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

DIVISION OF
CORPORATION FINANCE

March 3, 2025

Michael E. Mariani
Cravath, Swaine & Moore LLP

Re: International Business Machines Corporation (the "Company")
Incoming letter dated December 20, 2024

Dear Michael E. Mariani:

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

The Proposal requests that the board of directors conduct an evaluation and issue a report assessing how the Company's DEI requirements for hiring/recruitment impact its risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(3). We are unable to conclude that you have demonstrated objectively that the Proposal is materially false or misleading, and do not believe that the Proposal, taken as a whole, is so vague or indefinite that it is rendered materially misleading.

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/2024-2025-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Michael Ross
Alliance Defending Freedom

CRAVATH

Michael E. Mariani
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New York

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.

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.

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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
100 F Street, NE
Washington, DC 20549

VIA SEC ONLINE PORTAL

Encls.

Copies w/encls. to:

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VIA EMAIL: jorge.mancillas@ibm.com

Jerry Bowyer
Bowyer Research

VIA EMAIL

John Backiel
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 policies[2]directly require IBM executives to make recruitment/promotion decisions based on race.

IBM is listed[3] 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 support[4] for such KPIs, along with its use of gender and racial diversity-centric pipeline procedures, raises serious concerns about nondiscrimination[5] 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*.

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[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/eeoc-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: 117O

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**.

ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

January 23, 2025

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

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

Ladies and Gentlemen:

I am writing for The Heritage Foundation ("Proponent") to defend its shareholder proposal ("Proposal") to International Business Machines Corporation ("IBM" or the "Company"). The Proposal asks IBM to report on "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." IBM bears the burden of showing it can exclude the Proposal under Rule 14a-8(g). But it cannot do so.

IBM argues that the Proposal makes materially false statements because it states, "IBM executives are expected to meet certain recruitment quotas of 'underrepresented' minorities" and women, or risk being punished for failing to do so. But this is just paraphrasing the statements of IBM's CEO, Arvind Krishna, and one of his reports in a leaked video. IBM also leaves out crucial lead-in language, "Krishna asserted that," thus trying to paint this as Proponent's own statement. Further, the paraphrasing is accurate. Missouri is even suing IBM for discrimination based on these remarks. IBM's references to an equal employment policy—required by law to secure federal contracts—and its proxy statement raise this *at best* to a debatable issue, which Staff consistently agree is inappropriate for an (i)(3) challenge.

IBM also says the term "DEI" is vague. But the Proposal consistently ties it to workforce quotas and programs that discriminate based on race, sex, and other protected characteristics; IBM consistently uses the term in its own public SEC filings; and perhaps no term is more infamous in corporate culture right now than DEI. IBM fails to meet the high standard for vagueness, a standard that is appropriate for a document limited to 500 words.

The Proposal

The Proposal provides:

> **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 explains that IBM has over 280,000 employees but appears to be engaging in "so-called Diversity, Equity, and Inclusion" practices that discriminate based on race, sex, and other factors.

The Statement notes that IBM's CEO created significant controversy when he spoke on the Company's DEI practices: "In one exchange, Krishna asserted that IBM executives are expected to meet certain recruitment quotas of 'underrepresented' minorities, including various racial minority groups and women." Further, IBM executives who do not reach the quotas "risk slashed bonuses, demotion, or termination of employment." In support, the Statement cites to reporter James O'Keefe's post on X,[1] which contains video footage of Krishna, and a Bloomberg article[2] discussing the leaked video footage and an EEOC complaint filed based on the video.

This footage and other practices, the Statement says, raise "serious concerns about nondiscrimination and [IBM's] focus on maximizing value for shareholders" because of the "sustained legal pressure" against racial discrimination following recent Supreme Court cases. The Statement also observes that DEI is increasingly seen as divisive and unpopular and that many companies are retreating from DEI commitments.

Because of all of this, the Statement asks IBM to increase "transparency around its hiring/promotion practices to ensure such practices are focusing on business goals as opposed to corporate activism."

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[1] James O'Keefe, *X,* (Dec. 11, 2023), https://x.com/JamesOKeefeIII/status/1734374423124176944.

[2] Riddhi Setty, *IBM Diversity Efforts Targeted by Stephen Miller's Legal Group*, Bloomberg Law (Dec. 12, 2023), https://news.bloomberglaw.com/daily-labor-report/ibm-diversity-efforts-targeted-by-stephen-millers-legal-group.

Discussion

A. The Proposal is not materially false under Rule 14a-8(i)(3) because it accurately paraphrases remarks made by the CEO of IBM and one of its subsidiaries.

IBM is arguing that its own CEO's statements are materially false. Just as bad, it leaves out crucial context from the Proposal. The Proposal does not just state that "IBM executives are expected to meet certain recruitment quotas." It says that "*Krishna asserted that* IBM executives are expected to meet certain recruitment quotas." IBM cites to its diversity modifiers and its equal employment opportunity statement. But these do not contradict the CEO's statements. And to the extent they are in tension, they raise debatable factual issues that Staff stated and found are inappropriate for an (i)(3) challenge.

1. A proposal is not materially false just because it makes statements that are debatable or criticize the company.

Under Rule 14a-8(i)(3), a proposal and its supporting statement may not make a "materially false or misleading statement." This is a high bar, and Staff have reproved companies that nitpick a "proposal's supporting statement as a means to justify exclusion of the proposal in its entirety." Staff Legal Bulletin (Sept. 15, 2004) ("SLB 14B"). For that reason, Staff have stated that companies should not rely on 14a-8(i)(3) simply because "the company objects to statements because they represent the opinion of the shareholder proponent" or "factual assertions that, while not materially false or misleading, may be disputed or countered." *Id.* Rule 14a-8(l)(2) makes clear that the company is not responsible for the "contents of [a shareholder's] proposal or supporting statement." Instead of trying to exclude a proposal it does not like, a company is free to dispute the proposal in its proxy statement.

Based on this, Staff has routinely allowed statements that are factually debatable or criticize the company to appear on a proxy statement. *The Bank of New York Mellon Corp.* (Jan. 24, 2022) ("41%-support may have exceeded 51%-support from the share that have access to independent proxy voting advice and are not forced to rely on the biased opinion of management"); *Wells Fargo & Co.* (Feb. 28, 2022) (including 501(c)(4) organizations as "charitable organizations"); *Church & Dwight Co.* (Feb. 28, 2022) (stating the company "currently has one of the highest stock ownership thresholds to call a special meeting – 25% of shares"); *Laboratory Corp. of America Holdings* (Mar. 3, 2022) ("a theoretical 10% stock ownership requirement can in practice be a 20% stock ownership requirement"); *Arlington Asset Investment Corp.* (Mar. 31, 2022) ("management has nonetheless been richly compensated at the expense of shareholders").

Staff even allowed one proposal that stated that "[p]rojections have found that limiting global warming to 1.5 degrees versus 2 degrees *will save* $20 trillion globally

by 2100" when the source the proposal cited said only that "exceeding 2 degrees could lead to climate damages in the hundreds of trillions" and noted considerable "uncertainty about damages." *Chubb Limited* (Mar. 26, 2022) at 11. Staff have also allowed statements about "risk," including legal risk, from proponents. *The Travelers Companies, Inc.* (Mar. 30, 2022) at 38 (company "may be at risk for contributing to systemic racism" because it provides "law enforcement liability insurance" and "any company without a third-party audit and plan for improvement of internal and external racial impacts could be at risk").

This approach makes sense. Shareholders have only 500 words to describe their proposals. It is their prerogative to characterize issues and statements with their preferred framing, and sometimes with strong wording, so long as there is nothing objectively and materially false and misleading.

Further, Staff have long accepted that minor misstatements or errors can be easily fixed and have allowed shareholders to "make revisions that are minor in nature and do not alter the substance of the proposal." SLB 14B. This prevents proposals from being kicked off of the ballot for simple and minor inaccuracies.

By contrast, simple statements of fact that are provably false are more susceptible to challenges under (i)(3). IBM relies primarily on these citations. For example, in *Netgear Inc.* (Apr. 9, 2021) the proposal sought to amend the bylaws to let any shareholders with an aggregate of 15% call a special shareholder meeting. The Supporting Statement opened by stating that only certain board members or officers can call a special meeting. *Id.* at 2. But that statement directly contradicted the company's bylaws, which already allowed shareholders with at least 25% aggregate holdings to call a special meeting. *Id.* at 6. Similarly, in *Ferro Corp.* (Mar. 17, 2015), the proposal stated, among other things, that shareholders could not amend company bylaws when Ohio statutes specifically allowed for shareholders to do so. *Id.* at 7–8. *See also JetBlue Airways Corp.* at 11 (Mar. 12, 2021) (proposal stated, among other things, that shareholders "do not currently have a right . . . to call a special shareholder meeting" when company documents expressly allowed shareholders with 20% voting power to do so); *State Street Corp.* (Mar. 1, 2005) (misstating applicability of statute to company directors).

IBM also relies on *The Boeing Co.* (Feb. 23, 2021). But there, the supporting statement was internally inconsistent and lacked a basic level of precision. The proponent requested that the company require 60% of board members to have an "aerospace/aviation/engineering executive background." *Id.* at 10. These terms are highly technical. The supporting statement, though, did not elaborate on their meaning and instead used seven different and conflicting phrases to describe these same qualities. *Id.* at 3. Additionally, the proposal did not explain whether the slashes were conjunctive or disjunctive, i.e. whether a candidate would need any of the above three types of experience or all three types. *Id.* at 2–3.

2. The Proposal accurately paraphrases IBM's remarks on diversity quotas, so IBM cannot come close to showing it is materially false.

IBM protests that Krishna's remarks about executive race and sex quotas for workforce representation are in direct contradiction to its written policies. Unfortunately, IBM's statements through its CEO in the video do not square with IBM's statements through its legal counsel here. Further, the Proposal expressly qualifies the statements by noting that they are Krishna's remarks, not bald assertions from the Proponent. At best for IBM, this is a debatable point, completely like the cases Proponent cites above and unlike proposals IBM relies on where the proposals misstate governing statutes or bylaws. At worst, IBM is stating that its own CEO's remarks are misrepresentations. Either way, Proponent does not come close to making a material misrepresentation.

As an initial matter, IBM itself mischaracterizes the Proposal by leaving out critical context. The Proposal does not directly assert that "IBM executives are expected to meet certain recruitment quotas." It states that "*Krishna asserted that* IBM executives are expected to meet certain recruitment quotas." IBM does not leave out the subsequent qualifier, but it is worth repeating it: "*As per Krishna's remarks*, IBM execs who fail to reach such quotas risk slashed bonuses, demotion, or termination of employment." IBM is thus shadowboxing. To succeed, it would have to show that Proponent's characterization of Krishna's remarks is materially false or that Proponent's reliance on these statements is so unreasonable as to be materially false. It does not even attempt the former. And it fails to come close on the latter.

Proponent's characterization of Krishna's remarks is spot on. The leaked footage shows video of Arvind Krishna, the CEO of IBM, and Paul Cormier, Chairman of IBM's subsidiary Red Hat, responding to an employee's question about IBM's DEI commitments. In that video, Krishna states verbatim:

> I'm very clear about this. I expect at the executive level, so that is not just my directs, but all executives in the company, have to move forward by 1% on both underrepresented minorities. . . . Ditto on gender diversity. So we take underrepresented and gender. You've got to move both forward by a percentage. *That leads to a plus on your bonus. By the way if you lose, you lose part of your bonus.*[3]

So IBM's CEO is saying that workforce representation on both underrepresented minorities and women is tied both positively and negatively to executive

[3] James O'Keefe, X*, The IBM Leaked Tapes* at 7:43–8:14, *available at* https://x.com/JamesOKeefeIII/status/1734374423124176944.

compensation. Krishna goes on to discuss the company's "entire recruiting" and how it has reached a "high watermark" for women.[4]

Red Hat's Chairman, Paul Cormier, then states "I'll be very candid. Without an exception for privacy, I could name multiple leaders over the last year plus *that were held accountable to the point that they're no longer here at Red Hat* because they weren't willing to live up to the standards that we set in this space."[5] He then added that "[w]e're working on determining those metrics for success. . . . we're going to continue to hold . . . our executives accountable for all of this."[6] This implies, if not outright admits, that Red Hat punished executives for failing to meet race and sex quotas for their workforces.

These remarks even sparked a lawsuit against IBM from the Missouri Attorney General for illegal racial discrimination against employees and prospective employees.[7] As the Complaint states, "IBM gives its executives two choices: discriminate or lose your job."[8] Like the Proponent, Missouri makes the reasonable inference from this video that IBM's "diversity modifier" "seeks to unfairly change the balance in favor of some races, colors, national origins, ancestries, and one sex but not the others" and pleads that "upon information and belief, IBM took adverse employment actions against" certain executives "including decreased compensation . . . or termination of employment."[9] The Attorney General of Missouri's inferences here are reasonable, just like Proponent's.

IBM protests that "[t]he supporting statement does not cite any specific Company policy or provide any evidence that such a policy exists." IBM No-Action Request ("NAR") at 4. This is wrong twice over. First, the Proponent cites the statements of IBM's CEO as evidence. Second, the Proponent does not need to supply proof at all. Staff rightly stated in Bulletin 14B that companies may not object under (i)(3) just because "the company objects to factual assertions because they are not supported."

IBM points to its 2024 proxy statement as evidence that the diversity modifier "is not specific to particular executives or groups, has no 'direct' effect on individual compensation or employment status," and is "not tied to 'recruitment.'" NAR at 4. But again, it is arguing against itself. The Proponent never said that the diversity policies were tied to individual executives. And even if that were the case, that is a fair inference based on Cormier's statements that certain executives are "no longer at Red

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[4] *Id.* 8:31–8:47.

[5] *Id.* at 10:12–10:26.

[6] *Id.* at 11:15–11:40.

[7] *Missouri v. IBM* (21st Circuit of St. Louis Cnty., Mo.) Compl., *available at* https://ago.mo.gov/wp-content/uploads/Pet.-State-v.-IBM.docx.pdf.

[8] *Id, para.* 1.

[9] *Id.* paras. 74, 86.

Hat" and Krishna's statement that he draws the line of accountability at executives: "I don't like to set a target for a small group, but for the executive population. I want to say, hey, you got to improve by a percent a year."[10]

Finally, IBM says it has an equal opportunity policy, so that means they would never allow this kind of policy. NAR at 4. But a mere promise not to discriminate—and one legally required to secure federal contracts—is a fig leaf that unfortunately does little to prohibit discrimination that may pop up in the company's DEI policies, particularly after the sea change in the legal landscape following *Students for Fair Admission, Inc. v. Harvard*, 600 U.S. 181 (2023).

For all these reasons, IBM is *at most* showing that these are debatable points and nothing like simply misstating bylaws or charter provisions as IBM implies. But as discussed above, Rule 14a-8(i)(3) is not applicable simply because IBM disagrees with the "opinion of the shareholder proponent" or because the proponent's statements "may be disputed or countered." SLB 14B.

IBM also argues that the statement is material because it "misstates an existing corporate policy." NAR at 4. Again, the Proponent is simply stating what Krishna said. But even on materiality, IBM is mistaken. The Proposal's statements about Krishna are not material because IBM, like many companies, acknowledges and promotes DEI policies and those policies present significant reputational, operational, and legal risk to companies. So even without these statements, IBM still needs to provide transparency to shareholders on this important workforce issue.

B. The Proposal is not so vague as to be materially false under Rule 14a-8(i)(3) because the Proposal explains, and the shareholders and the Company know, what DEI means.

IBM's CEO talked about hiring and recruitment requirements in response to a question explicitly about DEI. So it is confusing that it then asks "What is 'DEI'?" and asserts that it does not know what "requirements" the Proposal is referring to. NAR at 5. There is perhaps no term more infamous in corporate culture right now than DEI. IBM has also made its own "diversity, equity, and inclusion" practices a highlight of its workforce culture. And the Proposal itself ties DEI multiple times to hiring and recruitment quotas. IBM also wants to play semantics with "requirements" when its own CEO and his subordinate laid out positive, and negative, consequences for failing to meet the quotas. Staff reject such a strained reading of Rule 14a-8(i)(3) and correctly allow shareholders leeway to frame issues in their preferred manner and to rely on commonly understood terms and phrases in a 500-word proposal instead of defining everything with a statutory level of precision.

[10] James O'Keefe, *The IBM Leaked Tapes* at 9:30–9:36, *available at* https://x.com/JamesOKeefeIII/status/1734374423124176944.

1. A proposal and supporting statement are impermissibly vague only when the two, taken together, lack a basic level of clarity or request no specific action.

Under Rule 14a-8(i)(3), a proposal and its supporting statement may not make a "materially false or misleading statement." This includes making statements that are impermissibly vague. As Staff have explained, a proposal may be excluded if it and the supporting statement are "so vague and 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.

Staff rely on commonsense meanings that are readily understood by investors and the context provided by the supporting statement. Indeed, (i)(3) is the only ground for exclusion that explicitly includes the supporting statement in its text. Accordingly, Staff have rejected vagueness challenges to terms like "the impact of the Company's policy positions, advocacy, partnerships and charitable giving on social and political matters," *Kohl's Corp.* (Mar. 14, 2024), "impacts on civil rights and non-discrimination" across all aspects of the company, *CVS Health Corp.* (Mar. 17, 2022), "viewpoint diverse board" regarding political bias, *DICK'S Sporting Goods, Inc.* (Apr. 22, 2024), "economic and humanitarian effects" of a climate transition policy, *JPMorgan Chase & Co. (NLPC)* (Mar. 29, 2024), "human rights impacts" associated with "high-risk products and services," *Northrop Grumman* (Mar. 26, 2021), and "risks" related to anti-competitive practices. *Alphabet Inc. (CtW)* (Apr. 16, 2021). And as explained in Section A, Staff have decided that issues that are factually debatable or put the corporation in a bad light are not excludable.

2. The terms "DEI" and "requirements" are readily understood in media, law, and by IBM.

Here, the Proposal easily satisfies the low bar of "reasonable certainty" for the term "DEI requirements for hiring/recruitment" because the term DEI is commonly known and because the Proposal repeatedly ties the term to race- and sex-based quotas for hiring and recruiting employees.

For example, the Supporting Statement repeatedly contextualizes the term DEI and observes that "IBM is engaging in recruitment and promotion practices that prioritize so-called Diversity, Equity, and Inclusion." These policies "expose it to liability for illegal discrimination and harm IBM's value for shareholders." It then characterizes Krishna's statements about race and sex-based hiring and recruitment quotas as "comments made by IBM CEO Arvind Krishna regarding the company's *DEI practices*." The Supporting Statement later notes that these kinds of "*DEI workforce initiatives* are facing sustained legal pressure in light of recent Supreme Court decisions" and that EEOC Commissioner Andrea Lucas "has also stated that workforce representation 'goals' like IBM's may run afoul of Title VII."

Further, the term "DEI" is commonly understood to refer to workforce practices, often labeled "diversity, equity, and inclusion" (as the Supporting Statement notes), that prioritize diversity based on protected characteristics like race and sex. This is especially true for a corporate audience like the Company and its shareholders. A recent survey of headlines shows that DEI is one of the most infamous issues in corporate culture right now. Here is a sampling of recent headlines from national news outlets:

- "Meta ends its DEI programs as Zuckerberg blasts Biden on Joe Rogan" from CNN[11],
- "Corporate America Drew Back From DEI. The Upheaval Isn't Over." from The Wall Street Journal,[12]
- "A Top University Bet on D.E.I. What Went Wrong?" from the New York Times,[13]
- "The Selective DEI of Pete Hegseth" from The Washington Post.[14]

In none of these headlines is DEI spelled out. Rather, the news outlets know that DEI is commonly known and understood by their readers. Legal experts published on the Harvard Law School Forum on Corporate Governance have also characterized the lawsuit against IBM for the quotas at issue in this Proposal as "the Next Round of DEI Litigation."[15]

IBM uses the term often too. IBM's 2024 proxy statement highlights IBM's "Equitable Impact" and notes that it is "[c]reating spaces and opportunities for everyone by focusing on "diversity, equity, and inclusivity within IBM as well as globally."[16] IBM's "diversity policies and practices" page is titled "Diversity, equity

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[11] Hadas Gold, *Meta ends its DEI programs as Zuckerberg blasts Biden on Joe Rogan*, CNN (Jan. 11, 2025), https://www.cnn.com/2025/01/10/tech/meta-ends-dei-programs/index.html.

[12] Theo Francis, *Corporate America Drew Back From DEI. The Upheaval Isn't Over*, The Wall Street Journal (Dec. 28, 2024), https://www.wsj.com/business/corporate-dei-policy-changes-pull-back-33fdab87.

[13] Nicholas Confessore, *A Top University Bet on D.E.I. What Went Wrong?*, The New York Times (Oct. 16, 2024), https://www.nytimes.com/2024/10/16/briefing/university-diversity-programs.html.

[14] Philip Bump, *The selective DEI of Pete Hegseth*, The Washington Post (Jan. 14, 2025), https://www.washingtonpost.com/politics/2025/01/14/selective-dei-of-pete-hegseth.

[15] Andrew Cook et al., *How Companies Can Prepare for the Next Round of DEI Litigation*, Orrick, Herrington & Sutcliffe LLP (July 7, 2024), https://corpgov.law.harvard.edu/2024/07/07/how-companies-can-prepare-for-the-next-round-of-dei-litigation/.

[16] IBM, *2024 Proxy Statement* at 32, https://www.ibm.com/annualreport/assets/downloads/IBM_Proxy_2024.pdf

and inclusion."[17] Of course, IBM also lists many of its workforce policies on these same sources under the similar monicker of "diversity and inclusion."

Even the leaked video came about because an employee asked a question about DEI. There, Red Hat's Senior Director of Corporate Communications stated that "our last question is about diversity, equity, and inclusion."[18] The question asks about "holding executives accountable for DE&I goals" and "DEI work."[19] Krishna clearly knew what he was responding to when the employee used the term DEI. Co-panelist Paul Cormier, who is chairman at Red Hat, also used the term DEI multiple times in his response to the question.[20]

It is plain that IBM knows precisely what DEI means and their argument to the contrary is absurd.

IBM also complains that the proposal fails to "specif[y] any actual Company policy that imposes any race- or gender-based 'requirements' related to hiring or recruitment." This is a borderline misrepresentation: the Proposal is drawing from the words of IBM's CEO and Red Hat's Chairman, who reports to him. Red Hat's Chairman even stated that multiple executives had already left because they were "held accountable to the point that they're no longer here at Red Hat."[21] It is reasonable to infer, just as the State of Missouri did, that these statements refer to workforce policies that "require," either directly or through coercive pressure, executives to meet hiring and recruitment quotas for employees based on race and sex. IBM cannot play semantics with "requirements" or point at the Proponent for failing to identify sensitive company policies or practices on affirmative action-type quotas.

IBM cannot object just because the Proponent phrases things in a way that criticize the Company's actions. *See, e.g.*, *Arlington Asset Investment Corp.* (Mar. 31, 2022) (rejecting vagueness challenge to "management has nonetheless been richly compensated at the expense of shareholders"). Nor does Proponent need to cite specific policies or maintain dictionary-levels of precision, as Staff explained in Bulletin 14B. Proponent has 500 words to make its point; and Staff appropriately give proponents leeway to make these characterizations and rely on well-understood and commonly used terms.

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[17] IBM, *Diversity, equity and inclusion*, https://www.ibm.com/history/diversity-policies.

[18] James O'Keefe, *The IBM Leaked Tapes* at 7:10, *available at* https://x.com/JamesOKeefeIII/status/1734374423124176944.

[19] *Id.*

[20] *Id.* at 10:02.

[21] *Id.* at 10:45.

IBM has a laundry list of citations it cites to without elaboration. NAR at 5 n.6 (citing to n.2). But all are inapposite. Some were vague because the actual action, rather than the characterization or social issue behind the action, was unclear. *See Apple Inc. (Zhao)* (Dec. 6, 2019) ("improve guiding principles of executive compensation"); *Cisco Systems, Inc.* (Oct. 7, 2016) ("not take any action whose primary purpose is to prevent the effectiveness of shareholder vote without a compelling justification"); *Int'l Paper Co.* (Feb. 3, 2011) (asking executives to relinquish all "preexisting executive pay rights"). In Apple, Staff even noted that "[a] proposal that described the nature of improvements that the company could consider, without prescribing the particular result, would be less likely to be viewed as vague and indefinite."

Likewise, other proposals left key parameters unclear. *NYCERS v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992) ("By its terms it would require . . . a report to the shareholders 1) comparing the health standards, methods of administration, costs, and financing of health care plans in all countries in which Brunswick has subsidiaries or business offices, and 2) describing to the shareholders any aspects of governmental policy affecting those plans which should be included in the development of a national health insurance plan in the United States."); *Verizon Commc'ns Inc.* (Feb. 21, 2008) left key parameters unclear (comparing company's senior executive compensation to "industry peer group" during "relevant time period").

Others were internally inconsistent or failed to meet basic standards of readability. In *AT&T Inc.* (Feb. 21, 2014), the proposal asked for disclosures on "the company's policies and procedures relating to directors' moral, ethical and legal fiduciary duties" to protect "the privacy rights of American citizens." But the supporting statement refused to elaborate on what "privacy rights" it was referring to, saying only that "voluminous media coverage of this issue provides all the context necessary." *Id.* at 8. The company also noted that it was unclear whether "moral, ethical and legal fiduciary" modified "opportunities" and, if so, what exactly "moral, ethical and legal fiduciary [] opportunities" were. *Id.* IBM also points to "politically charged biases" in *Walt Disney Co. (Grau)* (Jan. 19, 2022). NAR at 3. But there, the proposal submitted was replete with grammatical and syntactical errors, made references to a "woke cult" and "supremacy innuendos," lacked a "resolved" clause, and made several conflicting requests throughout the proposal. *Id.* at 13–14.

And in *Moody's Corp.* (Feb. 10, 2014), the proponent used the term "ESG" but only mentioned it once in passing. *Id.* at 9. In 2014, the term ESG was not nearly as well known as it is today and is likely even less well known today than DEI. The term "DEI" here is much closer to those where proposals relied on commonly understood terms and for which Staff rejected vagueness challenges.

Conclusion

For these reasons, we request that the Staff reject IBM's request for relief from The Heritage Foundation's Proposal. A copy of this correspondence has been timely provided to IBM through its legal counsel. If we can provide additional materials to address any queries the Commission may have on this letter, please feel free to contact me.

Sincerely,

Michael Ross

Cc: Michael E. Mariani
Jorge Mancillas