



DIVISION OF
CORPORATION FINANCE

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

April 15, 2024

James McRitchie

Re: Bank of America Corporation (the "Company")
Incoming letter dated March 5, 2024

Dear James McRitchie:

This letter is in response to your correspondence concerning the shareholder proposal you submitted to the Company. In response to a December 22, 2023 request from the Company, on February 29, 2024 we issued a letter expressing our informal views on the matter. You have asked us to reconsider our position or present the matter to the Commission.

We have reviewed the information contained in your correspondence, find no material information that has not been previously furnished, and have determined not to reconsider our position. *See* Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12599 (July 7, 1976). In addition, we have applied the standard set forth in Part 202.1(d) of Section 17 of the Code of Federal Regulations and have determined not to present this matter to the Commission.

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action>.

Sincerely,

Michael P. Seaman
Chief Counsel
Division of Corporation Finance

cc: Ronald O. Mueller
Gibson, Dunn & Crutcher LLP

Submission via Online Submission Form

March 5, 2024

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
cc: shareholderproposals@gibsondunn.com, GWalter@gibsondunn.com,
bac_shareholder_relations@bofa.com, bac_shareholder_relations@bofa.com

SEC Reference Number: 469916

Re: *Request for Reconsideration* Regarding Shareholder Proposal Submitted by James McRitchie (Proponent)

To Whom It May Concern:

Bank of America (McRitchie, February 29, 2024) was granted no-action relief under Rule 14a-8(i)(7). The Staff did not provide the rationale.

Background

From *BlackRock, Inc.* (McRitchie, April 4, 2022), it is clear that proxy voting is considered a significant social policy issue that transcends ordinary business and that shareholders can ask companies to adopt stewardship practices, such as proxy voting, that seek to curtail “activities that externalize social and environmental practices designed to curtail corporate activities that externalize social and environmental costs that are likely to decrease the returns of portfolios that are diversified in accordance with portfolio theory.”

The proposal at *BlackRock, Inc.* (McRitchie, April 4, 2022) and the Proposal at BAC are based on the logical conclusion of applying Modern Portfolio Theory¹ to proxy voting. Modern Portfolio Theory and sound investment practice mandate that fiduciaries diversify portfolios to reap increased returns from risky securities while significantly reducing their overall risk.

Once a portfolio is diversified, the most critical factor determining return is not how companies in that portfolio perform relative to other companies (“alpha”) but rather how the entire market performs (“beta”). According to accepted research,² beta drives 91 percent of the average portfolio return. While individual companies can externalize costs

¹ https://en.wikipedia.org/wiki/Modern_portfolio_theory

² <https://yalebooks.yale.edu/book/9780300194418/what-they-do-with-your-money/>

to “maximize shareholder value,” diversified shareholders essentially “internalize”³ such costs through lowered portfolio returns.

Focusing on individual companies undercuts the 91 percent of potential return attributed to market return (beta) in order to maximize the 9 percent that comes from outperformance (alpha). Externalized social and environmental costs can play an outsized role in the value of that 91 percent.

Yet the two principal proxy advisers provide voting guidance to clients with diversified returns based on maximizing returns at each individual company they cover. Although both services offer overlays addressing values beyond maximizing returns, many fiduciaries need help to justify supporting proposals focused on broad societal interests. Most funds take a similar approach to proxy voting. The Employee Retirement Income Security Act of 1974 (ERISA) requires fiduciaries to discharge their duties “solely in the interest of the participants and beneficiaries.”⁴ Many interpret that to mean maximizing returns regardless of adverse consequences.

Corporate directors focus on maximizing profits at their companies. That’s where their fiduciary duty lies. However, since most portfolios are broadly diversified, their proxy votes should focus on minimizing systemic risk since 91 percent of their potential returns are attributable to market returns.

BAC and *BlackRock*

The difference between Citi and *BlackRock* (McRitchie, April 4, 2022) is that I asked *BlackRock* to consider taking a portfolio-wide approach to proxy voting. In contrast, I am asking BAC to offer proxy voting policies that accomplish the same goal (maximizing returns by addressing externalized costs) by offering clients unsatisfied with BAC’s proxy voting policy (offered through Citi Investment Management’s third-party service) such an option.

According to *BlackRock* (McRitchie, April 4, 2022), asking a company to change their proxy voting policies to address externalities that may reduce overall portfolio returns, even if those votes reduce the value of individual companies in the portfolio, is not “ordinary business.” In other words, we asked *BlackRock* to take a portfolio-wide approach to maximizing value when voting its proxies, instead of viewing votes at each company out of context from their portfolios. Staff deemed that proposal not to be subject to the “ordinary business” exclusion.

The Proposal at BAC takes only a slightly different approach. It is a gentler approach to the same goal as *BlackRock*, so logically, it is less disruptive to BAC’s ordinary business, even though it deals with the same issue that proxy voting is considered a significant social policy issue that transcends ordinary business. We request a feasibility

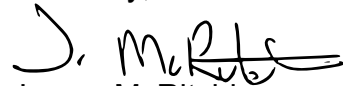
³ <https://www.jstor.org/stable/2331386>

⁴ <https://www.law.cornell.edu/uscode/text/29/1104>

report instead of asking BAC to change its voting policy. Instead of asking BAC to alter its core proxy voting policy, we ask them to consider offering portfolio-wide voting approaches to clients as an alternative.

Nothing in the Company's submission establishes the applicability of subsection (i)(7). As a result, the Staff's position should either be reversed, or the matter should be submitted to the entire Commission for review.

Sincerely,

A handwritten signature in black ink, appearing to read "J. McRitchie". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

James McRitchie

March 6, 2024

VIA ONLINE SUBMISSION

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

Re: *Bank of America Corporation*
Shareholder Proposal of James McRitchie
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

By letter submitted March 5, 2024, James McRitchie (the “Proponent”), requested (i) that the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) reconsider its decision, dated February 29, 2024, concurring that Bank of America Corporation (the “Company”) may omit a shareholder proposal that he submitted (the “Proposal”) from the Company’s proxy statement and form of proxy for its 2024 Annual Meeting of Shareholders (the “2024 Proxy Materials”) under Rule 14a-8(i)(7) and (ii) Commission review of the same (the “Request for Reconsideration”). As discussed further below, the Company believes the Proponent’s challenge to the Staff’s response should be denied as it is untimely and does not meet the standards for reconsideration.

By way of background, we submitted a no-action request (the “No-Action Request”) on behalf of the Company and with a copy to the Proponent on December 22, 2023, no later than 80 days prior to the date that the Company intended to file its definitive 2024 Proxy Materials with the Commission. The Proponent subsequently submitted to the Staff a letter, dated January 23, 2024 (the “Response Letter”), which we responded to on February 12, 2024. The Staff responded to the No-Action Request on February 29, 2024, concurring that the Company could exclude the Proposal under Rule 14a-8(i)(7).

Since receiving the Staff’s response to the No-Action Request, the Company has finalized and authorized printing of its form of proxy card, and is finalizing its proxy statement, which it must print and mail in short order in order to utilize notice and access under Rule 14a-16. Therefore, granting the Request for Reconsideration would impose significant burdens and expense on the Company. Likewise, if required, mailing supplemental proxy materials and

Office of Chief Counsel
Division of Corporation Finance
March 6, 2024
Page 2

soliciting revised proxies for the 2024 Annual Meeting of Shareholders would impose substantial time and expense burdens on the Company and create potential confusion among shareholders. As such, it would be unfair and unduly burdensome for the Staff to consider the Request for Reconsideration at this time.

Moreover, the Request for Reconsideration fails to satisfy the standards for reconsideration or further review. Under 17 C.F.R. § 202.1(d), the Staff may, in its discretion, present a request for Commission review of a Rule 14a-8 no-action response if the request “involve[s] matters of substantial importance and where the issues are novel or highly complex.” The Request for Reconsideration does not raise any new facts or arguments beyond what was already addressed in the Response Letter, which was submitted in time for adequate consideration by the Staff, and instead merely reiterates the Proponent’s opinion “that proxy voting is considered a significant policy issue that transcends ordinary business.” The *BlackRock, Inc. (McRitchie)* (avail. April 4, 2022) precedent cited in the Request for Reconsideration was already cited and discussed in the Response Letter, and it and the other precedent cited in the Response Letter involve substantively different proposals than the Proposal. In addition, the Staff’s determination that the Proposal “relates to ordinary business” is consistent with the precedent cited in the No-Action Request. As a result, the Request for Reconsideration fails to demonstrate that the Proposal presents novel or complex issues of substantial importance to the administration of Rule 14a-8. Accordingly, if the Staff considers the Request for Reconsideration, the Staff should reaffirm its prior determination and deny the Proponent’s request for Commission review.

If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company’s Corporate Secretary, at (980) 388-6878. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com.

Sincerely,



Ronald O. Mueller

Enclosures

cc: James McRitchie

Submission via Online Submission Form

March 9, 2024

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
cc: shareholderproposals@gibsondunn.com, GWalter@gibsondunn.com,
bac_shareholder_relations@bofa.com, bac_shareholder_relations@bofa.com

SEC Reference Number: 469916

Re: *Request for Reconsideration* Regarding Shareholder Proposal Submitted by James McRitchie (Proponent)

To Whom It May Concern:

Bank of America (McRitchie, February 29, 2024) was granted no-action relief under Rule 14a-8(i)(7). The Staff did not provide the rationale. I requested reconsideration on March 5, 2024. Bank of America (BAC) rebutted that request on March 6, 2024. BAC contends proxy voting is not considered a significant policy issue that transcends ordinary business despite the decision to the contrary in *BlackRock, Inc.* (McRitchie, April 4, 2022).

Reference *Whole Foods Market* (McRitchie, January 16, 2024). In that case, my Request for Reconsideration did not raise any new facts or arguments beyond what was already addressed in the Response Letter. However, the SEC Chair directed suspension and review of what led to a change in the Division's approach to such exclusions during that current proxy season to avoid turmoil and uncertainty.

Denying that proxy voting is a significant policy issue that transcends ordinary business could lead to similar confusion among shareholders, companies, and political representatives who believe the contrary.

Public Opinion and Shareholders: The influence of public opinion on investor voting and proxy advisors is substantial. Studies have shown a strong relationship between public opinion, as reflected in media coverage and surveys, and investor voting behavior. This suggests that institutional voting and changes over time reflect public opinion on corporate issues, indicating that proxy voting is a channel through which the public can communicate with corporate management and potentially influence corporate behavior.¹

¹ <https://www.unsw.edu.au/business/sites/default/files/seminars-conferences/R.%20Aggarwal.%20I.%20Erel.%20L.%20Starks%20-%20Influence%20of%20Public%20Opinion%20on%20Investor%20Voting%20and%20Proxy%20Advisors.pdf>

Companies: For companies, proxy voting is a critical component of corporate governance, allowing them to gauge shareholder sentiment on various issues. It also serves as a feedback mechanism for management and the board of directors, guiding them on areas that may require attention or improvement.²

Elected Officials and Regulatory Bodies: The regulatory framework surrounding proxy voting, including the rules and guidelines set by SEC, underscores the importance of this process ensuring transparency, accountability, and fairness in corporate governance. Elected officials and regulatory bodies recognize the significance of proxy voting in protecting investors' rights and promoting corporate responsibility.^{3 4} The INDEX Act [S.4241 in the 117th Congress (2021-2022)], seeks to return voting power from fund managers back to the beneficial owners of the shares.⁵

Corporate directors focus on maximizing profits at their individual companies since that's their fiduciary duty. However, since most portfolios are broadly diversified, their proxy votes should focus on minimizing systemic risk since 91% of their potential returns are attributable to market returns.

Unfortunately, Bank of America votes as if it were corporate directors at each company in the fund's portfolio. Offering a system stewardship option would maximize portfolio-wide returns by pursuing voting strategies designed to minimize the creation of negative social and environmental externalities. That would help our portfolios and the economy.

Nothing in the Company's submission establishes the applicability of subsection (i)(7). As a result, the Staff's position should either be reversed, or the matter should be submitted to the entire Commission for review.

Sincerely,



James McRitchie

² <https://www.investopedia.com/articles/basics/04/082704.asp>

³ <https://www.sec.gov/files/34-95266-fact-sheet.pdf>

⁴ <https://www.sec.gov/news/speech/lee-every-vote-counts>

⁵ <https://www.whitecase.com/insight-our-thinking/index-act-challenge-voting-influence-institutional-investors-may-yield>