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

DIVISION OF
CORPORATION FINANCE

April 22, 2024

Carmen X. W. Lu
Wachtell, Lipton, Rosen & Katz

Re: DICK'S Sporting Goods, Inc. (the "Company")
Incoming letter dated February 8, 2024

Dear Carmen X. W. Lu:

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

The Proposal seeks a bylaw amendment that requires the board of directors to waive the business judgment rule in any stockholder action for breach of the duty of care or loyalty which adequately pleads that the defendants acted on political or ideological views.

We are unable to concur in your view that the Company may exclude the Proposal under Rules 14a-8(i)(2) or 14a-8(i)(6). In our view, the Company has not met its burden of demonstrating that the Proposal, if implemented, would cause the company to violate Delaware state law. *See* Staff Legal Bulletin No. 14B (Sept. 15, 2004).

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

Sincerely,

Rule 14a-8 Review Team

cc: Scott Shepard
National Center for Public Policy Research

WACHTELL, LIPTON, ROSEN & KATZ

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MENG LU

February 8, 2024

VIA ONLINE SUBMISSION

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

Re: *DICK'S Sporting Goods, Inc.*
Shareholder Proposal Submitted by the National Center for Public Policy Research

Ladies and Gentlemen:

This letter is submitted on behalf of DICK'S Sporting Goods, Inc. (the "Company") to confirm to the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") that the Company intends to exclude from its proxy statement and form of proxy for its 2024 annual meeting of shareholders (collectively, the "2024 Proxy Materials") a shareholder proposal (the "Proposal") and statement in support thereof received from the National Center for Public Policy Research (the "Proponent").

For the reasons outlined below, we hereby respectfully request that the Staff concur in our view that the Proposal may be properly excluded from the 2024 Proxy Materials.

In accordance with Rule 14a-8(j) of the Securities Exchange Act of 1934, this letter is being filed with the Commission no later than eighty (80) calendar days before the Company intends to file its definitive 2024 Proxy Materials with the Commission, and we are contemporaneously sending a copy of this letter and its attachments to the Proponent. On behalf of the Company, we confirm that the Company will promptly forward to the Proponent any Staff response to this no-action request that the Staff transmits only to the Company.

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, we are taking this opportunity to inform the Proponent that if 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 pursuant to Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008).

SUMMARY OF THE PROPOSAL

The Proposal sets forth the following proposed resolution for the vote of the Company's shareholders at its 2024 annual meeting of shareholders:

> RESOLVED: Pursuant to Section 109 of the Delaware General Corporation Law and Article XIV of the bylaws of Dick's Sporting Goods, Inc., stockholders of Dick's hereby amend the bylaws to add the following Section 12:
>
> The board of directors shall waive the protections of the business judgment rule in any stockholder action for breach of the duty of care or loyalty which adequately pleads that that the defendants acted on political or ideological views, which shall presumptively include any conduct by the Company that boycotts a State of the United States. The board of directors may decline to exercise such waiver if the board expressly affirms the challenged conduct was based on a net-positive expected value calculation or was implemented directly or indirectly by a viewpoint diverse board.

A full copy of the Proposal and statement in support thereof is attached to this letter as Exhibit A hereto.

BASIS FOR EXCLUSION

The Company respectfully requests that the Staff concur in its view that the Proposal may be excluded from the 2024 Proxy Materials pursuant to:

- Rule 14a-8(i)(2) because the Proposal would cause the Company to violate Delaware law;
- Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal; and

- Rule 14a-8(i)(3) because the Proposal is inherently vague and indefinite, and subject to multiple interpretations, such that the Company and its shareholders voting on the Proposal would not know with any reasonable certainty exactly what actions or measures the Proposal requires.

ANALYSIS

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

Rule 14a-8(i)(2) permits a company to exclude a shareholder proposal if implementation of the proposal would cause the company to violate any state, federal or foreign law to which it is subject. The Company is incorporated under the laws of the State of Delaware. For the reasons set forth below and in the legal opinion regarding Delaware law from Morris, Nichols, Arsht & Tunnell LLP, attached hereto as Exhibit B (the "Delaware Counsel Opinion"), the Company believes that the Proposal is excludable under Rule 14a-8(i)(2) because, if implemented, the Proposal may cause the Company to violate Delaware law in several respects.

First, the Proposal seeks to implement a bylaw that would eliminate the business judgment standard of review for certain actions taken by the Company's board of directors (the "Board"). The business judgment rule is a standard of judicial review that has long been applied by the Delaware courts to board actions. Delaware law, as a general matter, does not permit a corporation from using its bylaws to modify the standard of judicial review for board actions. This issue has been directly addressed in case law where the Delaware courts have expressly held that modifications to judicial standards of review are only permitted by an affirmative act of the Delaware General Assembly. The Delaware General Corporation Law (the "DGCL") sets forth limited instances where the judicial standard of review may be modified but such instances do not include board actions that implicate political or ideological matters as contemplated by the Proposal. In fact, as the Delaware Counsel Opinion notes, the Delaware Chancery Court last year rejected application of a heightened standard of review in *Simeone* v. *Walt Disney Co.* in connection with a complaint seeking books and records to investigate alleged mismanagement arising from board actions relating to certain political and ideological matters. If implemented, the Proposal would violate both the DGCL and Delaware case law.

Second, the Proposal would also contradict the Company's Certificate of Incorporation which eliminates all money damages liability in connection with claims stemming from a director's breach of duty of care. As explained further in the Delaware Counsel Opinion, the Proposal, if implemented, would expose directors to liability, including money damages liability, and place the bylaws in direct conflict with the Company's Certificate of Incorporation. Delaware law, however, does not permit a bylaw to contradict the same company's certificate of incorporation.

Third, the Proposal would unlawfully force the Company's directors to waive a key protection and defense in the event of litigation. The business judgement rule affords directors certain defenses against breach of fiduciary duty claims. The Proposal, if implemented, would eliminate such defenses without the prior consent of individual directors. Given that directors' liability in breach of fiduciary duty claims are assessed individually, the Proposal would be contrary to

Delaware law which provides that a party may waive an argument or defense in litigation only through his or her own voluntary conduct, or the conduct of his or her counsel or other agent.

Finally, the Proposal is unlawful under Delaware law because it seeks to constrain Board authority and action in a manner that could prevent the Board from fully discharging its fiduciary duties. As discussed further in the Delaware Counsel Opinion, Section 141(a) of the DGCL vests a board of directors with the exclusive power to oversee the management of the corporation, and this management power may only be limited by the certificate of incorporation, not the bylaws. The Proposal, however, seeks to circumscribe the Board's authority to act on matters relating to political or ideological issues. Delaware case law has previously held that intragovernance documents outside the certificate of incorporation, including bylaw amendments, that would curtail a board's ability to *fully* exercise its fiduciary duties are prohibited under Delaware law.

The Staff has consistently permitted the exclusion of proposals which, if implemented, would result in a violation of state law, including Delaware law. *See Alaska Air Group, Inc.* (Mar. 20, 2023) (permitting exclusion of a proposal requesting, among other things, the board of directors to take steps to enable both street name and non-street name shareholders to formally participate in acting by written consent on the basis that the proposal, if implemented, would violate Section 228 of the DGCL); *Quotient Technology Inc.* (May 6, 2022) (permitting exclusion of a proposal requesting the board of directors disqualify all shares owned and/or controlled by executive officers from voting to approve a tax benefits preservation plan on the basis that Delaware law prohibits unilateral board actions that disenfranchised stockholders); *eBay Inc.* (Apr. 1, 2020) (permitting exclusion of a proposal requesting the company permit employees to elect at least 20% of the board of directors on the basis that such action would be contrary to Sections 211(b) and 212(a) of the DGCL); *PayPal Holdings, Inc.* (Mar. 9, 2018) (permitting exclusion of a proposal requesting, among other things, the board of directors make certain amendments to the company's charter in violation of Delaware law); *The Goldman Sachs Group, Inc.* (Feb. 1, 2016) (permitting exclusion of a proposal requesting the board of directors include outside experts on the compensation committee on the basis that such action would violate Section 141(c) of the DGCL).

In addition, the Staff has also specifically permitted the exclusion of proposals which, if implemented, would create intra-governance restrictions on the board in violation of Section 141(a) of the DGCL. For example, in *Bank of America Corporation* (Feb. 23, 2012), the Staff permitted the exclusion of a proposal requesting the board of directors take action to minimize the indemnification of directors to the extent fully permissible under the DGCL on the basis that such action would violate the prohibition on intra-governance restrictions under Delaware law. *See also Monsanto Company* (Nov. 7, 2008, *recon. denied,* Dec. 18, 2008) (permitting exclusion of a proposal requesting the board of directors to require all directors to take an oath of allegiance to the United States Constitution on the basis that such action constituted an intra-governance restriction that would limit directors from fully discharging their duties under Section 141(a) of the DGCL).

The Proposal would, if adopted, violate Delaware law in several respects. Accordingly, the Proposal may be properly excluded from the Company's 2024 Proxy Materials under Rule 14a-8(i)(2).

II. The Proposal May Be Excluded under Rule 14a-8(i)(6) Because the Company Lacks the Power to Implement the Proposal.

Rule 14a-8(i)(6) allows a company to exclude a proposal if the company would lack the power or authority to implement the proposal. As described above, the Proposal would, if implemented, cause the Company to violate Delaware law. The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(6) of proposals that would cause the company to violate the law of the jurisdiction of its incorporation. *See Arlington Asset Investment Corp.* (Apr. 23, 2021) (permitting exclusion of a proposal that would violate Virginia law); *eBay Inc.* (Apr. 1, 2020) (permitting exclusion of proposal that would violate Delaware law); *Highlands REIT, Inc.* (Feb. 7, 2020) (permitting exclusion of proposal that would violate Maryland law); *NiSource Inc.* (Mar. 22, 2010) (permitting exclusion of proposal that would violate Delaware law); *Schering-Plough Corp.* (Mar. 27, 2008) (permitting exclusion of proposal that would violate New Jersey law), *AT&T, Inc.* (Feb. 19, 2008) (permitting exclusion of a proposal that would violate Delaware law).

III. The Proposal May Be Excluded under Rule 14a-8(i)(3) Because It Is Contrary to the Proxy Rules.

Pursuant to Rule 14a-8(i)(3), the Company may exclude a shareholder proposal from its proxy materials 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 interpreted Rule 14a-8(i)(3) to include shareholder proposals that are vague and indefinite, and the Staff has consistently concurred with exclusion of shareholder proposals on the basis 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." Staff Legal Bulletin No. 14B (Sept. 15, 2004). The courts have also ruled that "shareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote" and that a proposal should be excluded when "it [would be] 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).

Consequently, the Staff has routinely permitted the exclusion of proposals that fail to define key terms, contain only general or uninformative references as to steps to be taken, or otherwise fail to provide sufficient clarity or guidance to enable either shareholders or the company to understand how the proposal would be implemented. For example, the Staff has noted that a proposal may be excludable when the "meaning and application of terms and conditions . . . in the proposal would have to be made without guidance from the proposal and would be subject to differing interpretations" such that "any action ultimately taken by the company upon implementation [of the proposal] could be significantly different from the actions envisioned by the shareholders voting on the proposal." *See Fuqua Industries, Inc.* (Mar. 12, 1991) (permitting exclusion of a proposal to prohibit "any major shareholder . . . which currently owns 25% of the Company and has three Board seats from compromising the ownership of the other stockholders," where the meaning and application of such terms as "any major shareholder," "assets/interest" and "obtaining control" would be subject to differing interpretations). *See also*

Apple Inc. (Dec. 22, 2021) (permitting exclusion of a proposal requesting that the company convert to a "public benefit corporation" without clarifying how the company should implement such proposal); *The Boeing Company* (Feb. 23, 2021) (permitting exclusion of a proposal requiring that 60% of the company's directors "must have an aerospace/aviation/engineering executive background" where such phrase was undefined); *Apple Inc.* (Dec. 6, 2019) (permitting 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"); *eBay Inc*. (Apr. 10, 2019) (permitting exclusion of a proposal requesting that the company "reform the company's executive compensation committee" because "neither shareholders nor the Company would be able to determine with any reasonable certainty the nature of the 'reform' the [p]roposal is requesting," and that, therefore, "the proposal, taken as a whole, is so vague and indefinite that it is rendered materially misleading"); *Cisco Systems, Inc.* (Oct. 7, 2016) (permitting exclusion of a proposal requesting that the board "not take any action whose primary purpose is to prevent the effectiveness of shareholder vote 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); and *AT&T Inc.* (Feb. 21, 2014) (permitting 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).

The Proposal includes two key terms that are not clearly defined and may be subject to a wide range of interpretations. First, the Proposal provides that directors may decline to waive the protections of the business judgment rule if the board "expressly affirms the challenged conduct was based on a net-positive expected value calculation." Neither the Proposal nor the supporting statement provides clear guidance on how a "net-positive expected value calculation" would be determined, including what factors the Board would need to consider and how such factors ought to be weighed against each other. While the supporting statement seems to imply that the focus on any "expected value calculation" should focus on financial outcomes, neither the Proposal nor the supporting statement provides guidance on what kinds of financial metrics should be taken into consideration and over what time horizon. Consequently, any shareholder and the Company, in interpreting and implementing the Proposal, if adopted, would not be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires.

In addition, the Proposal further provides that directors may decline to waive the protections of the business judgment rule if "the challenged conduct . . . was implemented directly or indirectly by a viewpoint diverse board." Again, neither the Proposal nor the supporting statement provides any guidance as to what criteria the Board would need to meet to be deemed "viewpoint diverse." In the absence of any guidance, there can be a range of interpretations as to what may constitute a "viewpoint diverse" board, including a board that may have a diversity of perspectives on the particular issue in question or a board whose members possess diverse perspectives more broadly. Diversity can also be measured in different ways whether it be through the background and experiences of board members or their philosophical, religious or political views. Given the significant range of interpretations that can be given to the term "viewpoint diverse," it is unlikely that any shareholder and the Company, in interpreting and implementing the Proposal, if adopted, would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires.

Given that the Proposal includes key terms that are undefined and subject to an indefinite range of interpretations, we ask that the Staff concur that the Company may exclude the Proposal from its 2024 Proxy Materials under Rule 14a-8(i)(3) on the basis that the Proposal is inherently vague and indefinite, in violation of Rule 14a-9.

CONCLUSION

Based on the foregoing analyses, the Company respectfully requests 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 the 2024 Proxy Materials.

If we can be of any further assistance in this matter, please do not hesitate to call me at (212) 403-1138. If the Staff is unable to concur with the Company's conclusions without additional information or discussions, the Company respectfully requests the opportunity to confer with members of the Staff prior to the issuance of any written response to this letter. In accordance with Staff Legal Bulletin No. 14F, Part F (Oct. 18, 2011), please kindly send your response to this letter by email to CXWLu@wlrk.com.

Very truly yours,

Carmen X. W. Lu

Enclosures

cc: Elizabeth H. Baran, DICK'S Sporting Goods, Inc.
Eric S. Klinger-Wilensky, Morris, Nichols, Arsht & Tunnell LLP
James D. Honaker, Morris, Nichols, Arsht & Tunnell LLP
Stefan Padfield, National Center for Public Policy Research

EXHIBIT A

Proponent's Proposal and Supporting Statement

RECEIVED

JAN 2 2023

DICK'S Sporting Goods, Inc.
Legal Department

December 29, 2023

Via FedEx to

Corporate Secretary, Legal Department,
DICK'S Sporting Goods, Inc.
345 Court Street
Coraopolis, PA 15108

Dear Corporate Secretary,

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the DICK'S Sporting Goods, Inc. (the "Company" or "Dick's") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations.

I submit the Proposal as Deputy Director of the Free Enterprise Project of the National Center for Public Policy Research, which has continuously owned Company stock with a value exceeding $2,000 for at least 3 years prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2024 annual meeting of shareholders. A proof of ownership letter is available upon request.

Pursuant to interpretations of Rule 14(a)-8 by the Securities & Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal Jan. 16, 2024, or Jan. 17, 2024, from 9-11:59 a.m. eastern. If that proves inconvenient, I hope you will suggest some other times to talk. Please feel free to contact me at [redacted] so that we can determine the mode and method of that discussion.

Copies of correspondence or a request for a "no-action" letter should be sent to me at the National Center for Public Policy Research, 2005 Massachusetts Ave. NW, Washington, DC 20036 and emailed to [redacted]

Sincerely,

Stefan Padfield

cc: Scott Shepard, FEP Director
Enclosures: Shareholder Proposal

Improving Accountability for Shareholder Value

Whereas:

Corporate decisions are subject to fiduciary duties.

Fiduciary duties include "acting to promote the value of the corporation for the benefit of its stockholders."[1]

Corporate decision-making based on an expected net-positive value calculation is consistent with these duties while decisions prioritizing political or ideological views are not.

The Delaware Supreme Court has recognized that in the context of defending against a takeover, the "omnipresent specter" of directors acting out of self-interest to protect their positions warrants subjecting their decisions to enhanced scrutiny rather than applying the deferential "business judgment rule" presumption of care, loyalty, and good faith – thereby shifting the burden of proof to the corporate decision-makers.[2]

In today's hyper-politicized business climate, there is a similar "specter of political bias" surrounding many corporate decisions.

Legislation introduced in the United States Senate would require publicly traded companies to adopt a bylaw committing to waiving the business judgment rule presumption in cases where a corporation engages in politically divisive conduct.[3]

Subjecting politicized decisions to enhanced scrutiny should benefit shareholders by (1) increasing the incentive for corporate decision-makers to only take such actions when it is demonstrably in the best interest of the corporation, and (2) signaling that Dick's is committed to respecting diverse viewpoints and not interfering with the political process.

Resolved: Pursuant to section 109 of the Delaware General Corporation Law and Article XIV of the bylaws of Dick's Sporting Goods, Inc., stockholders of Dick's hereby amend the bylaws to add the following Section 12:

> The board of directors shall waive the protections of the business judgment rule in any stockholder action for breach of the duty of care or loyalty which adequately pleads that the defendants acted on political or ideological views, which shall presumptively include any conduct by the Company that boycotts a State of the United States. The board of directors may decline to exercise such waiver if the board expressly affirms the challenged conduct was based on a net-positive expected value calculation or was implemented directly or indirectly by a viewpoint diverse board.

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[1] *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

[2] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

[3] https://corpgov.law.harvard.edu/2021/10/06/proposed-legislation-to-address-the-problem-of-woke-corporations/ ; https://www.rubio.senate.gov/wp-content/uploads/_cache/files/e89472b3-4fc2-4060-93b3-2f8ded53be12/ABB99C7DC3B70C1225E3AA655F6548D6.09.23.21-final-rubio-mind-your-own-business-act.pdf

Supporting Statement:

Politicized corporate decision-making has recently arguably cost corporations like Disney, Target, and Anheuser-Bush billions of dollars in market capitalization.[4] Dick's has itself arguably been hurt financially in the past by prioritizing political views when Ed Stack, then chairman and chief executive, decided that Dick's should "take a stand" on gun violence by foregoing the sale of assault-style weapons, and said "I don't really care what the financial implication is."[5] Implementing this proposal would commit Dick's to focusing on shareholder value. The bylaw can be analogized to the decision of many corporations to end the use of staggered boards, which protected incumbent directors but thwarted the market for corporate control.[6]

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[4] https://www.newsweek.com/target-latest-proofgoing-woke-means-going-broke-opinion-1803675

[5] https://perma.cc/E4VS-XAV6 ; https://perma.cc/2382-LKMU .

[6] https://archive.nytimes.com/dealbook.nytimes.com/2012/03/20/the-case-against-staggered-boards/

Exhibit B

Opinion of Morris, Nichols, Arsht & Tunnell LLP

Morris, Nichols, Arsht & Tunnell llp

1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347

(302) 658-9200
(302) 658-3989 FAX

February 7, 2024

DICK'S Sporting Goods, Inc.
345 Court Street
Coraopolis, Pennsylvania 15108

Ladies and Gentlemen:

We write to confirm our advice on a stockholder proposal (the "Proposal") submitted by the Free Enterprise Project of the National Center for Public Policy Research (the "Proponent") to DICK'S Sporting Goods, Inc., a Delaware corporation (the "Company"), to include in the Company's proxy materials for its next annual meeting of stockholders. In our opinion, the Company would violate Delaware law if the Proposal were implemented. We explain the reasons for our opinion below.

Overview.

The Proposal would automatically amend the Company's Amended and Restated Bylaws, adopted on June 6, 2012 (the "Company's Bylaws"). The new bylaw imposed by the Proposal (the "Bylaw") would force directors to waive the protections of the business judgment rule if a complaint "adequately pleads" that the Company's Board of Directors (the "Board") acted on political or ideological views. The Bylaw would have the business judgment rule apply only if the Board satisfies a "net-positive expected value" calculation required by the Bylaw or if the Board is "viewpoint diverse."

The Delaware courts use the business judgment rule to review ordinary business decisions. When the rule applies, the courts defer to the directors' business decision. Less than a year ago, the Delaware Court of Chancery confirmed that corporate action on a political issue is an ordinary business decision. The Proposal would therefore alter the deferential standard of review for Board decisions and upset the liability protections of directors. This means the Proposal would violate Delaware law for several independent reasons:

- Delaware law prohibits a corporation from using its bylaws to modify a standard of review (like the business judgment rule) that the court uses to review director action. The Delaware courts have identified limited exceptions where modification is permitted, but those exceptions do not apply to the Proposal.

- Directors would be exposed to potential personal liability for breach of the duty of care if the new Bylaw requirements are not satisfied. This is at odds with the Company's Amended and Restated Certificate of Incorporation (the "Certificate"), which eliminates money damages liability for all director breaches of the duty of care. A bylaw cannot contradict the certificate of incorporation under Delaware law.

- The Proposal would force the directors, without their consent, to waive the business judgment rule, which is a powerful argument and defense for directors in litigation against them. These protections cannot be waived without the consent of each individual director. The forced waiver is therefore invalid.

- The Proposal would effectively limit the Board's power to act on political or ideological issues unless the Proposal's novel conditions are satisfied. Delaware statutory and case law prohibit the adoption of bylaws that limit a board's substantive authority to make decisions on fundamental management issues. The Proposal would violate this law as well.

The Proposal.

The Proposal reads as follows:

> Resolved: Pursuant to Section 109 of the Delaware General Corporation Law and Article XIV of the bylaws of Dick's Sporting Goods, Inc., stockholders of Dick's hereby amend the bylaws to add the following Section 12:
>
> The board of directors shall waive the protections of the business judgment rule in any stockholder action for breach of the duty of care or loyalty which adequately pleads that the defendants acted on political or ideological views, which shall presumptively include any conduct by the Company that boycotts a State of the United States. The board of directors may decline to exercise such waiver if the board expressly affirms the challenged conduct was based on a net-positive expected value calculation or was implemented directly or indirectly by a viewpoint diverse board.

The Business Judgment Rule.

The Proposal would require directors to waive "the protections of the business judgment rule." This rule is the standard the Delaware courts use to review most business decisions to determine whether directors have breached their fiduciary duties. The rule requires the courts to refrain from second-guessing the merits of a board's business decision absent properly pleaded allegations that the directors have breached one or more of their fiduciary duties of care or loyalty (including the duty to act in good faith).[1] The rule has been described by the Delaware Supreme Court:

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1 *See, e.g.*, *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993).

> Our [Delaware] law presumes 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. Those presumptions can be rebutted if the plaintiff shows that the director breached their fiduciary duty of care or loyalty or acted in bad faith. If that is shown the burden shifts to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders.[2]

As described by the Court of Chancery, "the core rationale of the business judgment rule . . . is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information."[3] Thus, when the rule applies, the courts will not substitute their judgment for the judgment of directors, and an action for breach of fiduciary duty against the directors is dismissed early in litigation, typically for a plaintiff's failure to state a claim in its complaint.[4] When the rule does not apply, the directors must demonstrate that their actions were "entirely fair" to the corporation and its stockholders. A court applying entire fairness must necessarily substitute its views for those of the board, as "[n]ot even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness."[5] "Entire fairness" is an onerous standard of review, often requiring a trial. If the Court determines that the directors' actions were not fair, they will likely owe money damages to the corporation or its stockholders.[6]

The Proposal contradicts the business judgment rule.

The Proposal purports to force the directors to "waive the protections of" the business judgment rule if the directors are sued for breach of the duty of care or loyalty for causing the Company to act "on political or ideological views," including an act to "boycott a State of the United States." The directors may "decline to exercise" the waiver of the business judgment rule only if the Board expressly affirms its decision was based on a "net-positive expected value calculation" or was implemented by a "viewpoint diverse board."

The Proposal would cause an outcome opposite to a recent Delaware decision involving The Walt Disney Company, where the Disney board publicly opposed certain legislation

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2 *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 52 (Del. 2006).

3 *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 313-14 (Del. 2015).

4 The Delaware courts will sometimes apply an intermediate, reasonableness standard of review "before the protections of the business judgment rule may be conferred." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003) (citations and internal quotations omitted). This predicate to application of the business judgment rule is applied "when directors face subtle conflicts and situational pressures that could undermine the integrity of their decisions." *In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, 2024 WL 262322, at *2 (Del. Ch. Jan. 24, 2024). For the reasons set out below, this standard is inapplicable here.

5 *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

6 *See, e.g., In re Emerging Communs, Inc. S'holder Litig.*, 2004 WL 1305745, at *38-43 (Del. Ch. May 3, 2004) (awarding money damages to stockholders because directors acted unfairly in approving a merger).

adopted by Florida.[7] The legislation related to limiting classroom instruction on gender and sexual orientation issues. Disney's business depends on its relationships with its employees and other partners, and these groups criticized Disney for not mounting strong opposition to the legislation. Fearing damage to these relationships, the board decided to publicly oppose the legislation. Florida later revoked certain benefits afforded to Disney. A stockholder asked to inspect company records, asserting that the board's opposition to the legislation evidenced director wrongdoing and mismanagement. The Court held that the "[t]he plaintiff is not describing potential wrongdoing. He is critiquing a business decision."[8] The Court described the board's decision to oppose the legislation as an "ordinary business decision," noting that while investors may have different views on these issues, "stockholders invest with the understanding that the board is empowered to direct the corporation's affairs. . . . The board's action need only be rationally related to building the company's long-term value."[9] Although in *Disney* the plaintiff argued that the directors were "motivated by personal beliefs because several Board members are actively involved with political organizations such as the Human Rights Campaign that adamantly opposed [the legislation,]" the Court held "[t]hat some directors may be involved with a non-profit organization does not itself create a conflict of interest—much less undermine the full Board's deliberative process."[10]

Litigation against Company directors would proceed much differently if the Proposal were adopted. Although the Court of Chancery has held that it is not for it to "question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value,"[11] the Proposal would cause the Court to do just that, and potentially subject the Company directors to money damages liability for breach of fiduciary duty unless the directors satisfy the novel and undefined "net expected positive value calculation" or "viewpoint diversity" requirements in the Proposal. These requirements diverge from the deferential (and easily understood) standard applied in *Disney*, where the director actions "need only be rationally related to building the company's long-term value." *Disney* does not require some facts-and-figures "calculation" of expected value,[12] nor does the standard of review depend on whether the directors would be deemed "viewpoint diverse" by the Proponent.

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7 *See Simeone v. Walt Disney Co.*, 302 A.3d 956 (Del. Ch. 2023).

8 *Id.* at 969.

9 *Id.* at 970-71.

10 *Id.* at 971. Thus, although the Proponent attempts to equate a "specter of political bias" with the subtle conflicts that at times cause a court to apply an intermediate standard of review before the protections of the business judgment rule apply, the Court of Chancery effectively rejected such an argument in *Disney*.

11 *Id.* (quoting *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010)).

12 *See id.* (holding that a "board may conclude in the exercise of its business judgment that addressing interests of corporate stakeholders—such as the workforce that drives a company's profits—is rationally related to building long-term value" without requiring a calculation of expected value) (internal quotations omitted).

The Proposal would impermissibly alter judge-made law about what standard of review applies to director conduct.

As noted above, the Proposal is a bylaw that would eliminate business judgment rule review in instances where the case law would apply the rule. But the Court of Chancery held in a 2022 decision that a governing document provision is invalid if it purports to change a standard of review mandated by Delaware case law.[13] In *Totta v. CCSB Financial*, the Court of Chancery reviewed director conduct that interfered with a stockholder vote on a contested director election.[14] Based on the governing case law at the time, the court would review this type of interference with stockholder voting rights by inquiring whether the board had a compelling justification for its actions. The directors asserted that the case law standard had been modified by a certificate of incorporation provision that made the directors' actions "binding and conclusive" on the stockholders.[15] The Court held the case law standard of review could not be modified:

> The Company's argument contravenes fundamental principles of Delaware corporate law. In essence, the Company asks the court to hold that a corporate charter may alter the directors' fiduciary obligations and the attendant equitable standards the court will apply when enforcing those obligations. ... The constitutive agreements that govern an entity can only eliminate or modify fiduciary duties and the attendant judicial standards of review to the extent permitted by an affirmative act of the Delaware General Assembly. ... The General Assembly has granted only limited authority to corporations.[16]

The Court then identified instances where the Delaware General Corporation Law (the "DGCL") expressly permits fiduciary duties and standards of review to be modified: (i) the waiver of corporate opportunities that a fiduciary must share with the corporation; (ii) the exculpation of directors and officers for certain claims of breach of fiduciary duty; and (iii) stock issuances.[17] None of these exceptions apply to actions relating to board decisions on matters of political or ideological views. Instead, the *Disney* case confirms that claims for breach of the duty of care regarding political and ideological matters are reviewed under the business judgment rule.[18]

On appeal, the Delaware Supreme Court provided its own reasoned analysis. The Supreme Court agreed with the Court of Chancery by concluding that the provision at issue "strips the Court of Chancery of its authority to apply established standards of review to breach of

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13 *See Totta v. CCSB Fin. Corp.*, 2022 WL 1751741 (Del. Ch. May 31, 2022), *aff'd*, 302 A.3d 387 (Del. 2023).

14 The directors interpreted a provision of the certificate of incorporation in a way that sterilized the voting power of certain stockholders seeking to replace the directors with a new slate of nominees.

15 *See Totta*, 2022 WL 1751741, at *13-14.

16 *Id.* at *14.

17 8 *Del. C.* §§ 122(17), 102(b)(7), 152(d). With respect to stock issuances, the DGCL provides that the directors' judgment on the adequacy of consideration a corporation receives in exchange for issuing stock is conclusive absent actual fraud.

18 *See Disney*, *supra* note 7, at 970-71.

fiduciary duty claims."[19] The Supreme Court continued by reasoning that the provision was invalid because the standard of review urged by the directors would have the court uphold a director decision even if the directors breached their duty of loyalty. The Proposal is the opposite side of the same coin: it would impose (rather than eliminate) director liability when the Court's standard of review would not impose any liability at all. As explained below, this facet of the Proposal contradicts the director protections from liability established in the Certificate and the Delaware case law.

The Company's Bylaws may contain only provisions that are "not inconsistent with law," which includes Delaware case law.[20] The Proposal is therefore invalid because it would use the Bylaws to modify a judicial standard of review in violation of the *Totta* decisions.[21]

The Proposal is also invalid because it contradicts the Company's Certificate of Incorporation.

The Proposal would result in an automatic amendment of the Company's Bylaws, but the Bylaws may contain only provisions that are "not inconsistent with law *or with the certificate of incorporation*."[22] The Proposal is inconsistent with Section 6.1 of the Company's Certificate of Incorporation. It provides:

> 6.1. Limitation of Liability. No director or officer of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or officer, provided that this provision shall not eliminate or limit the liability of (a) a director or officer for any breach of the director's or officer's duty of loyalty to the Corporation or its stockholders, (b) a director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (c) a director under section 174 of the General Corporation Law, (d) a director or officer for any transaction from which the director or officer derived any improper personal benefits, or (e) an officer in any action by or in the right of the Corporation. If the General Corporation Law is amended after approval by the stockholders of this article to authorize

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[19] 302 A.3d at 400.

[20] 8 *Del. C.* § 109(b); *see also*, *Manti Holdings, LLC v. Authentix Acq. Co., Inc.*, 261 A.3d 1199, 1218 (Del. 2021) (observing that a provision would be inconsistent with Delaware law if it transgresses "a public policy settled by the common law").

[21] In another opinion the Court of Chancery discussed whether fiduciary duties could be modified through certificate of incorporation provisions that limit the corporation's power to take specific action under Section 102(a)(3) of the DGCL or through certificate provisions that rely on Section 141(a) of the DGCL, which permits certificate provisions that determine how the duties and powers of the board of directors "shall be exercised." *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 553-558 (Del. Ch. 2023). These are statements of non-binding *dicta*, but in any event the Proposal would amend only the Bylaws, not the Certificate of Incorporation.

[22] 8 *Del. C.* § 109(b); *see also, e.g.*, *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1189 (Del. 2010) ("It is settled Delaware law that a bylaw that is inconsistent with the corporation's charter is invalid.") (citing *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 929 (Del. 1990)).

> corporate action further eliminating or limiting the personal liability of directors or officers, then the liability of a director or officer of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law, as so amended.

Section 6.1 eliminates money damages liability for a director's breach of the fiduciary duty of care. The Proposal contradicts Section 6.1 by forcing a waiver of the protections of the business judgment rule specifically for the breach of the duty of care unless the "net positive expected value calculation" or "viewpoint diverse board" conditions in the Proposal are satisfied. As noted above, when the business judgment rule does not apply, a Court will inquire whether the directors' action is entirely fair and will assess damages against the directors if an action is unfair.[23] But Section 6.1 eliminates money damages liability in *all* circumstances for a breach of the duty of care. Implementation of the Proposal would therefore place the Company's Bylaws in conflict with Section 6.1 of the Certificate, so the Proposal is invalid.

The Proposal would unlawfully force a waiver of director rights.

The Proposal purports to force the Board to "waive the protections of the business judgment rule." But, as noted above, the business judgment rule is a presumption under Delaware common law that safeguards directors from liability when the business judgment rule is satisfied.[24] The *Disney* case establishes that directors who make a good faith judgment to cause a corporation to act on a political or ideological view have not committed any wrongful conduct, and nowhere does the *Disney* case, or any other Delaware law, suggest that a board decision on political or ideological views somehow becomes wrongful for failure to satisfy an "expected value calculation" or "viewpoint diversity" requirement.[25] The business judgment rule and related law therefore may provide directors an outcome-determinative argument and defense against a claim for breach of fiduciary duty.[26] Moreover, that protection may be viewed as personal to each director, as the "liability of the directors must be determined on an individual basis."[27] Under Delaware law, a party may waive an argument or defense in litigation only through his or her own voluntary conduct, or the conduct of his or her counsel or other agent.[28] The Proposal violates this Delaware law by effecting a waiver, without each individual directors' assent, of the arguments and defenses available to each director under the business judgment rule.

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[23] *See, e.g., Emerging Communs, supra* note 6.

[24] *See, e.g., Walt Disney Co., supra* note 2.

[25] *See Disney, supra* note 7, at 970-71.

[26] *See, e.g., Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993) ("It is sometimes thought that the decision whether to apply the business judgment rule or the entire fairness test can be outcome-determinative.").

[27] *See, e.g., Emerging Communs, supra* note 6, at *38.

[28] *See, e.g., Stein v. Blankfein*, 2019 WL 2323790, at *6 (Del. Ch. May 31, 2019) (finding that plaintiff-stockholders did not waive their right to have the entire fairness test apply as a judicial standard of review to a transaction that the stockholders approved through a stockholder vote because such a vote is "insufficient to demonstrate a knowing waiver of the right to redress for future unfair and self-dealing transactions").

The Proposal is invalid because it would prevent the Board from exercising its management authority on political and ideological matters.

The Bylaw called for by the Proposal would force the Board to refrain from causing the Company to act on political and ideological matters unless the Board satisfies the "expected value calculation" and "viewpoint diversity" requirements. But the Delaware courts have held that a bylaw cannot force a board to make, or refrain from making, a specific business decision. Section 141(a) of the DGCL vests a board of directors with the exclusive power to oversee the management of the corporation, and this management power may only be limited by the certificate of incorporation, not the bylaws. Section 141(a) provides in part:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

The Delaware Supreme Court has applied Section 141(a) to invalidate bylaws if they would "commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders."[29]

- In one case that answered a question certified to the Delaware Supreme Court by the Securities and Exchange Commission, the Court held that a stockholder proposal to amend a corporation's bylaws to require the corporation to reimburse a stockholder for his or her proxy solicitation expenses in a contested director election would violate Delaware law. The Court held that a bylaw cannot "prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate."[30]

- The Delaware Supreme Court also relied on Section 141(a) to invalidate an attempt by a board of directors to unilaterally restrict a future board's response to an offer to acquire the corporation. In *Quickturn Design Systems, Inc.*, a bidder made a hostile offer to acquire the corporation's stock, and the corporation had in place a stockholder rights plan that would effectively prohibit the bidder from acquiring more than 15% of the stock. The board of directors amended the rights plan to add a novel provision that would prohibit newly elected directors from terminating the rights plan for a six-month period following their election to allow the hostile offer to be consummated. The Court held that "[w]hile the [provision] limits the board of directors' authority in only one respect, … it nonetheless restricts the board's power in an area of fundamental importance to the shareholders—negotiating a possible sale of the corporation. Therefore, we hold that the [provision] is invalid under Section 141(a)[.]"[31]

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29 *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 238 (Del. 2008).

30 *Id.* at 239. The DGCL was later amended to permit bylaws that require proxy expense reimbursement for stockholders, but that amendment did not affect the Supreme Court's reasoning or holding as it applies to other board decisions. 8 *Del. C.* § 113.

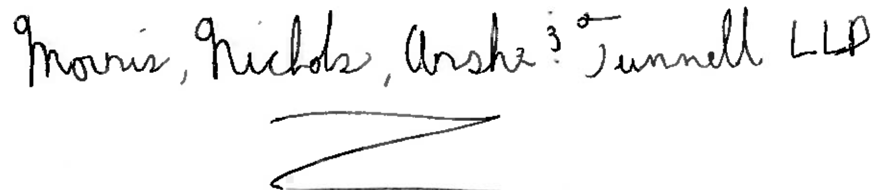
31 *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291-92 (Del. 1998).

The Bylaw urged by the Proposal would similarly prevent the Company directors from exercising their *full* management power. The Court in *Disney* held that matters relating to political and ideological issues may be controversial, but the board "alone bears the ultimate responsibility for establishing corporate policy" on "choosing to speak (or not) on public policy issues."[32] The directors believed that Disney's relationships with its employees and partners would suffer if the company did not take a position on the legislation. Those relationships, the directors concluded, had to be maintained to preserve the long-term value of Disney to its stockholders.[33] If the Proposal were adopted, then the Board could not exercise its *full* authority in the same way as the Disney directors, even if the Company were confronted with a similar threat to stockholder value. Instead, the Board could act only if it satisfied the novel limitations imposed by the Proposal. The Board's managerial power cannot be limited in any substantive respect in a governance document, unless the limitation appears in the certificate of incorporation. Accordingly, the Proposal would impermissibly interfere with the Board's authority to manage the Company.

Stockholders have other measures available to them if they disagree with corporate policy decisions. Stockholders can elect a different slate of directors. And directors who act in bad faith to advance their own personal agenda could be held liable for breach of fiduciary duty. But absent bad faith or disloyalty, directors who exercise their best judgment, in good faith, are secure in the knowledge that their business decisions will not expose them to liability. The Proponent cannot create a novel, one-off standard to enmesh the courts in classic business decisions on whether promoting non-stockholder interests ultimately promote stockholder value, or push directors away from making their best good faith judgments, even on matters that have political or ideological consequences.

For all the foregoing reasons, it is our opinion that the Proposal would cause the Company to violate Delaware law if it were implemented.

Very truly yours,



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32 *Disney*, *supra* note 7, at 969-70.

33 *See id.* at 970-71.

March 8, 2024

<u>**Via Online Shareholder Proposal Form**</u>

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

Re: No-Action Request from DICK'S Sporting Goods, Inc., Regarding Shareholder Proposal by the National Center for Public Policy Research

Ladies and Gentlemen:

This correspondence is in response to the letter of Carmen X. W. Lu on behalf of DICK'S Sporting Goods, Inc. (the "Company" or "DICK'S") dated February 8, 2024, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2024 proxy materials for its 2024 annual shareholder meeting.

RESPONSE TO THE COMPANY'S CLAIMS

Our Proposal seeks a bylaw amendment as follows:

> The board of directors shall waive the protections of the business judgment rule in any stockholder action for breach of the duty of care or loyalty which adequately pleads that the defendants acted on political or ideological views, which shall presumptively include any conduct by the Company that boycotts a State of the United States. The board of directors may decline to exercise such waiver if the board expressly affirms the challenged conduct was based on a net-positive expected value calculation or was implemented directly or indirectly by a viewpoint diverse board.

The Company seeks to exclude the Proposal from the 2024 Proxy Materials pursuant to:

- Rule 14a-8(i)(2) because the Proposal would cause the Company to violate Delaware law;
- Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal; and
- Rule 14a-8(i)(3) because the Proposal is inherently vague and indefinite, and subject to multiple interpretations, such that the Company and its shareholders voting on the Proposal

would not know with any reasonable certainty exactly what actions or measures the Proposal requires.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Rule 14a-8(k) and Section E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that companies are required to send proponents a copy of any correspondence that they elect to submit to the Commission or the Staff. Accordingly, we remind the Company that if it were to submit correspondence to the Commission or the Staff or individual members thereof with respect to our Proposal or this proceeding, a copy of that correspondence should concurrently be furnished to us.

I. The Staff "does not resolve disputed questions of Delaware law."

The Proposal would not cause the Company to violate Delaware law. However, the Staff "does not resolve disputed questions of Delaware law."[1] If the Staff disagrees with our view that the Proposal would not cause the Company to violate Delaware law, Proponent requests that, rather than granting no-action relief, the Staff request that the SEC certify the question to the Supreme Court of Delaware under Article IV, Section 11(8) of the Delaware Constitution.

II. Implementation of the Proposal Would Not Cause the Company to Violate Delaware Law

The Company argues, supported by an unsigned letter provided by the law firm Morris, Nichols, Arsht & Tunnell LLP ("MNAT"), that the Proposal's adoption of enhanced scrutiny for certain conflicted transactions would violate Delaware law. The MNAT letter is wrong on every point.

First, the MNAT letter argues that the Proposal "contradicts" the business judgment rule. But the Proposal targets corporate behavior that is already *not* subject to the business judgment rule, namely corporate actions traceable to the "political or ideological views" of the directors, which is another way of saying that the Proposal targets biased and conflicted decision-making, which Delaware law already subjects to enhanced scrutiny.[2] Given that decisions made by directors to advance their personal political or ideological views rather than the best interests of the corporation constitute bad-faith

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[1] SEC, Certification of Questions of Law Arising from Rule 14a-8 Proposal by Shareholder of CA, Inc. (June 27, 2008), https://www.sec.gov/files/rules/other/2008/ca14a8cert.pdf .

[2] Cf. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 43 (Del. Ch. 2013).

> Enhanced scrutiny is Delaware's intermediate standard of review. Framed generally, it requires that the defendant fiduciaries "bear the burden of persuasion to show that their motivations were proper and not selfish" and that "their actions were reasonable in relation to their legitimate objective." *Mercier v. Inter–Tel (Del.), Inc.*, 929 A.2d 786, 810 (Del.Ch.2007). Enhanced scrutiny applies to specific, recurring, and readily identifiable situations involving potential conflicts of interest where the realities of the decisionmaking context can subtly undermine the decisions of even independent and disinterested directors.

Id. (emphasis added).

decisions, the Proposal does not eliminate the business judgment rule framework and thus does not violate Delaware law.[3]

The MNAT letter's reliance on *Simeone v. Walt Disney Co*.[4] is misplaced, most obviously because it is a case applying the business judgment rule while the Proposal will leapfrog the business judgment rule in cases within its ambit. Many of the Company's arguments relying on *Disney* thus boil down to an attempt to apply the nonsensical proposition that a proposal to waive the business judgment rule is improper because it contravenes cases applying the business judgment rule. The fact that adoption of the Proposal would lead the relevant legal analysis to "diverge from the deferential … standard applied in *Disney*" is not a bug but a feature – a simple statement of the terms of the Proposal. Furthermore, the Delaware Supreme Court has recognized the need for enhanced scrutiny in cases where an "omnipresent specter" of biased decision-making makes application of the business judgment rule inappropriate, and the Company's shareholders would be adopting a similar policy were they to adopt the Proposal.[5] Thus, a court's decision applying the business judgment rule is irrelevant because avoidance of that rule is precisely the point of the Proposal. The Company, via MNAT, argues that "the Court of Chancery effectively rejected such an argument [for enhanced scrutiny] in *Disney*." However, neither "enhanced scrutiny" nor "omnipresent specter" appears anywhere in that opinion. Furthermore, even if the court had considered and rejected an argument for enhanced scrutiny, that would not limit the shareholders from adopting the enhanced scrutiny in the Proposal. Finally, it is worth noting the *Disney* may simply have been wrongly decided because:

> [M]any people would consider a corporate board made up of HRC supporters to be severely limited in its ability to act in an unbiased manner — as they are duty-bound to do — when it came time to decide whether to oppose a law derisively and deceitfully called the "Don't Say Gay" law. And yet, … [the judge in] Simeone v. Disney concluded that this was a "hypothetical conflict," and denied the shareholder's inspection request.[6]

The fact that directorial decision-making tainted by the personal political or ideological views of the directors constitutes bad faith decision-making also undermines the Company's second argument, which is that the Proposal would improperly strip directors of the protection afforded them by the DGCL s 102(b)(7) duty of care waiver contained in the Company's charter. Knowingly disregarding the duty to act in good faith constitutes a duty of loyalty violation, and thus the duty of care liability waiver remains intact.[7]

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[3] Cf. Joseph K. Leahy, *Corporate Political Contributions As Bad Faith*, 86 U. COLO. L. REV. 477 (2015) ("a CEO acts in bad faith if she causes the corporation to make a contribution in support of her own political views").

[4] 302 A.3d 956 (Del. Ch.).

[5] See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.").

[6] https://dcjournal.com/the-hypothetical-conflict-that-may-be-at-the-root-of-disneys-woes/

[7] Cf. Christopher M. Bruner, *Good Faith in Revlon-Land*, 55 N.Y.L. SCH. L. REV. 581, 584 (2011) ("The [*Disney*] court … accepted a formulation of non-exculpable bad faith conduct articulated by Chancellor Chandler—'intentional dereliction of duty, a conscious disregard for one's responsibilities.'"); id. ("the *Disney* standard clearly established

Second, the MNAT letter argues that the Proposal would "impermissibly alter judge-made law about what standard of review applies to director conduct." But, as explained above, the Proposal does not change the applicable standard of review for the covered transactions. Conflicted transactions are *already* subject to enhanced scrutiny.

Regardless, the MNAT letter is wrong that stockholders cannot via bylaw subject certain transactions to *greater* scrutiny. The MNAT letter relies on the Delaware Court of Chancery's decision in *Totta v. CCSB Financial*, but that case concerned a company's attempt to *reduce* scrutiny and even eliminate the fiduciary liability of directors altogether. In that case, a company sought to rely on a "Conclusive-And-Binding Provision" in the charter to preclude judicial review of the directors' compliance with fiduciary duties. Said the court: "The Conclusive-And-Binding Provision cannot conclusively empower the Board to make determinations under a good faith standard. The provision cannot prevent the court from applying equitable principles to evaluate the Board's decision."[8] In other words, while the charter provided that "[a]ny constructions, applications, or determinations made by the Board of Directors pursuant to this section in good faith and on the basis of such information and assistance as was then reasonably available for such purpose shall be conclusive and binding upon the Corporation and its stockholders" – this language did not guarantee directors review under the deferential business judgment rule when the conduct being challenged – interfering with the shareholder franchise – would typically subject the board to enhanced scrutiny in the form of placing the burden on the board to provide a compelling justification. By contrast, the Proposal does not seek to eliminate directors' fiduciary duties. To the contrary, it aims to enable enhanced compliance with those duties. It is also worth noting that the Delaware Supreme Court, on appeal, was much more focused on preventing the *avoidance* of liability for breaches of the duty of loyalty[9] and much less concerned about limiting the traditional flexibility of Delaware corporate law.[10]

Third, the MNAT letter argues the Proposal contradicts the Company's charter provision eliminating money damages liability for a director's breach of the fiduciary duty of care. But the Proposal does no such thing. The Proposal merely waives a defense directors would raise in a suit for breach of those duties; it does not make them liable for money damages. If a court determined directors breached duties for which damages liability has been exculpated, the charter provision would still operate to bar money damages. That does not bar declaratory or injunctive relief, which stockholders would be free to seek.

Fourth, the MNAT letter argues the Proposal would impermissibly force directors to waive applicable defenses. But there is no coercion involved here. By accepting directorships with the company, directors

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that monetary liability could be imposed--notwithstanding a section 102(b)(7) charter provision--for bad faith conduct not involving financial conflicts of interest") (referencing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006)).

[8] Totta v. CCSB Fin. Corp., No. CV 2021-0173-KSJM, 2022 WL 1751741, at *19 (Del. Ch. May 31, 2022), judgment entered, (Del. Ch. 2022), cert. denied, No. 2021-0173-KSJM, 2022 WL 4087800 (Del. Ch. Sept. 7, 2022), and appeal dismissed, 284 A.3d 713 (Del. 2022), and aff'd, 302 A.3d 387 (Del. 2023), and aff'd, 302 A.3d 387 (Del. 2023).

[9] See *CCSB Fin. Corp. v. Totta*, 302 A.3d 387, 390 (Del. 2023) ("The charter provision cannot be used to exculpate the CCSB directors from a breach of the duty of loyalty.").

[10] See generally, Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 San Diego L. Rev. 273, 289 n.58 (2015) (providing multiple citations for the proposition that the flexibility of the Delaware General Corporation Law is essential to Delaware's corporate law dominance).

consent to the attendant obligations of those positions—including company bylaws. Directors remain free to leave the board at any time.

Finally, there is no more constraint placed on the board's decision-making than already exists under applicable fiduciary duties, which prohibit self-dealing and bad-faith conduct.

Thus, none of the no-action decisions cited for contrary propositions are relevant because adoption of the Proposal does force the Company to violate Delaware law or improperly impose intra-governance restrictions on the board.

III. The Company Has the Power to Implement the Proposal

Given that the Proposal does not violate Delaware law, the Company has the power to implement the Proposal.

IV. The Proposal Is Not Contrary to the Proxy Rules

The phrase "net-positive expected value calculation" is not impermissibly vague. It may be alternatively understood as a positive net-present-value calculation. See Daniel F. Spulber, *Public Prizes Versus Market Price: Should Contests Replace Patents?*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 690, 728 (2015) ("The inventor can choose to undertake an R&D project if the project has a positive net present value (NPV), that is, if the expected value of the project exceeds its costs.") (emphasis added). Given that a recent Westlaw search for "positive net present value" returned 787 results,[11] it borders on the ridiculous to assert shareholders and corporate managers will be befuddled by the phrase "net-positive expected value calculation." Cf. Amy Gallo, A Refresher on Net Present Value, Harvard Business Review (Nov. 19, 2014) ("When a manager needs to compare projects and decide which ones to pursue, …. net present value, often referred to as NPV, is the tool of choice for most financial analysts.").[12]

The phrase "viewpoint diverse board" is not impermissibly vague. If adopted, both the shareholders and directors will know that a safe harbor exists to avoid enhanced scrutiny, and that this safe harbor consists of putting forth evidence of relevant viewpoint diversity. More than that is not required for stockholders to vote on the Proposal or the Company to implement it. Whether evidence of relevant viewpoint diversity that the Company puts forth satisfies the purpose of the safe harbor is a question of fact that may be challenged and resolved through negotiation or litigation. But this does not make "viewpoint diverse board" impermissibly vague any more than "disinterested" or "independent" could be deemed impermissibly vague in the context of other corporate governance safe harbors. Cf. Yu-Hsin Lin, Do *Social Ties Matter in Corporate Governance? The Missing Factor in Chinese Corporate Governance Reform*, 5 GEO. MASON J. INT'L COM. L. 39, 72 (2013) ("Delaware courts have recognized the good-faith use of independent directors by management in self-dealing transactions and have provided safe harbors in which managers can undertake transactions that are approved by disinterested directors. Meanwhile, United States courts can review the disinterestedness and independence of directors when transactions are challenged by shareholders.").

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[11] https://www.westlaw.com/SharedLink/e6a416669fdd4a3a882f69231228f9d0?VR=3.0&RS=cblt1.0

[12] https://hbr.org/2014/11/a-refresher-on-net-present-value

The fact that the Proposal may leave room for some disagreement about where precisely to draw some relevant definitional lines is a far cry from the requisite lack of "reasonable certainty" regarding "what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"). The Staff can be sure that had Proponent used narrower terminology the Company would be arguing that the Proposal seeks to micromanage the Company.

V. The Company is requesting relief the Staff lacks statutory authority to issue.

The Staff lack statutory authority to grant the Company no-action relief. The Company has notice that we intend to submit our proposal, which is valid under state law, for consideration at the annual meeting. The Staff may not give the company its blessing to exclude an otherwise valid proposal from its proxy statement.

Section 14(a) of the Exchange Act prohibits anyone from "solicit[ing] any proxy" "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[13] While this authority might be read "broadly," "it is not seriously disputed that Congress's central concern [in enacting § 14(a)] was with disclosure."[14] The purpose of Section 14(a) was to ensure that investors had "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings."[15]

While Section 14(a) gave the Commission authority to compel investor-useful disclosures, the substantive regulation of stockholder meetings was left to the "firmly established" state-law jurisdiction over corporate governance.[16] Recognizing that state law provides the "confining principle" to Section 14(a)'s otherwise "vague 'public interest' standard," the D.C. Circuit has held that "the Exchange Act cannot be understood to include regulation of" "the substantive allocation" of corporate governance that is "traditionally left to the states."[17] Under Section 14(a), then, the SEC may compel the disclosure in a company's proxy materials of items that will be before shareholders at the annual meeting.

Under state law, a shareholder proposal may be presented for consideration at the corporation's annual meeting if the proposal is a proper subject for action by the corporation's stockholders.[18] A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders' power to adopt.[19]

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[13] 15 U.S.C. § 78n(a)(1).
[14] Bus. Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990).
[15] S. Rep. No. 792 at 12 (1934).
[16] Bus. Roundtable, 905 F.2d at 413 (internal citation omitted).
[17] Id.
[18] See CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008).
[19] Id. at 232.

Our proposal is valid under state law. Under Section 14(a), the SEC only has power to compel that the Company disclose our proposal in its proxy materials. The Staff therefore may not then give the Company no-action relief to exclude it.

VI. Conclusion

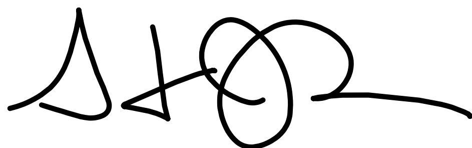
The Proposal does not violate Delaware law and the Company has the power to implement it. In addition, the Proposal is not impermissibly vague, indefinite, or subject to multiple interpretations. Finally, issuing relief to the Company would raise the specter of the Staff exceeding statutory authority.

The Company has clearly failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to call us at (202) 507-6398 or email us at [redacted] and at [redacted].

Sincerely,

Scott Shepard
FEP Director
National Center for Public Policy Research



Stefan Padfield
FEP Deputy Director
National Center for Public Policy Research

cc: Carmen X. W. Lu ([redacted])