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

DIVISION OF
CORPORATION FINANCE

April 9, 2024

Michael Kaplan
Davis Polk & Wardwell LLP

Re: Meta Platforms, Inc. (the "Company")
Incoming letter dated January 23, 2024

Dear Michael Kaplan:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by The Pension Fund of The United Church of Canada for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the Company's corporate governance guidelines be amended to add the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(2). We are unable to conclude that the Proposal, if implemented, would cause the company to violate Delaware state law.

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/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Sarah Couturier-Tanoh
Shareholder Association for Research & Education

Davis Polk

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
davispolk.com

January 23, 2024

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

Ladies and Gentlemen:

On behalf of Meta Platforms, Inc., a Delaware corporation (the "**Company**" or "**Meta**"), and in accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), we are filing this letter with respect to the shareholder proposal submitted by Shareholder Association for Research & Education, as representative on behalf of The Pension Fund of The United Church of Canada (the "**Proponent**"), on December 12, 2023 (the "**Proposal**") for inclusion in the proxy materials that the Company intends to distribute in connection with its 2024 Annual Meeting of Shareholders (the "**2024 Proxy Materials**"). The Proposal is attached hereto as Exhibit A.

We hereby request confirmation that the Staff of the Division of Corporation Finance (the "**Staff**") will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from the 2024 Proxy Materials.

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff's online Shareholder Proposal Form. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponent as notice of the Company's intent to omit the Proposal from the 2024 Proxy Materials. This letter constitutes the Company's statement of the reasons it deems the omission of the Proposal to be proper. We have been advised by the Company as to the factual matters set forth herein.

THE PROPOSAL

The Proposal states:

> RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", the following sentence: "Both the Chairperson and

the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

REASON FOR EXCLUSION OF THE PROPOSAL

The Company believes that the Proposal may be properly omitted from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law.

The Proposal May Be Excluded under Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause the Company to Violate Delaware Law.

The Proposal includes a binding resolution to amend the Company's Corporate Governance Guidelines (the "**Guidelines**") if approved by shareholders. Rule 14a-8(i)(2) allows the exclusion of a proposal if implementation of the proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." *See Kimberly-Clark Corp.* (Dec. 18, 2009); *Bank of America Corp.* (Feb. 11, 2009). The Company is incorporated in Delaware. For the reasons set forth in the legal opinion provided by Richards, Layton & Finger, P.A. regarding Delaware law (the "**Delaware Law Opinion**"), the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law. A copy of the Delaware Law Opinion is attached to this letter as Exhibit B.

If the Proposal is approved by shareholders, then either (a) the Guidelines are immediately amended to effectuate the resolution or (b) the Company's board of directors (the "**Board**") must amend the Guidelines to effectuate the resolution. As noted in the Delaware Law Opinion, both outcomes violate Delaware corporate law. The Company's shareholders cannot directly amend the Guidelines because the Guidelines represent either (x) a bilateral contract that the shareholder vote cannot to amend, or (y) Board resolutions that only the Board can rescind or modify. Shareholders also cannot force directors to take action without providing an exception for directors to exercise their fiduciary duties. Under Delaware law, fiduciary duties obligate directors to act in the best interests of the company and its shareholders, but do not subject directors to the wishes of shareholders.

The Staff has consistently permitted the exclusion of a shareholder proposal that would cause a company to violate the state law to which it is subject. For example, in *Citigroup Inc.* (Feb. 18, 2009), the Staff concurred with the exclusion of a proposal where its implementation would cause the company to violate Delaware law by requesting shareholders to adopt a bylaw establishing a board committee. Additionally, in *Alaska Air Group, Inc.* (Mar. 20, 2023), the Staff permitted the exclusion of a proposal that requested that the company board permit written consent by shareholders entitled to cast the minimum number of votes that would be necessary to authorize action at a meeting at which shareholders entitled to vote thereon were present and voting, and enable both street name and non-street name shareholders to participate by written consent, on the basis that adoption of the proposal would violate Delaware law. *See also*, *Quotient Technology Inc.* (May 6, 2022) (permitting the exclusion of a proposal seeking to disqualify all shares owned and/or controlled by both current and former named executive officers from voting to approve a proposed tax benefits preservation plan on the basis that adoption of the proposal would cause the company to violate Delaware law); *eBay Inc.* (Apr. 1, 2020) (permitting the exclusion of a proposal requesting that the company allow employees to elect a specified percentage of the board, which would have required the company to violate Delaware law); *Dominion Resources, Inc.* (Jan. 14, 2015) (permitting the exclusion of a proposal that requested a director be appointed by the board without a shareholder vote in violation of Virginia law).

As indicated in the Delaware Law Opinion, the Proposal, once approved, would violate Delaware corporate law. Therefore, the Company believes that the Proposal is excludable under Rule 14a-8(i)(2).

CONCLUSION

For the reasons set forth above, the Company believes that the Proposal may be excluded from its 2024 Proxy Materials pursuant to Rule 14a-8(i)(2). The Company respectfully requests the Staff's concurrence with its decision to exclude the Proposal from its 2024 Proxy Materials and further requests confirmation that the Staff will not recommend enforcement action to the Commission if it so excludes the Proposal.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this request. Please do not hesitate to call me at (212) 450-4111 if we may be of any further assistance in this matter.

Respectfully yours,

Michael Kaplan

Attachment: Exhibit A; Exhibit B

cc: Sarah Couturier-Tanoh, Associate Director, Corporate Engagement & Advocacy, Shareholder Association for Research & Education
Alan Hall, Executive Officer, The Pension Fund of The United Church of Canada
Katherine R. Kelly, Vice President, Deputy General Counsel and Secretary, Meta Platforms, Inc.

EXHIBIT A

Proposal

RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

Supporting Statement

Meta's CEO Mark Zuckerberg has been Board Chair since 2012. Although a majority of independent shareholders have voted three times on proposals to separate these two roles, the proposals have not achieved an overall majority vote due to Mr. Zuckerberg's dual-class shareholdings which give him approximately 58% of Facebook's voting shares while holding only 14% of the economic interest.

Instead of an independent Board Chair, Meta has appointed a Lead Independent Director (LID) with a range of duties which are meant to assist the board in exercising oversight of management, even with the CEO in place as Chair.

Currently, the LID collaborates with the Chair to set agendas for board meetings. While this allows the board to set a mutually-agreed agenda for most meetings, it also means that, in the event the board wishes to discuss a matter the CEO does not wish to discuss, the CEO may be able to prevent that item from being considered.

Our proposal does not interfere with the current collaborative approach to setting the board's agenda, nor does it prevent the CEO/Chair from putting items on the agenda.

It will, however, allow the board of directors to also consider any matter deemed necessary by the Lead Independent Director and thereby to exercise better independent oversight of management.

EXHIBIT B

Delaware Law Opinion

RICHARDS LAYTON & FINGER
125 YEARS

January 23, 2024

Meta Platforms, Inc.
1 Meta Way
Menlo Park, California 94025

Re: Stockholder Proposal Submitted by Pension Plan of The United Church of Canada

Ladies and Gentlemen:

We have acted as special Delaware counsel to Meta Platforms, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by the Pension Plan of The United Church of Canada (the "Proponent") that the Proponent intends to present at the Company's 2024 annual meeting of stockholders (the "Annual Meeting"). You have requested our opinion as to certain matters under the laws of the State of Delaware relating to the Proposal.

For the purpose of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents:

(i) the Amended & Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware on October 28, 2021 (the "Certificate of Incorporation");

(ii) the Amended and Restated Bylaws of the Company, as amended and restated on October 28, 2021 (the "Bylaws");

(iii) the Company's Corporate Governance Guidelines, as amended as of April 3, 2022 (the "Corporate Governance Guidelines"); and

(iv) the Proposal.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed,

photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above, and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal requests that the Company's stockholders adopt the following resolution:

> RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", [sic] the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

The Proposal further states that "[c]urrently, the [Lead Independent Director] collaborates with the Chair to set agendas for board meetings" and that "in the event the board wishes to discuss a matter the CEO does not wish to discuss, the CEO may be able to prevent that item from being considered." It further posits that the Proposal "will . . . allow the board of directors to also consider any matter deemed necessary by the Lead Independent Director and thereby exercise better independent oversight of management."

Discussion

You have asked for our opinion on whether the Proposal, if adopted and implemented, would violate Delaware law. Our opinion and reasoning are set forth below.

The Proposal is, to some extent, vague as to its intended mode of implementation. Because the Proposal uses the passive phrase "be amended" without specifying a subject, the Proposal has at least two potential meanings: First, the Proposal could mean that, by adopting the Proposal, the stockholders would amend the Corporate Governance Guidelines directly. Second, the Proposal could mean that, by adopting the Proposal, the stockholders would direct the Company's board of directors (the "Board") to make the required amendment to the Corporate Governance Guidelines. For the reasons set forth below, in our opinion, the Proposal, if adopted and implemented, would violate Delaware law under either meaning.

A. The Proposal Would Violate Delaware Law if Adopted and Implemented Because Stockholders Cannot Amend the Corporate Governance Guidelines.

To the extent the Proposal purports to directly amend the Corporate Governance Guidelines, it would violate Delaware law if adopted and implemented because the Company's stockholders lack the power to do so.

Delaware courts consider board-adopted policies like the Corporate Governance Guidelines equivalent to duly adopted board resolutions unless they are done in consideration of actions by a third party, in which case they can become a bilateral contract. For example, in *Unisuper Ltd. v. News Corp.*, the Court of Chancery addressed the legal nature of a board-adopted policy requiring stockholder rights plans to terminate within one year unless the corporation's stockholders approved an extension.[1] Stockholder-plaintiffs alleged that the policy was a binding, bilateral contract between the stockholders, on the one hand, and the board and corporation, on the other, such that the policy created a binding obligation preventing the board from unilaterally extending any rights agreement beyond a year.[2] The Court of Chancery ultimately held that plaintiffs had alleged facts "barely sufficient" to support that theory, but recognized that board policies are typically equivalent to board resolutions and are only enforceable as contracts where the elements of contract formation are present.[3] Otherwise, the court reasoned, "board policies, like board resolutions, are typically revocable by the board at will."[4] The Court of Chancery drew the same basic distinction in *In re General Motors (Hughes) Shareholder Litigation*, where it stated that board-adopted policies that have "the effect of a resolution adopted by the board," unlike those enforceable as contracts, can "be rescinded or amended by nothing more than another board resolution."[5] These authorities indicate that board-adopted policies are legally the same as board resolutions absent additional facts supporting contract formation.

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[1] 2005 WL 3529317, at *4–5 (Del. Ch. Dec. 20, 2005).

[2] *Id.* at *4.

[3] *Id.* at *4–5 (reasoning that "the Board Policy in this case had an effect greater than that of a resolution" only because "the board was contractually bound to keep it in place")

[4] *Id.*

[5] 2005 WL 1089021, at *3 n.34 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006). The opinion in *Unisuper*, authorized by the same judge who decided General Motors, clarified that this statement in General Motors was intended to convey that board policies are akin to board resolutions unless the elements of contract formation are met. *Unisuper*, 2005 WL 3529317, at *5 ("In *General Motors*, this Court stated in a footnote that if a board policy has the effect of a board resolution, it might be revocable by the board at any time. This statement was phrased as a conditional statement because, as the Court noted, the complaint in *General Motors* contained no information with respect to the extent to which the GM board was bound to protect the rights granted to shareholders by the policy statement, *i.e.*, the extent to which the policy had an effect greater than a simple board resolution."); *see also* 2 *Fletcher Cyc. Corp.* § 431 ("Corporate resolutions alone do not constitute a contract. . . . However, to make a written vote binding as

The Company's stockholders cannot amend the Corporate Governance Guidelines unilaterally regardless of whether they are equivalent to board resolutions or a bilateral contract. If the Corporate Governance Guidelines are equivalent to board resolutions, under Delaware law, board resolutions can only be rescinded or modified by the board of directors, not by the stockholders.[6] Thus, the Company's stockholders cannot unilaterally amend or rescind the Corporate Governance Guidelines if they have the legal force of duly adopted board resolutions.

Likewise, if the Corporate Governance Guidelines are a bilateral contract, they cannot be amended unilaterally by the stockholders because that would violate Delaware law governing the requirements for contract amendments. Amending a contract under Delaware law requires mutual assent and consideration absent a contractual provision setting forth different amendment requirements.[7] The Corporate Governance Guidelines contain no such provision that would enable stockholders to amend unilaterally—to the contrary, the Corporate Governance Guidelines provide only that *the Board* may unilaterally amend.[8] Thus, to the extent the Corporate

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a promise, it must be communicated to the other party. In other words, it must be offered to and accepted by them, which is the equivalent of the delivery and acceptance of a written instrument. However, there is no doubt that a resolution may be so specific and in such terms as itself to constitute a contract where accepted and relied on by the other party.").

[6] *See General Motors*, 2005 WL 1089021, at *3 n.34 ("If the Policy Statement had the effect of a resolution adopted by the board, it presumably could be rescinded or amended by *nothing more than another board resolution*." (emphasis added)); *Perlegos v. Atmel Corp.*, 2007 WL 475453, at *26 (Del. Ch. Feb. 8, 2007) ("But the power to take an action also includes the power, consistent with one's fiduciary duties and unless otherwise restricted, to undo it. As observed in *Unisuper Ltd. v. News Corporation*, it is 'an elementary principle of corporate law' that if a board has the power to adopt resolutions or policies, then it has the corresponding power to rescind them." (quoting *Unisuper*, 2005 WL 3529317, at *5)); *cf.* 8 *Del. C.* § 146 (contemplating the board's subsequent rescission or modification of a previously-adopted board resolution by providing that "[a] corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the stockholders reject or vote against the matter"); *id.* § 141(f) (providing that actions by written consent of the board are revocable before they become effective).

[7] *E.g.*, *Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232 (Del. Ch. 2000) ("Any amendment to a contract, whether written or oral, relies on the presence of mutual assent and consideration."); *Bay Point Cap. Partners L.P. v. Fitness Recovery Holdings, LLC*, 2021 WL 5578705, at *4 (Del. Super. Ct. Nov. 30, 2021) ("The parties to a contract may, of course, contract around virtually all common law rules. But in the absence of a written provision to the contrary, the common law rules 'form an implied part of every contract.' Those principles include, pertinently, that . . . an agreement cannot be modified without all the contracting parties' assent and without additional consideration . . . .").

[8] Corporate Governance Guidelines at Art. XXV ("The Compensation, Nominating & Governance Committee will annually review these Corporate Governance Guidelines and propose any changes it deems appropriate to the Board for consideration. The Board may amend these Corporate Governance Guidelines, or grant waivers in exceptional circumstances, provided that any such modification or waiver may not be a violation of any applicable law, rule or regulation, and, provided further, that any

Governance Guidelines are a bilateral contract, amending the Corporate Governance Guidelines in the manner contemplated by the Proposal would violate Delaware law. Accordingly, implementing the Proposal would violate Delaware law regardless of whether the Corporate Governance Guidelines are viewed as a bilateral contract or equivalent to board resolutions.

B. The Proposal Would Violate Delaware Law if Adopted and Implemented Because Stockholders Cannot Force the Board to Take Action Requiring the Discharge of Fiduciary Duties.

To the extent that the Proposal, instead of providing that the stockholders would unilaterally amend the Corporate Governance Guidelines themselves, is a direction to the Board to amend the Corporate Governance Guidelines to implement the Proposal, it also violates Delaware law.

Under Delaware law, stockholders cannot direct or commit the board of directors to take action requiring the discharge of directors' fiduciary duties. This general rule derives from several related legal premises, beginning with the core principle that Delaware corporate law "embraces a director-centric model of corporate governance"[9] in which the board of directors, not the stockholders, manages the corporation's business and affairs.[10] "In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders."[11] But although fiduciary duties obligate directors to act in the stockholders' best interests, directors' fiduciary duties do not require them to follow preferences expressed by the holders of a majority of the shares.[12] Nor can stockholders take action that would "prevent the directors from exercising

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such modification or waiver is appropriately disclosed."); *id.* at 1 ("These Corporate Governance Guidelines are subject to modification from time to time by the Board.").

[9] *Park Employees' & Ret. Bd. Employees' Annuity & Benefit Fund of Chicago v. Smith*, 2016 WL 3223395, at *8 (Del. Ch. May 31, 2016), *aff'd*, 175 A.3d 621 (Del. 2017); *accord Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *4 (Del. Ch. Nov. 7, 2013) (collecting cases).

[10] 8 *Del. C.* § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("Indeed, it is well-established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation."). The Company's Certificate of Incorporation reaffirms the Company's acceptance of this default rule. Certificate of Incorporation Art. VI, § 1 ("The business and affairs of the corporation shall be managed by or under the direction of the Board of Directors.").

[11] *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

[12] *E.g.*, *Paramount Communications, Inc. v. Time Inc.*, 1989 WL 79880, *30 (Del. Ch. July 14, 1989) *aff'd* 571 A.2d 1140 (Del. 1989) ("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. In fact, directors, not shareholders, are charged with the duty to manage the firm."); 2 Fletcher Cyc.

their full managerial power in circumstances where their fiduciary duties would . . . require" directors not to take the requested action.[13] Importantly, Delaware courts have applied this rule to invalidate several different species of mandates or restrictions on board action—including those imposed in both stockholder-adopted changes to governing documents[14] and board-adopted contracts.[15]

The Delaware Supreme Court applied this rule to invalidate a shareholder proposal similar to the Proposal in *CA, Inc. v. AFSCME Employees Pension Plan*.[16] There, the Delaware Supreme Court held that a stockholder proposal to amend a corporation's bylaws to add a provision mandating expense reimbursement for proxy contestants (subject to certain qualifications and conditions) would violate Delaware's common law rule against proscribing directors' free exercise

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Corp. § 2097 ("Of course, shareholders may recommend action to the board of directors, but, absent specific authority, the shareholders cannot direct the board.").

[13] *AFSCME*, 953 A.2d at 239.

[14] *AFSCME*, 953 A.2d at 239 ("Both *QVC* and *Quickturn* involved binding contractual arrangements that the board of directors had voluntarily imposed upon themselves. This case involves a binding bylaw that the shareholders seek to impose involuntarily on the directors in the specific area of election expense reimbursement. Although this case is distinguishable in that respect, the distinction is one without a difference. The reason is that the internal governance contract—which here takes the form of a bylaw—is one that would also prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate. That this limitation would be imposed by a majority vote of the shareholders rather than by the directors themselves, does not, in our view, legally matter.").

[15] *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (Del. 1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) (same); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936 (Del. 2003) (same). The Court of Chancery has discredited the general precept quoted in *QVC* on several occasions. *See, e.g.*, *Optima Int'l of Miami, Inc. v. WCI Steel, Inc.*, C.A. No. 3833-VCL, at 127 (Del. Ch. June 27, 2008) (TRANSCRIPT) ("*Omnicare* is of questionable continued validity."); *WaveDivision Hldgs., LLC v. Millennium Digital Media Sys., L.L.C.*, 2010 WL 3706624, at *17 (Del. Ch. Sept. 17, 2010) ("[D]espite the existence of some admittedly odd authority on the subject, it remains the case that Delaware entities are free to enter into binding contracts without a fiduciary out so long as there was no breach of fiduciary duty involved when entering into the contract in the first place."); *Sample v. Morgan*, 914 A.2d 647, 673 (Del. Ch. 2007) (same); *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *23 (Del. Ch. Apr. 14, 2017) ("Only if the directors breached their fiduciary duties when entering into a contract does it become possible to invalidate it on fiduciary grounds."). However, because the Delaware Supreme Court has yet to disturb it, it remains binding Delaware law. *But see Frederick Hsu Living Tr.*, 2017 WL 1437308, at *23 ("It is true that the fiduciary status of directors does not give them Houdini-like powers to escape from valid contracts. The Delaware Supreme Court definitively settled this question in *Smith v. Van Gorkom*, albeit in a less noticed (and less criticized) aspect of that famous decision.").

[16] 953 A.2d 227 (Del. 2008).

of fiduciary duties.[17] In particular, the court held that the bylaw, if implemented, would violate the rule against constraining directors' free exercise of fiduciary duties because it was hypothetically possible for directors to determine that reimbursing proxy contest expenses would not be in the corporation's best interests in scenarios where the bylaw would require reimbursement.[18] Thus, although the proposed bylaw was procedural and not substantive, its implementation was held invalid under Delaware law because it improperly required directors to take action that could be inconsistent with their fiduciary duties.

The Proposal has the same flaw. Although the Proposal seeks to implement a procedural change—altering who has authority over board meeting agendas—it does so through the improper means of forcing the Board to amend the Company's Corporate Governance Guidelines. Thus, as in *AFSCME*, the Proposal purports to bind the Board to take future action—here, amending the Corporate Governance Guidelines—without an exception were the Board to determine that doing so is not in the best interest of the Company and its stockholders and therefore inconsistent with directors' fiduciary duties. Accordingly, to the extent that the Proposal purports to require the Board to amend the Corporate Governance Guidelines without an exception for the exercise of its fiduciary duties, it would violate Delaware law if adopted and implemented.

C. The Company Does Not have the Power and Authority to Implement the Proposal

The General Corporation Law of the State of Delaware (the "DGCL") and the Certificate of Incorporation together provide that the Company cannot undertake unlawful acts.[19]

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[17] *Id.* at 240.

[18] *Id.* at 239–40 (holding that the bylaw was "invalid" because it "mandate[d] reimbursement of election expenses in circumstances that a proper application of fiduciary principles could preclude").

[19] *See* 8 *Del. C.* § 102(a)(3) (requiring the corporation to set forth in its certificate of incorporation a statement of purpose whose maximum breadth is "to engage in any *lawful* act or activity for which corporations may be organized under the General Corporation Law of Delaware," which permits the corporation to do "all *lawful* acts and activities, except for express limitations" (emphasis added)); *id.* § 121(a) ("In addition to the powers enumerated in § 122 of this title, every corporation, its officers, directors and stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation."); *id.* § 121(b) ("Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter."); Certificate of Incorporation Art. III ("The purpose of the corporation is to engage in any *lawful* act or activity for which corporations may be organized under the [DGCL]." (emphasis added)).

As set forth above, the Proposal, if adopted and implemented, would violate Delaware law. Therefore, the Company lacks the power and authority to implement the Proposal.

Conclusion

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that: (i) the Proposal, if adopted and implemented, would violate Delaware law and (ii) the Company does not have the power and authority to implement the Proposal.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission in connection with the matters addressed herein and that you may refer to it in your proxy statement for the Annual Meeting, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

MJG/BTM

SHARE

February 15, 2024

Via electronic mail to shareholderproposals@sec.gov

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

Re: Shareholder Proposal submitted to Meta Platforms Inc. recommending the Board to change the Lead Independent Director's responsibilities in setting the agenda for Board meetings

Ladies and Gentlemen;

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, the Shareholder Association for Research & Education (SHARE) as representative on behalf of The Pension Fund of The United Church of Canada (the "**Proponent**") submitted a shareholder proposal (the "**Proposal**") (Exhibit A) to Meta Platforms Inc. (the "**Company**" or "**Meta**") on December 12, 2023 for inclusion in the proxy materials ("**2024 Proxy Materials**") to be distributed in connection with the Company's 2024 Annual Meeting of Shareholders.

The Proposal reads:

> *RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."*

In a letter dated on January 23, 2024 submitted to the Division by the firm Davis Polk & Wardwell LLP representing Meta (Exhibit B), the Company states that "the Proposal may be properly omitted from the 2024 proxy materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law." Specifically, the Company argues that it is entitled to omit the Proposal on the ground that the

Proposal "includes a binding resolution to amend the Company's Corporate Governance Guidelines (the "**Guidelines**") if approved by shareholders".

In support of its arguments, the Company has included in its letter a Delaware Law Opinion (the "**Opinion**") (Exhibit C) from the firm Richard Layton Finge acting as a special Delaware counsel (the "**Special Counsel**") to the Company dated January 23, 2024. In its Opinion, the Special Counsel argues that "the Proposal is, to some extent, vague as to its intended mode of implementation." It further argues that by using the passive phrase "be amended" without specifying a subject, the Proposal would either mean that "by adopting the Proposal, the stockholders would amend the Corporate Governance Guidelines directly" or "by adopting the Proposal, the stockholders would direct the Company's board of directors to make the requirement amendment to the Corporate Governance Guidelines".

Both assumptions are incorrect as the Proposal was always intended to be precatory, not binding. In order to address Meta's argument that the adoption of the Proposal would bind the stockholders or the Board into adopting the proposed amendments, thus potentially causing Meta to violate the Delaware Law as suggested by the Company and its special counsel, the Proponent is willing to make a minor amendment to the Proposal in a way that would remove all doubt regarding the intended mode of implementation.

Staff Legal Bulletin 14 states that the Division Staff has "a long-standing practice of issuing no-action responses that permit shareholders to make revisions that are minor in nature and do not alter the substance of the proposal. [The Staff] adopted this practice to deal with proposals that generally comply with the substantive requirements of the rule, but contain some relatively minor defects that are easily corrected." When the basis of the no-action request relies on Rule 14a-8(i)(2), the Staff Legal Bulletin 14 says that "if implementing the proposal would require the company to breach existing contractual obligations, we may permit the shareholder to revise the proposal so that it applies only to the company's future contractual obligations." For example, in *SBC Communications Inc.* (Jan. 11, 2004), the Staff "concurred in the company's view that the proposal could be excluded under rules 14a-8(i)(2) and 14a-8(i)(6), unless the proponent revised the proposal as a recommendation or request that the board of directors take the steps necessary to implement the proposal." Similar responses were submitted by the Staff in *Gyrodyne Co. of America, Inc.* (Aug. 18, 1999) and *Sears, Roebuck and Co.* (Feb. 17, 1989).

Therefore, the Proponent requests the Staff's permission to modify the text by replacing "Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add […]" by "The Shareholders recommend that Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add […]".

Accounting for the proposed amendment mentioned above, the resolved clause of the Proposal would read:

> *RESOLVED THAT The Shareholders recommend that Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the*

Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

The Proponents believes that the amendment proposed above is minor in nature, does not alter the substance of the proposal and clarifies that the Proposal is precatory not binding thus addressing all concerns raised by the Company.

CONCLUSION

For the reasons set forth above, the Proponent believes that the Proposal may not be excluded from the Company's 2024 Proxy Materials pursuant to Rule 14a-8(i)(2) and respectfully requests that the Staff permits the Proponent to revise the Proposal as proposed above.

Should you have any questions or comments regarding this request, I can be contacted at scouturier-tanoh@share.ca or at +1 581 397 5721.

Sincerely,

Sarah Couturier-Tanoh

Attachment: Exhibit A, Exhibit B, Exhibit C

cc: Michael Kaplan, Davis Polk & Wardwell LLP
Ida Araya-Brumskine, Davis Polk & Wardwell LLP
Katherine R. Kelly, Vice President, Deputy General Counsel and Secretary, Meta Platforms, Inc.

EXHIBIT A

Shareholder Proposal Submitted by SHARE on behalf of The Pension of the United Church of Canada

RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

Supporting Statement

Meta's CEO Mark Zuckerberg has been Board Chair since 2012. Although a majority of independent shareholders have voted three times on proposals to separate these two roles, the proposals have not achieved an overall majority vote due to Mr. Zuckerberg's dual-class shareholdings which give him approximately 58% of Facebook's voting shares while holding only 14% of the economic interest.

Instead of an independent Board Chair, Meta has appointed a Lead Independent Director (LID) with a range of duties which are meant to assist the board in exercising oversight of management, even with the CEO in place as Chair.

Currently, the LID collaborates with the Chair to set agendas for board meetings. While this allows the board to set a mutually-agreed agenda for most meetings, it also means that, in the event the board wishes to discuss a matter the CEO does not wish to discuss, the CEO may be able to prevent that item from being considered.

Our proposal does not interfere with the current collaborative approach to setting the board's agenda, nor does it prevent the CEO/Chair from putting items on the agenda.

It will, however, allow the board of directors to also consider any matter deemed necessary by the Lead Independent Director and thereby to exercise better independent oversight of management.

EXHIBIT B

No-action Letter Submitted by the Firm Davis Polk & Wardwell on behalf of Meta Platforms, Inc.

Davis Polk

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
davispolk.com

January 23, 2024

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

Ladies and Gentlemen:

On behalf of Meta Platforms, Inc., a Delaware corporation (the "**Company**" or "**Meta**"), and in accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), we are filing this letter with respect to the shareholder proposal submitted by Shareholder Association for Research & Education, as representative on behalf of The Pension Fund of The United Church of Canada (the "**Proponent**"), on December 12, 2023 (the "**Proposal**") for inclusion in the proxy materials that the Company intends to distribute in connection with its 2024 Annual Meeting of Shareholders (the "**2024 Proxy Materials**"). The Proposal is attached hereto as Exhibit A.

We hereby request confirmation that the Staff of the Division of Corporation Finance (the "**Staff**") will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from the 2024 Proxy Materials.

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff's online Shareholder Proposal Form. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponent as notice of the Company's intent to omit the Proposal from the 2024 Proxy Materials. This letter constitutes the Company's statement of the reasons it deems the omission of the Proposal to be proper. We have been advised by the Company as to the factual matters set forth herein.

THE PROPOSAL

The Proposal states:

> RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", the following sentence: "Both the Chairperson and

the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

REASON FOR EXCLUSION OF THE PROPOSAL

The Company believes that the Proposal may be properly omitted from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law.

The Proposal May Be Excluded under Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause the Company to Violate Delaware Law.

The Proposal includes a binding resolution to amend the Company's Corporate Governance Guidelines (the "**Guidelines**") if approved by shareholders. Rule 14a-8(i)(2) allows the exclusion of a proposal if implementation of the proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." *See Kimberly-Clark Corp.* (Dec. 18, 2009); *Bank of America Corp.* (Feb. 11, 2009). The Company is incorporated in Delaware. For the reasons set forth in the legal opinion provided by Richards, Layton & Finger, P.A. regarding Delaware law (the "**Delaware Law Opinion**"), the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law. A copy of the Delaware Law Opinion is attached to this letter as Exhibit B.

If the Proposal is approved by shareholders, then either (a) the Guidelines are immediately amended to effectuate the resolution or (b) the Company's board of directors (the "**Board**") must amend the Guidelines to effectuate the resolution. As noted in the Delaware Law Opinion, both outcomes violate Delaware corporate law. The Company's shareholders cannot directly amend the Guidelines because the Guidelines represent either (x) a bilateral contract that the shareholder vote cannot to amend, or (y) Board resolutions that only the Board can rescind or modify. Shareholders also cannot force directors to take action without providing an exception for directors to exercise their fiduciary duties. Under Delaware law, fiduciary duties obligate directors to act in the best interests of the company and its shareholders, but do not subject directors to the wishes of shareholders.

The Staff has consistently permitted the exclusion of a shareholder proposal that would cause a company to violate the state law to which it is subject. For example, in *Citigroup Inc.* (Feb. 18, 2009), the Staff concurred with the exclusion of a proposal where its implementation would cause the company to violate Delaware law by requesting shareholders to adopt a bylaw establishing a board committee. Additionally, in *Alaska Air Group, Inc.* (Mar. 20, 2023), the Staff permitted the exclusion of a proposal that requested that the company board permit written consent by shareholders entitled to cast the minimum number of votes that would be necessary to authorize action at a meeting at which shareholders entitled to vote thereon were present and voting, and enable both street name and non-street name shareholders to participate by written consent, on the basis that adoption of the proposal would violate Delaware law. *See also*, *Quotient Technology Inc.* (May 6, 2022) (permitting the exclusion of a proposal seeking to disqualify all shares owned and/or controlled by both current and former named executive officers from voting to approve a proposed tax benefits preservation plan on the basis that adoption of the proposal would cause the company to violate Delaware law); *eBay Inc.* (Apr. 1, 2020) (permitting the exclusion of a proposal requesting that the company allow employees to elect a specified percentage of the board, which would have required the company to violate Delaware law); *Dominion Resources, Inc.* (Jan. 14, 2015) (permitting the exclusion of a proposal that requested a director be appointed by the board without a shareholder vote in violation of Virginia law).

As indicated in the Delaware Law Opinion, the Proposal, once approved, would violate Delaware corporate law. Therefore, the Company believes that the Proposal is excludable under Rule 14a-8(i)(2).

CONCLUSION

For the reasons set forth above, the Company believes that the Proposal may be excluded from its 2024 Proxy Materials pursuant to Rule 14a-8(i)(2). The Company respectfully requests the Staff's concurrence with its decision to exclude the Proposal from its 2024 Proxy Materials and further requests confirmation that the Staff will not recommend enforcement action to the Commission if it so excludes the Proposal.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this request. Please do not hesitate to call me at (212) 450-4111 if we may be of any further assistance in this matter.

Respectfully yours,

Michael Kaplan

Attachment: Exhibit A; Exhibit B

cc: Sarah Couturier-Tanoh, Associate Director, Corporate Engagement & Advocacy, Shareholder Association for Research & Education
Alan Hall, Executive Officer, The Pension Fund of The United Church of Canada
Katherine R. Kelly, Vice President, Deputy General Counsel and Secretary, Meta Platforms, Inc.

EXHIBIT C

Delaware Opinion

RICHARDS LAYTON & FINGER
125 YEARS

January 23, 2024

Meta Platforms, Inc.
1 Meta Way
Menlo Park, California 94025

Re: Stockholder Proposal Submitted by Pension Plan of The United Church of Canada

Ladies and Gentlemen:

We have acted as special Delaware counsel to Meta Platforms, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by the Pension Plan of The United Church of Canada (the "Proponent") that the Proponent intends to present at the Company's 2024 annual meeting of stockholders (the "Annual Meeting"). You have requested our opinion as to certain matters under the laws of the State of Delaware relating to the Proposal.

For the purpose of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents:

(i) the Amended & Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware on October 28, 2021 (the "Certificate of Incorporation");

(ii) the Amended and Restated Bylaws of the Company, as amended and restated on October 28, 2021 (the "Bylaws");

(iii) the Company's Corporate Governance Guidelines, as amended as of April 3, 2022 (the "Corporate Governance Guidelines"); and

(iv) the Proposal.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed,

photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above, and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal requests that the Company's stockholders adopt the following resolution:

> RESOLVED THAT Section V of Meta Platforms, Inc. ("Meta") Corporate Governance Guidelines (Amended as of April 3, 2022) be amended to add, after the sentence "The Chairperson shall schedule and chair the meetings of the Board, and shall coordinate with the Lead Independent Director to set the agenda for such meetings", [sic] the following sentence: "Both the Chairperson and the Lead Independent Director shall have the ability to include items on the agenda independent of the other."

The Proposal further states that "[c]urrently, the [Lead Independent Director] collaborates with the Chair to set agendas for board meetings" and that "in the event the board wishes to discuss a matter the CEO does not wish to discuss, the CEO may be able to prevent that item from being considered." It further posits that the Proposal "will . . . allow the board of directors to also consider any matter deemed necessary by the Lead Independent Director and thereby exercise better independent oversight of management."

Discussion

You have asked for our opinion on whether the Proposal, if adopted and implemented, would violate Delaware law. Our opinion and reasoning are set forth below.

The Proposal is, to some extent, vague as to its intended mode of implementation. Because the Proposal uses the passive phrase "be amended" without specifying a subject, the Proposal has at least two potential meanings: First, the Proposal could mean that, by adopting the Proposal, the stockholders would amend the Corporate Governance Guidelines directly. Second, the Proposal could mean that, by adopting the Proposal, the stockholders would direct the Company's board of directors (the "Board") to make the required amendment to the Corporate Governance Guidelines. For the reasons set forth below, in our opinion, the Proposal, if adopted and implemented, would violate Delaware law under either meaning.

A. The Proposal Would Violate Delaware Law if Adopted and Implemented Because Stockholders Cannot Amend the Corporate Governance Guidelines.

To the extent the Proposal purports to directly amend the Corporate Governance Guidelines, it would violate Delaware law if adopted and implemented because the Company's stockholders lack the power to do so.

Delaware courts consider board-adopted policies like the Corporate Governance Guidelines equivalent to duly adopted board resolutions unless they are done in consideration of actions by a third party, in which case they can become a bilateral contract. For example, in *Unisuper Ltd. v. News Corp.*, the Court of Chancery addressed the legal nature of a board-adopted policy requiring stockholder rights plans to terminate within one year unless the corporation's stockholders approved an extension.[1] Stockholder-plaintiffs alleged that the policy was a binding, bilateral contract between the stockholders, on the one hand, and the board and corporation, on the other, such that the policy created a binding obligation preventing the board from unilaterally extending any rights agreement beyond a year.[2] The Court of Chancery ultimately held that plaintiffs had alleged facts "barely sufficient" to support that theory, but recognized that board policies are typically equivalent to board resolutions and are only enforceable as contracts where the elements of contract formation are present.[3] Otherwise, the court reasoned, "board policies, like board resolutions, are typically revocable by the board at will."[4] The Court of Chancery drew the same basic distinction in *In re General Motors (Hughes) Shareholder Litigation*, where it stated that board-adopted policies that have "the effect of a resolution adopted by the board," unlike those enforceable as contracts, can "be rescinded or amended by nothing more than another board resolution."[5] These authorities indicate that board-adopted policies are legally the same as board resolutions absent additional facts supporting contract formation.

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[1] 2005 WL 3529317, at *4–5 (Del. Ch. Dec. 20, 2005).

[2] *Id.* at *4.

[3] *Id.* at *4–5 (reasoning that "the Board Policy in this case had an effect greater than that of a resolution" only because "the board was contractually bound to keep it in place")

[4] *Id.*

[5] 2005 WL 1089021, at *3 n.34 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006). The opinion in *Unisuper*, authorized by the same judge who decided General Motors, clarified that this statement in General Motors was intended to convey that board policies are akin to board resolutions unless the elements of contract formation are met. *Unisuper*, 2005 WL 3529317, at *5 ("In *General Motors*, this Court stated in a footnote that if a board policy has the effect of a board resolution, it might be revocable by the board at any time. This statement was phrased as a conditional statement because, as the Court noted, the complaint in *General Motors* contained no information with respect to the extent to which the GM board was bound to protect the rights granted to shareholders by the policy statement, *i.e.*, the extent to which the policy had an effect greater than a simple board resolution."); *see also* 2 *Fletcher Cyc. Corp.* § 431 ("Corporate resolutions alone do not constitute a contract. . . . However, to make a written vote binding as

The Company's stockholders cannot amend the Corporate Governance Guidelines unilaterally regardless of whether they are equivalent to board resolutions or a bilateral contract. If the Corporate Governance Guidelines are equivalent to board resolutions, under Delaware law, board resolutions can only be rescinded or modified by the board of directors, not by the stockholders.[6] Thus, the Company's stockholders cannot unilaterally amend or rescind the Corporate Governance Guidelines if they have the legal force of duly adopted board resolutions.

Likewise, if the Corporate Governance Guidelines are a bilateral contract, they cannot be amended unilaterally by the stockholders because that would violate Delaware law governing the requirements for contract amendments. Amending a contract under Delaware law requires mutual assent and consideration absent a contractual provision setting forth different amendment requirements.[7] The Corporate Governance Guidelines contain no such provision that would enable stockholders to amend unilaterally—to the contrary, the Corporate Governance Guidelines provide only that *the Board* may unilaterally amend.[8] Thus, to the extent the Corporate

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a promise, it must be communicated to the other party. In other words, it must be offered to and accepted by them, which is the equivalent of the delivery and acceptance of a written instrument. However, there is no doubt that a resolution may be so specific and in such terms as itself to constitute a contract where accepted and relied on by the other party.").

[6] *See General Motors*, 2005 WL 1089021, at *3 n.34 ("If the Policy Statement had the effect of a resolution adopted by the board, it presumably could be rescinded or amended by *nothing more than another board resolution*." (emphasis added)); *Perlegos v. Atmel Corp.*, 2007 WL 475453, at *26 (Del. Ch. Feb. 8, 2007) ("But the power to take an action also includes the power, consistent with one's fiduciary duties and unless otherwise restricted, to undo it. As observed in *Unisuper Ltd. v. News Corporation*, it is 'an elementary principle of corporate law' that if a board has the power to adopt resolutions or policies, then it has the corresponding power to rescind them." (quoting *Unisuper*, 2005 WL 3529317, at *5)); *cf.* 8 *Del. C.* § 146 (contemplating the board's subsequent rescission or modification of a previously-adopted board resolution by providing that "[a] corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the stockholders reject or vote against the matter"); *id.* § 141(f) (providing that actions by written consent of the board are revocable before they become effective).

[7] *E.g.*, *Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232 (Del. Ch. 2000) ("Any amendment to a contract, whether written or oral, relies on the presence of mutual assent and consideration."); *Bay Point Cap. Partners L.P. v. Fitness Recovery Holdings, LLC*, 2021 WL 5578705, at *4 (Del. Super. Ct. Nov. 30, 2021) ("The parties to a contract may, of course, contract around virtually all common law rules. But in the absence of a written provision to the contrary, the common law rules 'form an implied part of every contract.' Those principles include, pertinently, that . . . an agreement cannot be modified without all the contracting parties' assent and without additional consideration . . . .").

[8] Corporate Governance Guidelines at Art. XXV ("The Compensation, Nominating & Governance Committee will annually review these Corporate Governance Guidelines and propose any changes it deems appropriate to the Board for consideration. The Board may amend these Corporate Governance Guidelines, or grant waivers in exceptional circumstances, provided that any such modification or waiver may not be a violation of any applicable law, rule or regulation, and, provided further, that any

Governance Guidelines are a bilateral contract, amending the Corporate Governance Guidelines in the manner contemplated by the Proposal would violate Delaware law. Accordingly, implementing the Proposal would violate Delaware law regardless of whether the Corporate Governance Guidelines are viewed as a bilateral contract or equivalent to board resolutions.

B. The Proposal Would Violate Delaware Law if Adopted and Implemented Because Stockholders Cannot Force the Board to Take Action Requiring the Discharge of Fiduciary Duties.

To the extent that the Proposal, instead of providing that the stockholders would unilaterally amend the Corporate Governance Guidelines themselves, is a direction to the Board to amend the Corporate Governance Guidelines to implement the Proposal, it also violates Delaware law.

Under Delaware law, stockholders cannot direct or commit the board of directors to take action requiring the discharge of directors' fiduciary duties. This general rule derives from several related legal premises, beginning with the core principle that Delaware corporate law "embraces a director-centric model of corporate governance"[9] in which the board of directors, not the stockholders, manages the corporation's business and affairs.[10] "In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders."[11] But although fiduciary duties obligate directors to act in the stockholders' best interests, directors' fiduciary duties do not require them to follow preferences expressed by the holders of a majority of the shares.[12] Nor can stockholders take action that would "prevent the directors from exercising

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such modification or waiver is appropriately disclosed."); *id.* at 1 ("These Corporate Governance Guidelines are subject to modification from time to time by the Board.").

[9] *Park Employees' & Ret. Bd. Employees' Annuity & Benefit Fund of Chicago v. Smith*, 2016 WL 3223395, at *8 (Del. Ch. May 31, 2016), *aff'd*, 175 A.3d 621 (Del. 2017); *accord Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *4 (Del. Ch. Nov. 7, 2013) (collecting cases).

[10] 8 *Del. C.* § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("Indeed, it is well-established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation."). The Company's Certificate of Incorporation reaffirms the Company's acceptance of this default rule. Certificate of Incorporation Art. VI, § 1 ("The business and affairs of the corporation shall be managed by or under the direction of the Board of Directors.").

[11] *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

[12] *E.g.*, *Paramount Communications, Inc. v. Time Inc.*, 1989 WL 79880, *30 (Del. Ch. July 14, 1989) *aff'd* 571 A.2d 1140 (Del. 1989) ("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. In fact, directors, not shareholders, are charged with the duty to manage the firm."); 2 Fletcher Cyc.

their full managerial power in circumstances where their fiduciary duties would . . . require" directors not to take the requested action.[13] Importantly, Delaware courts have applied this rule to invalidate several different species of mandates or restrictions on board action—including those imposed in both stockholder-adopted changes to governing documents[14] and board-adopted contracts.[15]

The Delaware Supreme Court applied this rule to invalidate a shareholder proposal similar to the Proposal in *CA, Inc. v. AFSCME Employees Pension Plan*.[16] There, the Delaware Supreme Court held that a stockholder proposal to amend a corporation's bylaws to add a provision mandating expense reimbursement for proxy contestants (subject to certain qualifications and conditions) would violate Delaware's common law rule against proscribing directors' free exercise

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Corp. § 2097 ("Of course, shareholders may recommend action to the board of directors, but, absent specific authority, the shareholders cannot direct the board.").

[13] *AFSCME*, 953 A.2d at 239.

[14] *AFSCME*, 953 A.2d at 239 ("Both *QVC* and *Quickturn* involved binding contractual arrangements that the board of directors had voluntarily imposed upon themselves. This case involves a binding bylaw that the shareholders seek to impose involuntarily on the directors in the specific area of election expense reimbursement. Although this case is distinguishable in that respect, the distinction is one without a difference. The reason is that the internal governance contract—which here takes the form of a bylaw—is one that would also prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate. That this limitation would be imposed by a majority vote of the shareholders rather than by the directors themselves, does not, in our view, legally matter.").

[15] *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (Del. 1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) (same); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936 (Del. 2003) (same). The Court of Chancery has discredited the general precept quoted in *QVC* on several occasions. *See, e.g.*, *Optima Int'l of Miami, Inc. v. WCI Steel, Inc.*, C.A. No. 3833-VCL, at 127 (Del. Ch. June 27, 2008) (TRANSCRIPT) ("*Omnicare* is of questionable continued validity."); *WaveDivision Hldgs., LLC v. Millennium Digital Media Sys., L.L.C.*, 2010 WL 3706624, at *17 (Del. Ch. Sept. 17, 2010) ("[D]espite the existence of some admittedly odd authority on the subject, it remains the case that Delaware entities are free to enter into binding contracts without a fiduciary out so long as there was no breach of fiduciary duty involved when entering into the contract in the first place."); *Sample v. Morgan*, 914 A.2d 647, 673 (Del. Ch. 2007) (same); *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *23 (Del. Ch. Apr. 14, 2017) ("Only if the directors breached their fiduciary duties when entering into a contract does it become possible to invalidate it on fiduciary grounds."). However, because the Delaware Supreme Court has yet to disturb it, it remains binding Delaware law. *But see Frederick Hsu Living Tr.*, 2017 WL 1437308, at *23 ("It is true that the fiduciary status of directors does not give them Houdini-like powers to escape from valid contracts. The Delaware Supreme Court definitively settled this question in *Smith v. Van Gorkom*, albeit in a less noticed (and less criticized) aspect of that famous decision.").

[16] 953 A.2d 227 (Del. 2008).

of fiduciary duties.[17] In particular, the court held that the bylaw, if implemented, would violate the rule against constraining directors' free exercise of fiduciary duties because it was hypothetically possible for directors to determine that reimbursing proxy contest expenses would not be in the corporation's best interests in scenarios where the bylaw would require reimbursement.[18] Thus, although the proposed bylaw was procedural and not substantive, its implementation was held invalid under Delaware law because it improperly required directors to take action that could be inconsistent with their fiduciary duties.

The Proposal has the same flaw. Although the Proposal seeks to implement a procedural change—altering who has authority over board meeting agendas—it does so through the improper means of forcing the Board to amend the Company's Corporate Governance Guidelines. Thus, as in *AFSCME*, the Proposal purports to bind the Board to take future action—here, amending the Corporate Governance Guidelines—without an exception were the Board to determine that doing so is not in the best interest of the Company and its stockholders and therefore inconsistent with directors' fiduciary duties. Accordingly, to the extent that the Proposal purports to require the Board to amend the Corporate Governance Guidelines without an exception for the exercise of its fiduciary duties, it would violate Delaware law if adopted and implemented.

C. The Company Does Not have the Power and Authority to Implement the Proposal

The General Corporation Law of the State of Delaware (the "DGCL") and the Certificate of Incorporation together provide that the Company cannot undertake unlawful acts.[19]

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[17] *Id.* at 240.

[18] *Id.* at 239–40 (holding that the bylaw was "invalid" because it "mandate[d] reimbursement of election expenses in circumstances that a proper application of fiduciary principles could preclude").

[19] *See* 8 *Del. C.* § 102(a)(3) (requiring the corporation to set forth in its certificate of incorporation a statement of purpose whose maximum breadth is "to engage in any *lawful* act or activity for which corporations may be organized under the General Corporation Law of Delaware," which permits the corporation to do "all *lawful* acts and activities, except for express limitations" (emphasis added)); *id.* § 121(a) ("In addition to the powers enumerated in § 122 of this title, every corporation, its officers, directors and stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation."); *id.* § 121(b) ("Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter."); Certificate of Incorporation Art. III ("The purpose of the corporation is to engage in any *lawful* act or activity for which corporations may be organized under the [DGCL]." (emphasis added)).

As set forth above, the Proposal, if adopted and implemented, would violate Delaware law. Therefore, the Company lacks the power and authority to implement the Proposal.

Conclusion

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that: (i) the Proposal, if adopted and implemented, would violate Delaware law and (ii) the Company does not have the power and authority to implement the Proposal.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission in connection with the matters addressed herein and that you may refer to it in your proxy statement for the Annual Meeting, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

MJG/BTM