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

DIVISION OF
CORPORATION FINANCE

April 23, 2025

Mark R. Busch
K&L Gates LLP

Re: Exact Sciences Corporation (the "Company")
Incoming letter dated February 3, 2025

Dear Mark R. Busch:

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

The Proposal asks the board of directors to adopt a new director election resignation governance provision in the Company's corporate governance principles.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(3). We 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: David Minasian
North Atlantic States Regional Council of Carpenters

K&L GATES

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February 3, 2025

VIA ELECTRONIC SUBMISSION

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

Re: Exact Sciences Corporation - Omission of Shareholder Proposal Submitted by North Atlantic States Carpenters Pension Fund

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, Exact Sciences Corporation, a Delaware corporation (the "Company" or "Exact"), to inform the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") of the Company's intention to exclude from its proxy statement and form of proxy to be filed and distributed in connection with its 2025 annual meeting of shareholders (collectively, the "2025 Proxy Materials") the shareholder proposal and supporting statement (the "Proposal") submitted by Joseph Byrne, as Trustee, on behalf of the North Atlantic States Carpenters Pension Fund (the "Proponent"). The Company hereby requests confirmation that the Staff will not recommend enforcement action to the Commission if the Company omits the Proposal from the 2025 Proxy Materials, which the Company intends to file with the Commission not less than 80 days after the date of this letter.

In accordance with the Staff guidance, we are submitting this letter electronically to the Staff through the Commission's online shareholder proposal form. Pursuant to Rule 14a-8(j), a copy of this submission is also being sent to the Proponent as notification of the Company's intention to omit the Proposal from the 2025 Proxy Materials. Rule 14a-8(k) and SLB 14D provide that a shareholder proponent is required to send to the company a copy of any correspondence that the proponent elects to submit to the Commission or the Staff. Accordingly, we hereby inform the Proponent that, if it elects to submit additional correspondence to the Commission or the Staff relating to the Proposal, the Proponent should concurrently furnish a copy of that correspondence to the undersigned.

I. The Proposal

On December 20, 2024, the Company received a letter from the Proponent submitting the Proposal for inclusion in the 2025 Proxy Materials. The text of the Proposal is set forth below and the Proposal and supporting statement are attached hereto as Exhibit A.

> **Resolved**: The shareholders of Exact Sciences Corporation ("Company") request that the Board adopt a new Director Election Resignation Governance Policy ("Resignation Policy") provision in its corporate governance principles to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Policy shall provide that each director upon joining the Board tender an irrevocable resignation conditioned on the director 's failure to receive the required majority vote support in an uncontested election. The Resignation Policy shall provide that the Board should accept a director's tendered resignation absent its finding of a compelling reason or reasons to reject the resignation, as decided by the Board in the exercise of its business judgment. The Resignation Policy shall further stipulate that if the Board rejects a director's resignation and the director remains on the Board as a "holdover" director but is not re-elected at the next annual meeting of shareholders, that such director's second tendered resignation shall be effective ninety days after the vote certification.

II. Basis for Exclusion

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 is materially false and misleading.

III. Background

Rule 14a-8(i)(3) allows a company to exclude a shareholder proposal if the "proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials." The Staff has taken the position that a shareholder proposal is excludable under Rule 14a-8(i)(3) if the proposal is 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." Section B.4. of Staff Legal Bulletin 14B (Sept. 15, 2004). The Staff has further explained that a shareholder proposal can be sufficiently misleading and therefore excludable under Rule 14a-8(i)(3) when the company and its shareholders might interpret the proposal differently such that "any action ultimately taken by the [c]ompany upon implementation [of the proposal] could be significantly different from the actions envisioned by the shareholders voting on the proposal." *Fuqua Industries, Inc.* (Mar. 12, 1991).

The Staff has repeatedly concurred with the exclusion of shareholder proposals with vague terms or ambiguous references where shareholders would not know with any certainty the matters on which they are asked to vote. When key terms in a proposal are vague or undefined, a company and shareholders may have diverging interpretations of these terms.

The Staff has permitted companies to exclude proposals seeking that the board of directors "shall make a determination as to whether there is a compelling justification for . . . any action whose primary purpose is to prevent the effectiveness of shareholder vote." *Walgreens Boots Alliance, Inc.* (Oct. 7, 2016); *Cisco Systems, Inc.* (Oct. 7, 2016); *Microsoft Corp.* (Oct. 7, 2016). In these cases, the proponent failed to define or explain what such a "compelling justification" could or should include.

Further, the Staff permitted a company to exclude, as vague and indefinite, a proposal that sought to "improve [the] guiding principles of executive compensation," noting that "[t]he proposal lacked sufficient description about the changes, actions or ideas for the company and its shareholders to consider that would potentially improve such guiding principles." *See Apple Inc.* (Dec. 6, 2019). Similarly, in permitting an exclusion of a proposal to "reform" executive compensation, the Staff noted that "neither shareholders nor the company would be able to determine with any reasonable certainty the nature of the 'reform' the proposal was requesting," and therefore, the proposal, "taken as a whole, is so vague and indefinite that it is rendered materially misleading." *Ebay, Inc.* (Apr. 10, 2019). Notably, the Staff has permitted the exclusion of proposals purporting to address financial matters that provided no guidance or direction regarding the implementation of the proposals. *See Morgan Stanley* (Mar. 12, 2013) (permitting, on grounds of vagueness, the exclusion of a proposal requesting "an extraordinary transaction resulting in the separation of one or more businesses"); *Bank of America Corp.* (Mar. 12, 2013) (permitting, on grounds of vagueness, the exclusion of a proposal requesting the formation of a committee to explore "extraordinary transactions that could enhance stockholder value"); *Fuqua Industries, Inc.* (Mar. 12, 1991) (permitting the exclusion, on grounds of vagueness, of a proposal, noting that such terms as "any major shareholder," "assets/interest" and "obtaining control" would be subject to differing interpretations); and *Exxon Corp.* (Jan. 29, 1992) (permitting the exclusion, on grounds of vagueness, of a proposal noting that such terms as "bankruptcy" and "considerable amount of money" would be subject to differing interpretations).

Just like the proposals in these no-action letters, there are many different potential interpretations of what the Proposal requires. As a result, if approved, the Company could implement the Proposal in a way that is materially different from what shareholders anticipate when they vote on it.

IV. The Proposal is Materially False and Misleading

The Proposal would require that "the Board...accept a director's tendered resignation absent its *finding* of a *compelling reason or reasons* to reject the resignation, as decided by the Board *in the exercise of its business judgment*." (Emphasis added). The Proposal is inherently vague and internally inconsistent such 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." See *Staff Legal Bulletin No. 14B* (Sept. 15, 2004). In addition, established principles of Delaware law (discussed below) make it "impossible for the board of directors or the stockholders at large to comprehend precisely what the proposal would entail." *New York City Employees' Retirement System v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992); *Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961).

First, "compelling reason or reasons" is as much inherently misleading, vague and indefinite as the "compelling justification" standard that the Delaware Supreme Court recently found to be "unworkable." See *Coster v. UP Cos.*, 300 A.3d 656, 669 (Del. 2023) ("The Blasius 'compelling justification' standard of review turned out to be unworkable in practice.") (citations omitted). The Staff has recognized this by permitting companies to exclude proposals purporting to require the board of directors to have a "compelling justification" for its actions. *Cisco Systems, Inc.* (Oct. 7, 2016) (Proposal: "The board shall not take any action whose primary purpose is to prevent the effectiveness of shareholder vote without a compelling justification for such action."); *Microsoft Corporation* (Oct. 7, 2016) (same); *Walgreens Boots Alliance, Inc.* (Oct. 7, 2016) (Proposal: "Before the board takes any action whose primary purpose is to prevent the effectiveness of shareholder vote, it shall make a determination as to whether there is a compelling justification for such action.").

There is no information, definition, or example in the Proposal or supporting statement describing what could potentially constitute a "compelling reason." In fact, there are innumerable ways in which shareholders could interpret what a "compelling reason" standard would entail. Accordingly, the term "compelling reason" is unclear, undefined by the Proposal, and without an ordinary, commonly understood meaning in the context of the Proposal. The lack of any defining or explanatory language in the Proposal and supporting statement are likely to cause confusion as to what standard is meant by a "compelling reason." Ultimately, the Proposal's failure to define or explain this key term renders the Company and shareholders unable to understand or determine with any reasonable certainty exactly what actions or measures the Proposal requires or what changes to the Company's current governance policies and procedures could be undertaken if the Proposal were to be voted on by shareholders or implemented by the Company (if adopted).

Second, as discussed in greater detail below, the Proposal is internally inconsistent, rendering it impossible to understand and implement. The Proposal would require the Company's Board of Directors (the "Board") to find "a compelling reason or reasons to reject the resignation" and that finding to be made "by the Board in the exercise of its business judgment."

Under established Delaware law, "[t]he default standard of [judicial] review is the business judgment rule, which is a 'presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 459 (Del. 2024) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000)). "If the business judgment standard of review applies, a court will not second guess the decision of disinterested and independent directors. The reviewing court will only interfere if the board's decision lacks any rationally conceivable basis, thereby resulting in waste or bad faith." *Id.*

At the same time that the Proposal instructs the Board to adhere to Delaware's business judgment rule standard, the Proposal seeks to create a "more demanding" standard. The supporting statement indicates that the Proposal would establish "a new demanding director resignation governance guideline" and "a *more demanding* director resignation review process, requiring the Board to articulate a compelling reason or reasons when it rejects the tendered resignation…." (Emphasis added). Delaware courts have established a more stringent "enhanced scrutiny" standard of review, which it applies in certain circumstances *instead* of the business judgment rule standard of review. See *e.g., Match*, 315 A3d at 459-460 ("Even though business judgment is the default standard of review, the level of judicial scrutiny increases in certain situations when the danger of conflicts is inherent in the board's decision-making process…. Recognizing the inherent potential for conflicts, a reviewing court will apply an enhanced scrutiny standard of review."). The Proposal's supporting statement therefore suggests that the intention of the Proposal is to establish the higher "enhanced scrutiny" standard of review rather than the "default" "business judgment" standard of review. Yet, the

Proposal would concurrently require the Board to exercise its "business judgment." The Proposal is inherently inconsistent, unclear and impossible to implement with any reasonable certainty.

For these reasons, and consistent with published positions of the Staff, the Company respectfully submits that the Proposal can be excluded from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(3).

V. Conclusion

Based upon the foregoing analysis, we respectfully request the Staff's concurrence with the Company's view or, alternatively, that the Staff confirm that it will not recommend any enforcement action if the Company excludes the Proposal from its 2025 Proxy Materials.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of the Company's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (704) 331-7440.

Very truly yours,

Mark Busch

Mark R. Busch

Enclosures

cc: Joseph Byrne

David Minasian

NORTH ATLANTIC STATES REGIONAL COUNCIL OF CARPENTERS

United Brotherhood of Carpenters and Joiners of America

750 DORCHESTER AVENUE
BOSTON, MA 02125-1132

TELEPHONE [redacted]
FAX [redacted]

JOSEPH BYRNE
EXECUTIVE SECRETARY - TREASURER

SENT VIA OVERNIGHT DELIVERY

December 17, 2024

James Herriott
Senior VP, General Counsel and Secretary
Exact Sciences Corporation
5505 Endeavor Lane
Madison, Wisconsin 53719

Dear Mr. Herriott:

I hereby submit the enclosed shareholder proposal ("Proposal") on behalf of the North Atlantic States Carpenters Pension Fund ("Fund"), for inclusion in the Exact Sciences Corporation ("Company") proxy statement to be circulated in conjunction with the next annual meeting of shareholders. The Proposal relates to the issue of director resignations and is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission proxy regulations.

The Fund is the beneficial owner of shares of the Company's common stock, with a market value of at least $25,000, which shares have been held continuously for more than a year prior to and including the date of the submission of the Proposal. Verification of this ownership by the record holder of the shares, State Street Bank and Trust Company, will be sent under separate cover. The Fund intends to hold the shares through the date of the Company's next annual meeting of shareholders. Either the undersigned or a designated representative will present the Fund's Proposal for consideration at the annual meeting of shareholders.

If you would like to discuss the Proposal, please contact David Minasian at [redacted] Mr. Minasian will be available to discuss the proposal on Monday, January 6, 2025, or Monday, January 13, from 1:00PM to 5:00PM (ET) each day or other mutually agreeable date and time. Please forward any correspondence related to the proposal to Mr. Minasian, North Atlantic States Regional Council, 29 Endicott Street, Worcester, MA 01610 or at the email address above.

Sincerely,

Joseph Byrne
Fund Trustee

cc. David Minasian
Edward J. Durkin

Enclosure

Director Election Resignation Governance Policy Proposal:

Resolved: The shareholders of Exact Sciences Corporation ("Company") request that the Board adopt a new Director Election Resignation Governance Policy ("Resignation Policy") provision in its corporate governance principles to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Policy shall provide that each director upon joining the Board tender an irrevocable resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Resignation Policy shall provide that the Board should accept a director's tendered resignation absent its finding of a compelling reason or reasons to reject the resignation, as decided by the Board in the exercise of its business judgment. The Resignation Policy shall further stipulate that if the Board rejects a director's resignation and the director remains on the Board as a "holdover" director but is not re-elected at the next annual meeting of shareholders, that such director's second tendered resignation shall be effective ninety days after the vote certification.

Supporting Statement: The Resignation Policy sets a new demanding director resignation governance guideline to reflect shareholder voting sentiment in director elections. Delaware corporate law states that each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. An incumbent director who does not receive the required vote for election may continue to serve as a "holdover" director. The Company's current director resignation guideline requires incumbent directors to tender a resignation if they do not receive the requisite vote to be re-elected in an uncontested annual election. Directors on the Board's Corporate Governance and Nominating Committee will then review the tendered resignation and recommend to the Board whether to accept or reject it.

The proposed Resignation Guideline Policy sets a more demanding director resignation review process, requiring the Board to articulate a compelling reason or reasons when it rejects a tendered resignation, thus allowing an unelected director to continue to serve. Importantly, the Resignation Policy further establishes that if a "holdover" director again fails to be re-elected at the next annual meeting of shareholders, the new resignation is effective ninety days following the election vote certification. While the Guideline Resignation Policy provides the Board latitude to reject the first resignation of an incumbent director who does not receive majority vote support, it honors the shareholder vote as the final word on a "holdover" director's second election defeat.

Shareholder director election voting rights under Delaware corporate law are foundational rights in the governance of corporations. The majority vote director election standard adopted by the Company gives shareholders voting rights that have legal effect. It is important that corporate director resignation policies, guidelines and bylaws not undermine shareholder voting rights. The proposed Resignation Policy establishes shareholder voting in director elections as a more consequential governance right, striking a proper balance between board discretion and shareholder voting rights.

From: Jim Herriott <[redacted]>
Sent: Wednesday, January 22, 2025 6:10 PM
To: David Minasian <[redacted]>
Cc: Busch, Mark <Mark.Busch@klgates.com>; Henry Weiner [redacted]>
Subject: Exact Sciences - Shareholder Proposal

This Message Is From an External Sender

This message came from outside your organization.

Mr. Minasian,

Thank you for taking the time to discuss your proposal with me last Monday. Since our discussion, we have spent a significant amount of time thoughtfully considering your proposal, including with Delaware counsel, and I wanted to share our thoughts and conclusions with you.

I want to start by first saying we fully acknowledge that our board of directors is required to uphold its Delaware common law fiduciary duties to our stockholders in making a decision under our existing Corporate Governance Guidelines to accept or reject the resignation of a director failing to receive a majority vote in an uncontested election. We believe adopting the director resignation policy as described in the proposal, however, would violate Delaware law and is, in all events, unworkable in application.

First, despite the uncertainty that currently exists under Delaware law given some of the 2024 Delaware Chancery Court decisions that are on appeal to the Delaware Supreme Court and the adoption of new Section 122(18) of the DGCL, we don't believe that the Corporate Governance Guidelines are permitted to modify the fiduciary duties owed by directors under Delaware common law or the standard of judicial review applicable to director conduct. The proposal effects such modifications by requiring a "compelling reason" to reject a resignation under our Corporate Governance Guidelines.

Second, I would like to point your attention to the recent decision of the Delaware Supreme Court in *Coster v. UIP Companies, Inc.*, 300 A.3d 656, 672 (Del. 2023), in which the Delaware Supreme Court concluded that the *Blasius* "compelling justification" standard was "unworkable in practice." *Coster*, 300 A.3d at 669. Specifically, the Delaware Supreme Court stated that "[t]he *Blasius* 'compelling justification' standard of review turned out to be unworkable in practice. Once the court required a compelling justification to justify the board's action, the outcome was, for the most part, preordained." *Id.* (citations omitted).

Further, we are concerned that the proposal is materially misleading and, therefore, violates Rule 14a-9 of the Exchange Act because what constitutes a "compelling reason" is unclear and uncertain. Just as the Delaware Supreme Court found the "compelling justification" standard "unworkable in practice" in the *Coster* decision, the Company and our board of directors find, and we believe our stockholders will find, the "compelling reason" standard to be unworkable in application. For these reasons we cannot adopt the policy revisions outlined in the proposal.

However, our board understands and appreciates the significance of a stockholder vote resulting in a director receiving less than a majority vote in an uncontested election and acknowledges its indispensable obligation under Delaware law to exercise its fiduciary duties in applying our existing director resignation policy. Therefore, we would be willing to revise our Corporate Governance Guidelines to include language expressly requiring the board (and the Corporate Governance and Nominating Committee) to exercise its Delaware common law fiduciary duties in connection with the decision to accept or reject the resignation of a director that does not receive a majority vote in an uncontested election.

Please let me know if you would like to discuss.

Best regards,

Jim

James Herriott
Senior Vice President, General Counsel and Secretary

Mobile: [redacted] **| Office:** [redacted]
Exact Sciences Corporation | 5505 Endeavor Lane, Madison, WI 53719

EXACT SCIENCES