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December 20, 2024

International Business Machines Corporation
Shareholder Proposal of The Heritage Foundation
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

I am writing on behalf of our client, International Business Machines Corporation, a New York corporation (“IBM” or the “Company”), in accordance with Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended, to respectfully request that the Staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) concur with our view that IBM may exclude a shareholder proposal and supporting statement (the “Proposal”) submitted by Bowyer Research, Inc. (the “Representative”) on behalf of The Heritage Foundation (the “Proponent”) from the proxy materials to be distributed by IBM in connection with its 2025 annual meeting of shareholders (the “2025 Proxy Materials”). A copy of the Proposal is included in Exhibit A. IBM has advised us as to the factual matters set forth below.

In accordance with the Staff announcement published on November 7, 2023, we are submitting this letter electronically to the Staff via the online shareholder proposal form. Pursuant to Rule 14a-8(j), we are:

- submitting this letter no later than 80 calendar days before the Company intends to file its definitive 2025 Proxy Materials with the Commission; and
- concurrently sending copies of this submission to the Representative and the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the Staff. Accordingly, the Company is taking this opportunity to inform the Representative and the Proponent that if the Representative, on behalf of the Proponent, or the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company and to Jorge E. Mancillas, Senior Attorney of the Company.

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BACKGROUND

The Representative, on behalf of the Proponent, submitted the Proposal and supporting statement to the Company in a letter via email on November 11, 2024. See Exhibit A. The Company met with the Representative on December 17, 2024 to discuss the Proposal.

The Proposal states:

Resolved: Shareholders request the Board of Directors of IBM conduct an evaluation and issue a report within the next year, at reasonable cost and excluding confidential information, assessing how the Company's DEI requirements for hiring/recruitment impact IBM's risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views.

The supporting statement further states in relevant part:

IBM executives are expected to meet certain recruitment quotas of 'underrepresented' minorities, including various racial minority groups and women. As per Krishna's remarks, IBM execs who fail to reach such quotas risk slashed bonuses, demotion, or termination of employment. These policies directly require IBM executives to make recruitment/promotion decisions based on race.

The text of the Proposal is attached as Exhibit A.

BASES FOR EXCLUSION

On behalf of the Company, we hereby respectfully request that the Staff concur in the Company's view that it may exclude the Proposal from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(3) because the Proposal and supporting statement contain materially false and misleading statements in violation of Rule 14a-9 for the reasons set forth below.

First, Rule 14a-8(i)(3) permits the exclusion of a shareholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules or regulations, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff recognized in Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B") that the exclusion of a proposal or supporting statement may be appropriate where the company demonstrates that a factual statement in the proposal or supporting statement is materially false or misleading. The Staff has concurred in the exclusion of proposals, supporting statements and portions thereof on the basis that such proposals or supporting statements included materially false or misleading statements.¹

¹ See, e.g., NETGEAR, Inc. (Apr. 9, 2021) (concurring in the exclusion of a proposal requesting that the company take steps to lower the ownership threshold required to call a special meeting where the supporting statement falsely claimed that shareholders did not already have the power to call a special meeting); JetBlue Airways Corporation (Mar. 12, 2021) (concurring in the exclusion of a proposal requesting that the company take steps to permit shareholders with 10% ownership to call a special meeting where the supporting statement misleadingly omitted the fact that shareholders with 20% ownership were already entitled to call a special meeting); The Boeing Company (Feb. 23, 2021) (concurring in the exclusion of a proposal requesting that the company require 60% of directors to have "aerospace/aviation/engineering executive background" where the supporting statement misrepresented the number of directors that already had such experience); Ferro Corporation (Mar. 17, 2015) (concurring in the exclusion of a proposal requesting that the company take steps to change the company's jurisdiction of incorporation

Second, the Staff has advised that shareholder proposals may be excludable as materially false or misleading pursuant to Rules 14a-9 and 14a-8(i)(3) where the proposal is “so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.” SLB 14B. The Staff has also advised that a proposal may be excludable as materially false or misleading where the “meaning and application of terms and conditions . . . in the proposal . . . would be subject to differing interpretations” and therefore “any action ultimately taken by the [c]ompany upon implementation could be significantly different from the actions envisioned by shareholders voting on the proposal”, Fuqua Industries, Inc. (Mar. 12, 1991), and, under this theory, the Staff has concurred in the exclusion of proposals under Rules 14a-9 and 14a-8(i)(3) where the proposal fails to define terms that are central to the proposal.²

I. The Proposal may be excluded from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(3) because the supporting statement’s references to “recruitment quotas” and “policies [that] directly require IBM executives to make recruitment/promotion decisions based on race” materially misstate the Company’s policies in violation of Rule 14a-9.

The Proponent’s statement in support of the Proposal states as fact that “IBM executives are expected to meet certain recruitment quotas of ‘underrepresented’ minorities” and that “IBM execs who fail to reach such quotas risk slashed bonuses, demotion, or termination of employment”, concluding that “[t]hese policies directly require IBM executives to make recruitment/promotion decisions based on race.” Exhibit A.

to Delaware based on misstatements of Ohio law, which improperly suggested that the shareholders would have increased rights if the Delaware law governed the company instead of Ohio law); Entergy Corporation (Feb. 14, 2007) (permitting exclusion of a proposal regarding a requested shareholder vote on the compensation committee report where the supporting statement made objectively false statements regarding executive compensation, director committee membership, and director stock ownership); State Street Corporation (Mar. 1, 2005) (concurring in the exclusion of a proposal requesting that the board of directors be exempt from a section of state law that had been recodified and was thus no longer applicable); General Magic, Inc. (May 1, 2000) (concurring in the exclusion of a proposal requesting that the company make “no more false statements” to its shareholders because the proposal created the false impression that the company tolerated dishonest behavior by its employees when in fact the company’s corporate policies had specific guidelines addressing dishonest behavior).

² See, e.g., The Walt Disney Company (Jan. 19, 2022) (concurring in the exclusion of a proposal that requested a prohibition on communications of “politically charged biases regardless of content or purpose” including “‘Woke Cult’, ‘Delete Culture’, ‘Supremacy Innuendos’ . . . or other similar biases” where the supporting statement provided no guidance as to what such terms would include); Apple Inc. (Dec. 6, 2019) (concurring in the exclusion of a proposal seeking to “improve guiding principles of executive compensation” that did not provide an explanation or definition of the key term “executive compensation”); Cisco Systems, Inc. (Oct. 7, 2016) (concurring in the exclusion of a proposal requesting that the board “not take any action whose primary purpose is to prevent the effectiveness of shareholder vote [sic] without a compelling justification for such action” where it was unclear what board actions would “prevent the effectiveness of [a] shareholder vote” and how the essential terms “primary purpose” and “compelling justification” would apply to board actions); AT&T Inc. (Feb. 21, 2014) (concurring in the exclusion of a proposal requesting a review of policies and procedures related to the “directors’ moral, ethical and legal fiduciary duties and opportunities” where such phrase was undefined); Moody’s Corporation (Feb. 10, 2014) (concurring in the exclusion of a proposal where the term “ESG risk assessments” was not defined); International Paper Company (Feb. 3, 2011) (concurring in the exclusion of a proposal requesting the adoption of a particular executive stock ownership policy because it did not sufficiently define “executive pay rights”); Verizon Communications Inc. (Feb. 21, 2008) (concurring in the exclusion of a proposal where the proposal failed to define certain critical terms such as “Industry Peer group” and “relevant period of time”).

These factual statements are objectively and demonstrably false and misleading. The Company does not have a policy that sets any “recruitment quotas” for executives. Nor does the Company have a policy that threatens any executive with “slashed bonuses, demotion, or termination of employment” over failure to meet the nonexistent “recruitment quotas”. There is not a Company policy that “directly require[s] IBM executives to make recruitment/promotion decisions based on race.” The supporting statement does not cite any specific Company policy or provide any evidence that such a policy exists. As described in the Company’s definitive proxy statement for its 2024 annual meeting of shareholders, the Company’s Annual Incentive Program may adjust the total pool of aggregate funding available up or down under the Program by a few percent if representation of certain groups among the total executive cohort changes a significant amount year-over-year,³ but this adjustment is based on Company-wide data that affects the Company-wide funding pool for approximately 4,000 eligible executives—it is not specific to particular executives or groups, has no “direct” effect on individual compensation or employment status, is not tied to “recruitment” and does not set any “recruitment quota”. Furthermore, no Company policy matches the description stated in the Proposal. In fact, Corporate Policy 117 “Workforce Diversity and Inclusion”, referenced in the Company’s Business Conduct Guidelines and attached as Exhibit B, expressly requires the opposite, stating that “[i]t is the policy of this organization to continue to engage in activities such as hiring, promotion and compensation of employees, without regard to race, color, religion, sex, gender, gender identity or expression, sexual orientation, national origin, caste, genetics, pregnancy, mental or physical disability, neurodivergence, age or other characteristics protected by applicable law.”⁴

These factual misstatements are material to shareholders voting on the Proposal. A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976). When a shareholder proposal addresses an existing corporate policy, the description of the existing corporate policy is material to the shareholder’s decision whether to vote in favor of the proposed measure. Express Scripts Holding Co. v. Chevedden, 2014 WL 631538 (E.D. Mo. Feb. 18, 2014). Here, in deciding whether to vote in favor of the Proposal, a reasonable shareholder would consider it important in deciding how to vote to know what current Company policies actually are, but the Proposal’s description of existing Company policies is objectively and demonstrably false. Thus, the Proposal contains material misstatements in violation of Rule 14a-9 and is therefore excludable under Rule 14a-8(i)(3).

In similar cases where a proposal misstates an existing corporate policy, the Staff has for decades routinely concurred with exclusion of the proposal as materially false and misleading.⁵ The Proposal’s materially inaccurate description of the Company’s policies are no different from the misstated bylaws at issue in NETGEAR, Inc. (Apr. 9, 2021), the misstated charter provisions at issue in JetBlue Airways Corporation (Mar. 12, 2021) or the false implication that the company permitted insider trading at issue in General Magic, Inc. (May 1, 2002)—and in each

³ For example, no adjustment was made in 2022 or 2023 because changes in representation were insignificant

⁴ The Company’s Business Conduct Guidelines, an excerpt of which is attached as Exhibit C, also specify that “IBM strives to maintain for its employees a healthy, safe and productive work environment free from discrimination and harassment, whether based on race, color, religion, gender, gender identity or expression, sexual orientation, pregnancy, national origin, caste, genetics, disability, age or any other factors that are unrelated to IBM’s legitimate business interests.”

⁵ See supra note 1.

such case, the Staff concurred with exclusion. We therefore respectfully request that the Staff concur with the Company's assessment that the Proposal here may be excluded as well.

II. The Proposal may be excluded from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(3) because the Proposal, taken as a whole, is so vague and indefinite that it is rendered materially misleading, in violation of Rule 14a-9.

The Proposal requests that the Company prepare a report “assessing how the Company's DEI requirements for hiring/recruitment impact IBM's risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views.” Exhibit A.

The phrase “DEI requirements for hiring/recruitment” is not defined, and neither the Proposal nor the supporting statement specifies any actual Company policy that imposes any race- or gender-based “requirements” related to hiring or recruitment. As discussed above, the Company has no such policy. The Proponent does not provide any information that would help shareholders voting on the Proposal understand what purported policies the Company should cover in any resulting report. What is “DEI”? What “requirements” are the Proposal addressing? The key terms of the Proposal are not defined.

“Shareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote.” New York City Employees' Retirement System v. Brunswick Corp., 789 F. Supp. 144 (S.D.N.Y. 1992) (holding proposal excludable as vague and misleading where there was “no limitation on the number or size of health care plans to be studied”). Here, the Proposal does not specify the purported Company policies to be studied. Shareholders voting on the Proposal will not be able to determine what action the Proposal is contemplating, and, if the Proposal were to be adopted, the Company would not know what to report. The Proposal is therefore misleading because any action ultimately taken by the Company, if the Proposal were to be adopted, could be significantly different from the actions envisioned by shareholders voting on the Proposal. See Fuqua Industries, Inc. (Mar. 12, 1991). In similar cases where a proposal fails to explain what a term central to the proposal means, the Staff has routinely found the proposal to be materially false and misleading.⁶ Because the Proposal is misleading in violation of Rule 14a-9, it is excludable under Rule 14a-8(i)(3).

CONCLUSION

Based on the foregoing analysis, the Company respectfully requests that the Staff confirm that it will take no enforcement action if IBM excludes the Proposal from its 2025 Proxy Materials for one or more of the reasons set forth above. We would be pleased to provide the Staff with any additional information, and answer any questions that you may have regarding this letter. I can be reached at (212) 474-1007 or mmariani@cravath.com. Please copy Jorge E. Mancillas, Senior Attorney of the Company, on any related correspondence at jorge.mancillas@ibm.com.

We are sending the Proponent and the Representative a copy of this submission. Rule 14a-8(k) provides that a shareholder proponent is required to send a company a copy of any correspondence that the proponent elects to submit to the Commission or the Staff. As such, the Proponent and the Representative are respectfully reminded that if they elect to submit additional correspondence to the Staff with respect to this matter, a copy of that correspondence

⁶ See supra note 2.

should concurrently be furnished directly to my attention and to the attention of Jorge E. Mancillas, Senior Attorney of the Company, at the addresses set forth below in accordance with Rule 14a-8(k).

Very truly yours,



Michael E. Mariani

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
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VIA SEC ONLINE PORTAL

Encls.

Copies w/encls. to:

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Vice President of Finance and Accounting and Treasurer
The Heritage Foundation

VIA EMAIL

Exhibit A
to IBM's No-Action Letter Request

Shareholder Proposal of The Heritage Foundation
International Business Machines Corporation
The Proposal

Report on Hiring/Recruitment Discrimination

Whereas: IBM is one of the largest companies in America and employs more than 280,000 people. As such, IBM ought to be recruiting employees without regard to race, gender, religious beliefs, or political affiliation, and empowering its many managers/executives to make decisions regarding recruitment and promotion in the same nondiscriminatory manner. But instead, IBM is engaging in recruitment and promotion practices that prioritize so-called Diversity, Equity, and Inclusion and expose the company to charges of not only running afoul of its legal responsibilities for non-discrimination, but jettisoning its fiduciary duty to maximize shareholder return.

IBM has faced significant backlash against comments made by IBM CEO Arvind Krishna regarding the company's DEI practices. In one exchange,¹ Krishna asserted that IBM executives are expected to meet certain recruitment quotas of 'underrepresented' minorities, including various racial minority groups and women. As per Krishna's remarks, IBM execs who fail to reach such quotas risk slashed bonuses, demotion, or termination of employment. These policies² directly require IBM executives to make recruitment/promotion decisions based on race.

IBM is listed³ as a member of the Minority Corporate Counsel Association, an initiative aimed at "advanc[ing] the goal of furthering diversity and inclusion in the legal profession," indicating that diversity KPIs are used in IBM's recruiting and promotion policies. IBM's support⁴ for such KPIs, along with its use of gender and racial diversity-centric pipeline procedures, raises serious concerns about nondiscrimination⁵ and its focus on maximizing value for shareholders.

IBM's policies raise particular concern, given that DEI workforce initiatives are facing sustained legal pressure in light of recent Supreme Court decisions in *Students for Fair Admissions v. Harvard*, *Groff v. DeJoy*, and *City of St. Louis v. Muldrow*.

¹ <https://x.com/JamesOKeefeIII/status/1734374423124176944>

² <https://news.bloomberglaw.com/daily-labor-report/ibm-diversity-efforts-targeted-by-stephen-millers-legal-group>

³ <https://mcca.com/membership/corporate-members-membership-list/>

⁴ https://1792exchange.com/pdf/?c_id=813

⁵ <https://www.eeoc.gov/racecolor-discrimination>

The Wall Street Journal recently reported that “Diversity Goals Are Disappearing from Companies’ Annual Reports.”⁶ EEOC Commissioner Andrea Lucas has also stated that workforce representation “goals” like IBM’s may run afoul of Title VII.⁷

A recent Gallup poll found that only 38% of Americans want businesses to take a stance on current events. This was part of a steady, multi-year decline among Americans across nearly every age, race, sex, and political persuasion.⁸ A survey from Viewpoint Diversity Score also found that a plurality of employees surveyed find that DEI divides, rather than unites, colleagues.⁹

IBM should avoid needless political controversies and illegal discrimination and support fundamental freedoms that are of broad societal impact and benefit every American. One step to do this is by increasing transparency around its hiring/promotion practices to ensure such practices are focusing on business goals as opposed to corporate activism.

Resolved: Shareholders request the Board of Directors of IBM conduct an evaluation and issue a report within the next year, at reasonable cost and excluding confidential information, assessing how the Company’s DEI requirements for hiring/recruitment impact IBM’s risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views.

⁶<https://www.wsj.com/business/diversity-goals-are-disappearing-from-companies-annual-reports-459d1ef3>

⁷ <https://www.jacksonlewis.com/insights/eec-commissioner-andrea-lucas-discusses-workplace-dei>

⁸ <https://news.gallup.com/poll/648269/americans-business-stay-quiet-public-policy.aspx>

⁹ <https://www.viewpointdiversityscore.org/polling>

Exhibit B
to IBM's No-Action Letter Request

Shareholder Proposal of The Heritage Foundation
International Business Machines Corporation
Corporate Policy 117 "Workforce Diversity and Inclusion"

Workforce Diversity and Inclusion

Policy Letter

Number: 1170

Date: April 2024

Subject: Workforce Diversity and Inclusion

The employees of IBM represent a talented and diverse workforce. Achieving the full potential of this diversity is a business priority that is fundamental to our competitive success. A key element in our workforce diversity programs is IBM's long-standing commitment to equal opportunity and an inclusive workplace.

IBM has more than 100 years of work on diversity, inclusion and equality in the workplace. That legacy, and our continued commitment to advance equity in a global society, has made us leaders in diversity and inclusion. Guided by our values and beliefs, we're proud to foster an environment where every IBMer is able to thrive because of their differences, not in spite of them. IBM has taken and will continue to take a bold stand in favor of equal opportunity for all. It is the policy of this organization to continue to engage in activities such as hiring, promotion and compensation of employees, without regard to race, color, religion, sex, gender, gender identity or expression, sexual orientation, national origin, caste, genetics, pregnancy, mental or physical disability, neurodivergence, age or other characteristics protected by applicable law. IBM makes reasonable accommodations available where the Company believes they are appropriate to enable employees with disabilities and others to effectively perform their jobs.

In respecting and valuing the diversity among our employees and all those with whom we do business, managers and employees are expected to foster a work environment free of all forms of discrimination, harassment, bullying and retaliation.

This policy is based on sound business judgment and anchored in our IBM Values. Every manager in IBM is expected to abide by our policy, and all applicable laws on this subject, and to uphold IBM's commitment to workforce diversity and inclusion.

Arvind Krishna

Chief Executive Officer

Exhibit C
to IBM's No-Action Letter Request

Shareholder Proposal of The Heritage Foundation

International Business Machines Corporation

Excerpt from the Company's Business Conduct Guidelines



Business Conduct Guidelines

Integrity Comes First

2.1 Maintaining a Safe and Productive Work Environment

IBM strives to maintain for its employees a healthy, safe and productive work environment free from discrimination and harassment, whether based on race, color, religion, gender, gender identity or expression, sexual orientation, pregnancy, national origin, caste, genetics, disability, age or any other factors that are unrelated to IBM's legitimate business interests. IBM will not tolerate sexual advances or comments, racial or religious slurs or jokes, or any other conduct, such as bullying, that creates or encourages an offensive or intimidating work environment. Familiarize yourself with Corporate Policy 117 "Workforce Diversity and Inclusion", which demonstrates our commitment to fostering a work environment where every IBMer is able to thrive because of their differences, not in spite of them. Be mindful of Corporate Instruction HR 116, addressing harassment and bullying in the workplace, and be respectful and considerate of others when communicating your viewpoint or otherwise using social computing tools, such as Slack channels.

Take note!



IBM is committed to the use of inclusive language. Your words matter. Avoid racial and cultural bias by following the **Inclusive IT Terminology Guidelines**.

IBM does not tolerate acts of violence in the workplace. Workplace violence may include incidents in the environment where we work and live. Refer to IBM's **Workplace Violence Program** for additional training and support.

Other prohibited conduct, because of its adverse impact on the work environment, includes the following:

- > Threats or violent behavior
- > Possession of weapons of any type
- > A manager having a romantic relationship with a subordinate
- > Discrimination against any employee on the basis of any element of diversity
- > Use, distribution, sale or possession of illegal drugs or any other controlled substance, except for approved medical purposes
- > Being under the influence of illegal drugs, controlled substances used for non-medical purposes, or alcoholic beverages in the workplace
- > Consumption of alcoholic beverages on IBM premises, unless approved in advance by your manager

If you believe you are the victim of or are concerned about a risk of prohibited workplace conduct, contact the Talk it Over @ IBM team or report it using one of the IBM Communication Channels.

If IBM management finds that your conduct on or off the job adversely affects others or your ability to perform your job, IBM may take any action regarding your employment, including termination of employment, subject to applicable law.

When using Slack, exercise good judgment and follow the BCGs, the Social Computing Guidelines, and guidelines for Slack usage found [here](#).