although the opinions were issued on the same day, considering that the vaguely attributed "Rule 14a-8 Review Team" issued each decision, it is unclear whether the members of this "Team" were aware of each respective opinion and the incongruity of these opinions when viewed side-by-side. The No-Action Decision made no reference to *JPMorgan Chase & Co. (David Bahnsen)* (avail. Mar. 21, 2023). Nor did the No-Action Decision resolve both our Proposal and *JPMorgan Chase & Co. (David Bahnsen)* in the same decision, as the Staff has previously done, *see Apple Inc. (National Center for Public Policy Research & Myra K. Young and James McRitchie)* (Dec. 22, 2021). The fact that each proposal focuses on issues of viewpoint discrimination, and in particular those of a political and religious nature, and both about concerns over the Company's "debanking" of individuals based on these views, suggests that the "Rule 14a-8 Team" may not have applied the same rule to both matters. While the proposals are different enough so as not to be substantially identical (which neither the Staff nor the Company raise here), they do raise the same issue of *debanking*, and in the proceedings related to each proposal the proponents established that debanking is an issue of significant public-policy concern.

Reconsideration would therefore be appropriate to ensure that the Staff is consistently applying its interpretation of Rule 14a-8(i)(7) in light of its decision in *JPMorgan Chase & Co. (David Bahnsen)* (Mar. 21, 2023). We request that the Staff promptly reconsider the No-Action Decision.

II. The Staff must present the No-Action Decision to the Commission for review because it involves fundamental questions of constitutional and statutory authority that are novel, highly complex, and beyond the Staff's competency to resolve.

Binding Commission regulations provide that the Staff will present a no-action decision to the Commission for the Commission's review that "involve[s] matters of substantial importance and where the issues are novel or highly complex." 17 C.F.R. § 202.1(d). The Staff's No-Action Decision raises fundamental questions about the continuing viability of the Staff's interpretation and application of Rule 14a-8(i)(7) and, even more importantly, its validity under the United States Constitution, Administrative Procedure Act, and the Commission's authority under the Exchange Act. These questions are plainly beyond the Staff's competence to resolve and must be presented to the Commission.

A. The No-Action Decision involves a question of substantial importance because the Staff erred as a matter of law in its application of Rule 14a-8(i)(7).

Our February 14 reply letter explains that the Proposal does not relate to the Company's ordinary business, and that the Company has failed to meet its burden to demonstrate that it does. *See* Letter from Scott Shepard & Sarah Rehberg, National Center for Public Policy Research, to the Staff (Feb. 14, 2023) (the "NCPPR Response Letter"). As discussed in that letter, shareholder proposals that raise questions about Company treatment of customers is not per se omissible. We incorporate those arguments by reference herein.

More importantly, and we believe this bears repeating: decisions based solely on extrinsic, non-pecuniary factors, such as the ideology or point of view espoused by a client, are exactly the opposite of ordinary business decisions, and are therefore *outside* of the ordinary business of the Company. To argue otherwise would be to argue that the Company routinely engages in conduct such as ideological and political discrimination against clients and potential clients as part of its business model.

Whatever the case, the Proposal should not have been found omissible. If our argument that non-pecuniary/non-financially oriented factors do not constitute ordinary company business is correct, then our Proposal is facially non-omissible. And, if the consideration of non-pecuniary factors such as the political or religious orientation of an organization engaged in a banking relationship with the Company *is* in fact ordinary business—as the Company and Staff have contended—then our Proposal most certainly is non-omissible on the grounds that it raises a significant social policy issue.

1. The Staff incorrectly determined that discrimination based on viewpoint and ideology, including political and religious orientation, is not a significant social policy concern.

The Staff's No-Action Decision granting the Company's no-action request fails to recognize the clearly significant social policy issue raised by our Proposal. Although we explained how our Proposal raises an issue of social policy significance in our February 14 reply, we believe those points bear repeating.

Indeed, the use of non-pecuniary factors by corporations to engage in viewpoint discrimination is undoubtedly a significant social policy issue, an issue that is only growing in concern.[1] 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 percent) or somewhat (36 percent) likely that social media sites intentionally censor political viewpoints that they find objectionable. Just 25 percent believe this is not likely the case."[2] 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."[3] (emphasis added).

---

[1] 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

[2] https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/

[3] https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/

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.[4] 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.[5]

Elon Musk's release of the "Twitter Files" detailing the company's extensive efforts to "shadow ban" and otherwise censor conservatives and others not sharing the same left-of-center worldview as company execs finally shed some light on the pervasiveness of the problem. "A new [Twitter Files] investigation reveals that teams of Twitter employees build blacklists, prevent disfavored tweets from trending, and actively limit the visibility of entire accounts or even trending topics — all in secret, without informing users," journalist Bari Weiss shared with the public.[6] Weiss then shared examples of Twitter censoring—and thereby discriminating against—users based on viewpoint and ideology. These examples include Stanford's Dr. Jay Bhattacharya, who Twitter secretly placed on a "Trends Blacklist" to prevent his tweets from trending because he argued that Covid lockdowns would harm children; popular conservative talk show host Dan Bongino, who Twitter placed on a "Search Blacklist;" and Turning Point USA's Charlie Kirk, who Twitter set his account to "Do Not Amplify."[7]

Given that context, it is certainly a significant social policy issue whether the Company uses non-pecuniary factors—such as viewpoint—to determine which individuals and companies can use it to conduct business, as it is no stretch of the imagination that such ideological and viewpoint discrimination is likewise occurring in industries other than media and social media. As we point out in our Proposal, there is legitimate concern that the Company relies on non-pecuniary factors with regard to its decision to cancel the account of the National Committee for Religious Freedom, to send cancellation letters to Michael Flynn's family, or to cut payment services for an event featuring Donald Trump, Jr.[8] The Company has been revealed to have de-banked the National Committee for Religious Freedom, headed by former Ambassador, Senator and Governor Brownback, and then lied about the reason for closing the account, and then stonewalled and refused to provide the honest explanation for its actions.[9] As discussed in our Proposal, there appears to be no pecuniary reason, and therefore no reason related to the

---

[4] 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/

[5] 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/

[6] https://twitter.com/bariweiss/status/1601008766861815808?s=20&t=-e4ic59DaLSa3Q0eE9ZPIA; https://nypost.com/2022/12/08/suppression-of-right-wing-users-exposed-in-latest-twitter-files/

[7] https://twitter.com/bariweiss/status/1601008766861815808?s=20&t=-e4ic59DaLSa3Q0eE9ZPIA; https://nypost.com/2022/12/08/suppression-of-right-wing-users-exposed-in-latest-twitter-files/; https://thehill.com/opinion/civil-rights/3770581-elon-musk-shows-shadow-banning-of-conservatives-no-conspiracy-theory/

[8] https://thencrf.org/chasedaway; https://www.yahoo.com/now/chase-bank-apologizes-michael-flynn-233500718.html; https://www.newsweek.com/cancel-culture-comes-banking-opinion-1668200

[9] https://www.realclearinvestigations.com/2022/10/14/claim_chase_debanked_religious_freedom_org_sought_donor_list_859213.html

Company's ordinary business operations, to have taken the aforementioned actions against these conservative-minded groups and individuals. If there were clear issues related to delinquent payments, creditworthiness, or other issues of a pecuniary nature, then that would be one thing, but the body of evidence points to a larger, more pernicious explanation. Indeed, cutting off an organization or individual's ability to hold bank accounts and conduct business is most certainly one of the quickest ways to silence their message, which is something bank officials would know and understand, and something that too-big-to-fail banks backstopped ultimately by U.S. taxpayers – all of them, not just the ones of whose opinions JPMorgan Chase executives approve – have no business getting involved with on partisan grounds. This is but one example of how non-pecuniary considerations create risk that is a matter of significant social policy concern.

In the wake of the Company's and others' ill-explained and likely deeply ill-judged actions, lawmakers on Capitol Hill have vowed to investigate the banking industry's ESG agenda and alleged discriminatory practices toward conservatives. For instance, Representative Andy Barr, the chair of the House financial services subcommittee responsible for financial institutions and monetary policy, has expressed concern that America's financial industry has been "co-opted by the intolerant left that is intolerant of diversity" of thought and expression.[10] And North Dakota Senator Kevin Cramer recently reintroduced the "Fair Access to Banking Act" with more than one-third of the Senate cosponsoring the legislation. According to Senator Cramer's press release regarding the bill, it "is in response to United States banks and financial institutions increasingly using their economic standing to categorically exclude the fossil energy and firearms industries, among others, from accessing services."[11] The aim of the bill is to "protect[] fair access to banking for any legally compliant person who meets the qualifying criteria established by empirical data."

Such public debate and Congressional interest have been cause for the SEC Staff to reverse itself in the past. For instance, in 2009, the SEC Staff reversed its decision to permit omission of a proposal regarding the use of antibiotics in livestock production at Tyson's on ordinary business grounds, due to "widespread public debate" and Congressional interest. In doing so, the Staff said:

> At this time, in view of the widespread public debate concerning antimicrobial resistance and the increasing recognition that the use of antibiotics in raising livestock raises significant policy issues, it is our view that proposals relating to the use of antibiotics in raising livestock cannot be considered matters relating to a meat producer's ordinary business operations. In arriving at this position, we note that since 2006, the European Union has banned the use of most antibiotics as feed additives and that legislation to prohibit the non-therapeutic use of antibiotics in animals absent certain safety findings relating to antimicrobial resistance has recently been introduced in Congress.

[10] https://www.ft.com/content/cd226411-f0db-4027-90cb-f067381817fa
[11] https://www.cramer.senate.gov/news/press-releases/sen-cramer-demand-grows-for-fair-access-to-banking-act

See Tyson's Food, Inc. (avail. Dec. 15, 2009). As previously discussed, and just like the issue presented in *Tyson's Food*, Congress is very concerned over the banking industry's intolerance of viewpoint and political diversity. The fact that the *Tyson's* opinion precedes SLB 14L only furthers our argument, as the issue of whether such censorship or discrimination is company-specific is irrelevant post-14L.

Now those *not* holding conservative viewpoints or ideologies may be quick to dismiss allegations of such discrimination and bias in the banking industry and corporate America writ large for whatever reason, but these claims should not be and cannot be dismissed as somehow less genuine or less believable than claims by individuals claiming to have experienced the same discrimination based on other pernicious grounds of discrimination such as race or sex. It is therefore clear, regardless of what ideological or political persuasion one holds, that the issue of viewpoint discrimination is a significant social policy issue.

2. The Staff reversed key precedent without explanation.

In the No-Action Decision, the Staff reversed key precedent without explanation. Prior to the No-Action Decision, the Staff's recent precedent denied exclusion requests under Rule 14a-8(i)(7) for proposals that relate to the consideration of non-pecuniary factors, which confirmed its status outside of the ordinary business operations of the Company. For example, in *Alphabet Inc.* (avail. Apr. 16, 2021), the proposal requested action to "balance [the] interests of shareholders [and] stakeholders... allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run." *See also Broadridge Financial Solutions, Inc.* (avail. Sept. 22, 2021) (focusing on non-pecuniary "public benefit" company policy); *Tractor Supply Company* (avail. Mar. 9, 2021) (same); *3M Company* (avail. Mar. 9, 2021) (same). But the No-Action Decision reverses course by deciding that our Proposal, which also focuses on non-pecuniary considerations, was excludable.

To the extent that the Staff considered our Proposal alongside the approach it took in its decision in *JPMorgan Chase & Co. (David Bahnsen)* (avail. Mar. 29, 2023) the Staff also reversed that decision. The proposal in *JPMorgan Chase & Co. (David Bahnsen)* expressed concern that "vague and subjective standards" in companies' policies "creat[ed] the potential that such persons or groups will be denied access to essential services as a consequence of their speech or political activity." Similarly, our Proposal is concerned that the use of "non-pecuniary factors" by the Company has led to the Company "debanking customers based on political, religious, or any other opinion or characteristic." Each proposal squarely presented the issue of discriminatory debanking. Indeed, both proposals even use the term "debanking" to describe such conduct. Both proposals express concern for discrimination based on political and religious views. And both proposals are concerned with the risks to society created by this conduct. The Staff provided no reason to support its conclusion that the viewpoint debanking proposal in *JPMorgan Chase & Co. (David Bahnsen)* was a significant social policy that "transcends ordinary business matters," while our Proposal "does not transcend[] ordinary business matters." In our view, there is none.

B. The No-Action Decision raises fundamental questions of constitutional and statutory authority that are of substantial importance, and which raise issues that are novel and highly complex.

The No-Action Decision raises fundamental questions of constitutional and statutory authority that are of substantial importance, and which raise issues that are novel and highly complex. These issues go to whether the Staff has the power to issue the No-Action Decision *at all*. As such, the Staff is plainly unfit to resolve these questions and must submit them to the Commission for review.

1. Constitutional authority.

The Proposal relates to the significant social policy concern of the use of non-pecuniary factors by corporations to engage in viewpoint discrimination, especially against conservative viewpoints. By evaluating whether the Proposal's political viewpoint is a matter of sufficiently significant social policy concern, the Staff itself discriminates based on viewpoint.

It is well-established that the government cannot engage in viewpoint discrimination. *See 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 Staff has engaged in viewpoint discrimination by issuing relief on the Proposal. The Proposal requests that the Company's Board "commission and disclose a report on the risks created by Company business practices that prioritize non-pecuniary factors when it comes to establishing, rejecting, or failing to continue client relationships." As discussed *supra*, the Staff has routinely denied no-action relief to similar requests in *Alphabet Inc.* (Apr. 16, 2021) (requesting action to "balance [the] interests of shareholders [and] stakeholders . . . allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run"), *Broadridge Financial Solutions, Inc*. (Sept. 22, 2021) (focusing on non-pecuniary "public benefit" company policy), *Tractor Supply Company* (Mar. 9, 2021) (same), and *3M Company* (Mar. 9, 2021) (same). If the Staff opts to exclude the Proposal, one might reasonably conclude that it could only do so because of its opinion of the political implications of the Proposal. Here, that would be the Proposal's highlighting of recent and prominent viewpoint discrimination against conservative individuals and organizations on presumptively non-

pecuniary bases. But that is no less valid a perspective in the marketplace of ideas than those expressed in the proposals from the precedents cited above, which asked companies to affirmatively consider non-pecuniary factors. In effect, the Staff has determined a proposal to be significant if it relates to the purported *benefits* of considering non-pecuniary factors in business, but not if it relates to *concerns* 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.

Indeed, the No-Action Decision is part of a broader and concerning trend that supports our claim of viewpoint discrimination. As the Society for Corporate Governance observed in a recent comment submitted to the Commission, in the 2022 proxy season the Staff granted no-action relief in 50 percent of the instances where relief was requested on "anti-ESG," or conservative proponents' proposals like our Proposal, compared with a 38 percent success rate across all proposals. The gap further widened when considering only social/political proposals, where the Staff granted relief at 50 percent rate for excluding proposals from "anti-ESG" proponents, as compared with 31 percent across all social/political proposals considered by the Staff.[12] The way that the Staff has been applying Rule 14a-8(i)(7)'s "significant social policy" exception appears to suggest that the left's political viewpoints are "significant," but conservative viewpoints are *in*significant. If that is what is happening, that is flatly unconstitutional under the First Amendment.

The No-Action Decision—especially in the context of these broader trends—provides 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. That is a matter of substantial importance and requires Commission review.

2. Validity under the Administrative Procedure Act.

The Staff has identified no reasonable basis for distinguishing between the Proposal and other proposals addressing the significant issue of non-pecuniary acts by companies. As a result, the No-Action Decision is 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

[12] https://www.sec.gov/comments/s7-20-22/s72022-20142742-308679.pdf;

(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 non-pecuniary factors, *see supra* Part II.A, issuing relief to the Company would undoubtedly be a change in its position. At a bare minimum, the Staff—or the Commission—would have to explain its reasoning for the reversal in position to comply with the APA.

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

With the No-Action Decision, the Staff have raised complex matters concerning the Commission's compliance with the Administrative Procedure Act. The Commission's compliance with this fundamental aspect of agency process is a matter of substantial importance and should be reviewed.

3. Statutory authority.

By issuing the No-Action Decision, the Staff has acted beyond what Congress has authorized it to do. The Exchange Act does not confer upon the Commission or the Staff the authority to intrude upon substantive matters of corporate governance traditionally governed by state law. The Proposal is a permissible subject for stockholder concern under state law. Therefore the Staff has no basis to provide the Company with no-action relief.

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 uses "broad[ ]" language, "it is not seriously disputed that Congress's central concern [in enacting § 14(a)] was with disclosure." *Bus. Roundtable v. SEC*, 905 F.2d 410 (D.C.

Cir. 1990). In enacting the Exchange Act, Congress expressly rejected a "federal corporation law" that would replace existing state law with a grant of authority to the SEC to regulate corporate governance. *See* Stephen M. Bainbridge, *The Scope of the SEC's Authority over Shareholder Voting Rights*, UCLA Rsch. Paper No. 07-16, tinyurl.com/mw2nf9um. Instead, Congress empowered the SEC to require that public companies disclose relevant information to investors in order to mitigate fraud. As the Senate report for the Exchange Act provides, the purpose of Section 14(a) was to ensure that investors had "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings." S. Rep. No. 792, at 12 (1934).

By contrast, while Section 14(a) gave the Commission authority to compel disclosures of existing information, the substantive regulation of stockholder meetings was left to the "firmly established" state-law jurisdiction over corporate governance. *Bus. Roundtable*, 905 F.2d at 411, 413 (internal citation omitted). Interpreting the "broad[ ]" language of Section 14(a)'s otherwise "vague 'public interest' standard," in *Business Roundtable v. SEC*, the D.C. Circuit held that "the Exchange Act cannot be understood to authorize the regulation of" "the substantive allocation of powers" in matters of "corporate governance traditionally left to the states." *Id*. 407, 413 (internal citation omitted). Applying this limit, the Court held unlawful a Commission rule that prohibited listed companies from having more than one vote per share of common stock. The Court noted that "state law will govern the internal affairs of the corporation" such as the allocation of votes among the common stock. *Id*. at 412. Under state law, shareholders could generally opt to create common-stock voting structures outside of the one-vote, one-share structure. The Commission's rule therefore "directly interfere[d] with the substance of what the shareholders may enact" and "prohibit[ed] certain reallocations of voting power and certain capital structures" that were otherwise valid under state law. *Id*. at 411. The Court concluded that such direct regulation of state law was not authorized by the Exchange Act.

Though the language of Section 14(a) of the Exchange Act is broad, the reach of its authority has a clear limit as against state law. Section 14(a) does not authorize the Commission to impose upon matters of corporate governance traditionally governed by state law. This limit bears directly upon state law concerning shareholder proposals. Rule 14a-8 has exceeded 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. Van Gorkom*, 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 227 (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 displaces this system of state law by subjecting the Proposal to additional requirements to be included in the corporation's proxy statement.[13] 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." 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, *supra*, or which insufficiently "raise[] issues with a broad societal impact," 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 helps 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 also regulates the substance of corporate governance because it regulates the substantive issues that a corporation considers at its stockholder meetings. The matters that may be validly brought before shareholders at a corporation's shareholder meetings 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.

[13] 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 at issue in the No-Action Decision.

First, even though Rule 14a-8 applies primarily to the content of a corporation's proxy statement, its regulation of the proxy statement has the eminently predictable *effect* of regulating the stockholder meeting for which proxies are solicited. Today, substantially all stockholder voting is conducted by proxy. "Because most shareholders do not attend public company shareholder meetings in person, voting occurs almost entirely by the use of proxies that are solicited before the shareholder meeting, thereby resulting in the corporate proxy becoming 'the forum for shareholder suffrage.'" *Concept Release on the Proxy System*, SEC Release No. 34-62495 (July 24, 2010) (quoting *Roosevelt v. E.I duPont de Nemours & Co.*, 958 F.2d 416, 422 (D.C. Cir. 1992)). As a practical matter, if a stockholder proposal is excluded from the corporation's proxy statement, it is functionally unavailable for consideration at a stockholder meeting. Not many stockholders would be aware of the proposal, nor would many be able to vote on it. To be sure, a stockholder proponent could pay for his own proxy forms to be distributed. But that is hardly a remedy given the complex realities of the modern proxy system. With Rule 14a-8, the Commission has clearly put its thumb on the scale, allowing some stockholders to access the corporate proxy statement, but not others, on substantive bases untethered to state law. Rule 14a-8 has created a whole new body of "law" governing the consideration of shareholder proposals that lies outside of the purview of the state corporate law that is supposed to govern the substance of what shareholders can consider at shareholder meetings. 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 form of proxy, 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). The Staff has no authority to issue the No-Action Decision.

That is an issue that goes to the very heart of the Exchange Act and should require Commission review for resolution.

III. The Staff's failure to present the No-Action Decision to the Commission would be arbitrary and capricious, or otherwise unlawful.

The Staff have a duty to present questions of substantial importance and which raise issues that are novel or highly complex to the Commission. The Staff's failure to perform that duty would be arbitrary and capricious, unlawful, and, as applied to our Proposal, call into question the validity of the Commission's regulation governing the Commission's review. If the Commission's regulations permit the Staff to determine that the above constitutional and statutory concerns are not matters of substantial importance and novel or highly complex, then those regulations have serious problems.

The Commission's regulations provide that the Staff "will generally" present a no-action decision to the Commission for the Commission's review that "involve[s] matters of substantial importance and where the issues are novel or highly complex." 17 C.F.R. § 202.1(d). The best interpretation of this language is that, if a no-action decision involves issues of substantial importance and is novel or highly complex, there is a strong presumption that the Staff will present the matter to the Commission. If the Staff determines not to present the matter to the Commission, it must be based on an exception to the "general" requirement of presentation. As applied here, no exception the Staff has previously made is available for our Proposal. As a result, the Staff must present the decision to the Commission. Otherwise, the Staff would have to create a new exception to the requirement of presentation, which would independently raise additional administrative law issues since, as discussed below, the Commission has already established those limited exceptions.

The regulation provides that the Staff "will generally" present such matters to the Commission. Though the term "will" suggests a command, the term "generally" implies the existence of exceptions to that command. Read in this way, the most plausible interpretation of "will generally" in the regulation is that the Staff must present such matters to the Commission unless there is an exception available. This interpretation is supported by two additional facts. First, the regulation supplies the textual inference that "will generally" is not entirely discretionary. The regulation's directive that "[t]he staff . . . will generally present" certain questions contrasts with its proviso, later on in the same sentence, that the Commission's granting of review is "entirely within its discretion." 17 C.F.R. § 202.1(d). If the Staff's decision to present a no-action decision to the Commission were discretionary, the regulation would have provided as much. Second, the Commission has interpreted the regulation to mean that while there is no "requirement" for the Staff to present a matter to the Commission, the Staff "endeavors to forward *all* such requests to the Commission, provided that they are received sufficiently far in advance of the scheduled printing date for the management's definitive proxy materials to avoid a delay in the printing process." 1976 Interpretative Release, 41 Fed. Reg. at 29991. As the Commission describes, the regulation's directive that the Staff 'will generally" present substantially important and novel or

complex matters to the Commission means such matters will be presented unless the Staff provides an exception.

The Commission's interpretation also limits the Staff's available exceptions. Specifically, the only example the Commission's interpretation provides where the Staff would *not* present the matter to the Commission is based on timing. The Commission has stated that the Staff will present such matters to the Commission, "provided that they are received sufficiently far in advance of the scheduled printing date for the management's definitive proxy materials to avoid a delay in the printing process." *Id*. This interpretation suggests the Staff will present such matters to the Commission unless the Commission's review would impose upon the *timing* of the applicable company's proxy meeting. It provides no basis for any other exception.

Here, there is no time-based reason for the Staff not to present the No-Action Decision to the Commission. The Company has not yet published its proxy materials. Nor has the Company provided a scheduled printing date for its proxy materials. By contrast, we provided the Staff and the Company advance notice of our intent to seek the Staff's presentation to the Commission for review. *See* NCPPR Response Letter at 2, 17. The Company has had ample time since receiving this notice to notify us and the Staff if Commission review would conflict with their planned printing schedule. On this accounting of time-related issues, the equities favor the Staff's presentation of the No-Action Decision to the Commission.

Nonetheless, even if the Staff were to determine that submitting the No-Action Decision to the Commission for review risks causing a "delay in the printing process," the Staff should still present it to the Commission to resolve the important matters it raises. "[T]he short duration of the proxy season makes full litigation on the merits of a shareholder proposal before an annual meeting close to impossible." *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 75 F. Supp. 3d 617, 625 (D. Del. 2014). That is why, in the court system, shareholder proposals are subject to the "capable of repetition, yet evading review" exception to mootness. *Id*. Under that exception, a court may evaluate the proposal's validity not only after the company has printed its proxy materials, but even after the company's annual meeting has completed. *Id.* The court may order relief that only affects future meetings, rather than attempting to unwind a printing or meeting that has already occurred. *Id*. at 634–35. Similarly, Commission review need not affect the Company's printing process. The Commission has discretion as to its disposition of the matter. Any ultimate enforcement by the Commission in court against the Company's wrongful exclusion of our Proposal would also be subject to the mootness doctrine, its exceptions, and availability of prospective relief. The Company's 2023 annual meeting is not reason enough for the Staff to fail to present a matter of substantial importance to the Commission when the Commission could require action applicable to its 2024 annual meeting.

The short duration of the proxy season should also affect the Staff's construction of the "printing-delay" exception. Given the short timeframe for review, too liberal a construction of the 1976 Interpretative Release's printing-delay exception would deny *any* Commission review. That would swallow the rule that the Staff "will generally" present certain no-actions decisions to the Commission and prevent the Commission from being presented with the questions of

substantial importance that its regulations require. The ultimate reason why it is important the Commission be presented with such matters is more than a concern for reaching the proper outcome in a particular no-action proceeding. It is for ensuring the Commission's review of the no-action process generally and across all proceedings. The Commission's resolution of a no-action decision helps to provide guidance to other Staff decisions, both in current and future proxy seasons. Here, the same important constitutional, statutory, and regulatory concerns are present in multiple proposals the Staff has already acted on or is currently considering. *See, e.g.*, *American Express (National Center for Public Policy Research)* (avail. Mar. 9, 2023), *JPMorgan Chase (David Bahnsen)* (avail. Mar. 21, 2023), *JPMorgan Chase (National Center for Public Policy Research)* (avail. Mar. 21, 2023). Commission review would be valuable to resolving matters of substantial importance in proposals beyond the No-Action Decision.

However, if the Staff opts for a blinkered view of the 1976 Interpretative Release's printing-delay exception to Commission review, that would also independently be arbitrary and capricious or otherwise unlawful. As discussed above, the Staff cannot interpret 17 C.F.R. § 202.1(d) to deny presentation to the Commission of matters of substantial importance. But that is precisely what the Staff has done in the past. Each time that we have requested Commission review, the Staff has responded by denying our request and stating that the Company had already begun printing its proxy materials – if, that is, it provided any explanation for its decision at all. *See, e.g.*, *BlackRock, Inc. (National Center for Public Policy Research)* (avail. Apr. 4, 2022, *recon. denied* May 2, 2022). The Staff's conduct was especially egregious last year in *BlackRock, Inc.* As we recounted in the NCPPR Response Letter, in last year's *BlackRock, Inc.* proceeding, we told the Staff and the applicable company of our intention to seek reconsideration within approximately 15 minutes of receiving the Staff's no-action decision. Yet even that notice was apparently insufficient. The Staff denied our request after the company testified that it began printing its proxy materials "[i]mmediately upon receiving the No-Action Letter." Letter from Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP, to the Staff (Apr. 13, 2022) at 2. How the Company was able to respond "immediately," without arbitrary *ex parte* communication with the Staff remains unclear to us. But if the printing-delay exception does not permit Commission review under these circumstances, it is difficult to imagine circumstances under which it would. Either the printing-delay exception must allow for greater Commission review than what we have been given, or it arbitrarily denies interested persons the ability to participate in the review process. The Staff should not rely on it here.

If the No-Action decision raises questions of substantial importance and issues that are novel or highly complex, then the Staff must present it to the Commission. And as discussed above, the No-Action Decision undeniably does. Failing to present the No-Action Decision to the Commission would be independently arbitrary and capricious and unlawful under the 1976 Interpretative Release.

Conclusion

Given the guidance offered by SLB 14L and relevant precedent, our Proposal should have been found by the Staff to include a non-omissible issue of significant policy concern that transcends ordinary business matters. We therefore ask the Staff to reconsider the No-Action decision and the Commission to reverse the decision of the Staff and to deny the Company's no-action request.

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

Sarah Rehberg
Free Enterprise Project
National Center for Public Policy Research

cc: Brian V. Breheny, Skadden, Arps, Slate, Meagher & Flom LLP
(brian.breheny@skadden.com)