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December 23, 2022

VIA EMAIL

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

Email: shareholderproposals@sec.gov

Re: Shareholder Proposal of the National Center for Public Policy Research

Ladies and Gentlemen:

We submit this letter on behalf of Eli Lilly and Company (“*Lilly*” or the “*Company*”) to notify the Securities and Exchange Commission (the “*Commission*”) that the Company intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (the “*2023 Annual Meeting*” and such materials, the “*2023 Proxy Materials*”) a shareholder proposal and supporting statement (the “*Proposal*”) submitted by the National Center for Public Policy Research (the “*Proponents*”). We also request confirmation that the staff of the Division of Corporation Finance (the “*Staff*”) will not recommend enforcement action to the Commission if the Company omits the Proposal from the 2023 Proxy Materials for the reasons discussed below.

The Company currently anticipates filing a preliminary proxy statement with the Commission on or around February 24, 2023 due to the inclusion in the 2023 Proxy Materials of proposals to amend the Company’s Amended Articles of Incorporation and expects to file its definitive 2023 Proxy Materials on or around March 17, 2023. Accordingly, in compliance with Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended, we have filed this letter with the Commission no later than 80 calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission. In light of the Company’s timeline for filing a preliminary proxy statement, the Company requests that the Staff respond to this letter prior to February 24, 2023 if practicable.

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008), we are emailing this letter to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponents as notice of the Company’s intent to omit the Proposal from the 2023 Proxy Materials. Likewise, we

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take this opportunity to inform the Proponents that if the Proponents elects to submit any correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be provided concurrently to the undersigned on behalf of the Company.

THE PROPOSAL

The Proposal sets forth the following resolution to be voted on by shareholders at the 2023 Annual Meeting:

Resolved: Shareholders request the Company issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.¹

BASIS FOR EXCLUSION

The Company hereby respectfully requests that the Staff concur in its view that the Company may exclude the Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because it relates to the Company's ordinary business.

ANALYSIS

1. The Proposal May be Excluded Under Rule 14a-8(i)(7) Because it Relates to the Company's Ordinary Business

A. Background

Rule 14a-8(i)(7) permits the exclusion of shareholder proposals dealing with matters relating to a company's "ordinary business operations." The Commission has stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." 1998 Release. The term "ordinary business" in this context refers to "matters that are not necessarily 'ordinary' in the common meaning of the word, and is rooted in the corporate law concept

¹ The Proposal in full is attached hereto as Exhibit A.

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providing management with flexibility in directing certain core matters involving the company's business and operations." *Id.*

The ordinary business exclusion rests on two central considerations: (1) the subject matter of the proposal (*i.e.*, whether the subject matter involves a matter of ordinary business), provided the proposal does not raise significant social policy considerations that transcend ordinary business; and (2) the degree to which the proposal attempts to micromanage a company by "probing too deeply into matters of a complex nature upon which shareholders as a group, would not be in a position to make an informed judgment." *Id.*

A shareholder proposal requesting the publication of a report is excludable pursuant to Rule 14a-8(i)(7) if the substance of the requested report deals with the ordinary business of the company. Exchange Act Release No. 20091 (Aug. 13, 1983) ("[T]he staff will consider whether the subject matter of the special report ... involves a matter of ordinary business; where it does, the proposal will be excludable..."). The Staff takes a similar approach to shareholder proposals requesting a report on certain risks. The Staff explained how it evaluates shareholder proposals that address risk in Staff Legal Bulletin No. 14E (Oct. 27, 2009) ("*SLB 14E*"):

[R]ather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk . . . [S]imilar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document—where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business—we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company.

For example, the Staff recently permitted exclusion under Rule 14a-8(i)(7) of a proposal in *Amazon.com, Inc.* (Apr. 7, 2022) (*UAW Retiree Medical Benefits Trust*) where the proposal requested a report on risks to the company related to staffing of its business and operations.

B. The Proposal May Be Excluded Because It Relates to an Ordinary Business Matter, the Company's Management of Its Workforce

Although the resolved clause in the Proposal refers to "risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regarding abortion," the supporting statement makes clear that the Proposal is focused on matters of ordinary business. Specifically, the first paragraph of the supporting statement immediately following the resolved clause provides: "In 2022, Eli Lilly made clear its opposition to an Indiana law that restricts abortion ... The Company claimed that as a result of this law, its ability to attract diverse employees would be hindered, and it would be 'forced to plan for more

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employment growth outside our home state.’ The Company also said it expanded its employee health plan coverage to include travel for abortion” (internal citations omitted). This language shows that the Proposal focuses on the Company’s hiring of employees and its employee health plan coverage. These are issues of workforce management, which is an ordinary business matter under Rule 14a-8(i)(7). This fact is supported not only by Staff precedent, but also by a Commission-level release. In *United Technologies Corp.* (Feb. 19, 1993), the Staff provided the following examples of excludable ordinary business categories: “employee health benefits, general compensation issues not focused on senior executives, management of the workplace, employee supervision, labor-management relations, employee hiring and firing, conditions of the employment and employee training and motivation.” Subsequently, the Commission stated in the 1998 Release that a company’s “management of [its] workforce, such as the hiring, promotion, and termination of employees” is a prime example of an excludable ordinary business matter. 1998 Release. Granting relief here would be consistent with the Commission’s view expressed in 1998 as well as a long line of Staff no-action letter precedent that has allowed for the exclusion of proposals that deal with relations between a company and its employees and workforce management. In particular, the Staff has historically permitted the exclusion of proposals that, like the Proposal, refer to the hiring and retention of employees. See *Delhaize America, Inc.* (Mar. 9, 2000) (permitting, under Rule 14a-8(i)(7), the exclusion of a proposal requesting that the company adopt a policy “to be more aggressive in employee retention when the issue of compensation is considered”); *Sprint Corporation* (Jan. 28, 2004) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on “the impact on the [c]ompany’s recruitment and retention of employees due to the [c]ompany’s changes to retiree health care and life insurance coverage”); *Consolidated Edison, Inc.* (Feb. 24, 2005) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting the termination of certain employees because it related to “the termination, hiring, or promotion of employees”); *Merck & Co., Inc.* (Mar. 6, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting “that the company fill only entry-level positions with outside candidates and re-introduce its original policy of developing individuals for its higher level research and management positions exclusively from the ranks of its [current] employees” because in the Staff’s view, “the proposal relates to procedures for hiring and promoting employees. Proposals concerning a company’s management of its workforce are generally excludable under rule 14a-8(i)(7)”).

The Proposal is comparable to the proposals in *Deere & Company* (Nov. 14, 2014, *recon. denied* Jan. 5, 2015) and *The Walt Disney Company* (Nov. 24, 2014, *recon. denied* Jan. 5, 2015) that requested the companies’ boards of directors adopt anti-discrimination policies that protect employees’ human rights. The Staff granted no-action relief pursuant to Rule 14a-8(i)(7), noting in each case “that the proposal relates to [the company’s] policies concerning its employees.” Here, the Proposal also relates to the Company’s policies concerning its employees because it focuses on the Company’s policies adopted in order to attract and retain employees. These are workforce

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management policies, which, as the Commission has explained, fall squarely within the ordinary business exclusion.

The Proposal is also comparable to several proposals that dealt with workforce management that the Staff determined were excludable pursuant to Rule 14a-8(i)(7) during the 2022 proxy season. For example, as mentioned above, in *Amazon.com, Inc. (UAW Retiree Medical Benefits Trust)*, the proposal requested a report on risks to the company related to staffing of its business and operations. The company argued that the proposal was excludable under Rule 14a-8(i)(7) because it related to “the quintessential ordinary business topic of managing workforce staffing.” The Staff agreed and permitted exclusion pursuant to Rule 14a-8(i)(7). Here, the Proposal also asks for a report on risks to the Company related to its policies for attracting and retaining employees as well as geographic staffing decisions. The Staff should reach the same determination here as it did in *Amazon.com, Inc. (UAW Retiree Medical Benefits Trust)* and allow the Company to exclude the Proposal pursuant to Rule 14a-8(i)(7).

As another example from the 2022 proxy season, several companies received proposals requesting that they report information about the distribution of stock-based incentives to employees, including data about EEO-1 employee classification. *See, e.g., Amazon.com, Inc.* (Apr. 8, 2022) (*James McRitchie*); *Repligen Corporation* (Apr. 1, 2022). The Staff permitted exclusion of these proposals pursuant to Rule 14a-8(i)(7). In addition, the Staff in *Dollar Tree, Inc.* (May 2, 2022) permitted exclusion of a proposal pursuant to Rule 14a-8(i)(7) that requested a report on risks to the company’s business strategy, including a discussion of employee benefits and safety. Like in those examples, the Proposal seeks a report on information related to employee hiring and retention incentives, including employee benefits, which at its core is the Company’s ordinary business. The Staff last season also permitted exclusion of the proposal in *BlackRock, Inc.* (Apr. 4, 2022) that requested a report on the risks of not having a more inclusive equal employment opportunity policy that prevents discrimination based on viewpoint and ideology. As one further example, in *Intel Corporation* (Mar. 18, 2022), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on “whether and/or to what extent, the public display of the pride flag has impacted current, and to the extent reasonable, past and prospective employees’ view of the company as a desirable place to work.” As discussed further below, these proposals all referenced or touched on a significant social policy issue but were excludable because the focus of the proposals was on ordinary business matters related to workforce management. The Proposal should similarly be excludable under Rule 14a-8(i)(7).

C. *The Proposal Does Not Focus on a Significant Social Policy Issue*

The Company recognizes that the Staff recently changed its approach to how it evaluates significant social policy issues, explaining in Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“*SLB 14L*”):

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proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.

However, the Staff's shift in approach has not resulted in the significant social policy exception swallowing the rule that proposals dealing with ordinary business matters are excludable. Since the publication of SLB 14L, the Staff has continued to distinguish between proposals that focus on a significant social policy issue and those that contain references to significant social policy issues like human capital management, but are actually directed at a company's ordinary business matters.

The no-action letters referenced in the preceding section relate to proposals that the proponent might argue raise a significant social policy issue. For instance, the proposal in *Amazon, Inc. (UAW Retiree Medical Benefits Trust)* was drafted in a manner to suggest that human capital management was the focus of the proposal. However, the Staff determined that the focus was actually on workforce management and should come to the same conclusion with respect to the Proposal, despite references in the Proposal to reproductive rights. As in *Amazon.com, Inc. (UAW Retiree Medical Benefits Trust)*, references to a significant social policy issue in a proposal are not enough to transcend ordinary business where the proposal requests a report on the company's management of its workforce.

Similarly, in *Amazon.com, Inc. (James McRitchie)* and *Repligen Corporation*, despite declarations in the supporting statements that the intention was for the proposals to address a significant social policy issue, the Staff concluded that the proposals addressed the companies' ordinary business matters and permitted exclusion pursuant to Rule 14a-8(i)(7). The Proposal is distinguishable from the proposals in *Lowe's Companies, Inc. (Apr. 7, 2022)*, *The TJX Companies, Inc. (Feb. 7, 2022)*, and *Walmart Inc. (Apr. 12, 2022)*. Those proposals requested that the companies issue reports detailing any risks and costs to the companies resulting from enacted or proposed state policies that restrict access to reproductive health care, "and detailing any strategies beyond litigation and legal compliance that the [companies] may deploy to minimize or mitigate these risks." Those proposals were directed at risks to the companies resulting from state policies regarding reproductive health care. The focus was squarely on the issue of state policies affecting reproductive health care, which the Staff determined "transcends ordinary business matters." Here, the focus of the Proposal is not on risks related to state-level reproductive health care policies—a topic on which the general public as voters has become sophisticated due to the robustness of public discussion and analysis on the topic—but rather, as the Proposal's supporting statement makes clear, the focus is on health care policies that the Company adopts to attract and retain employees. In other words, the Proposal focuses on risks from the Company's own actions

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regarding employee benefits and management of the workforce. Therefore, the Proposal does not focus on a significant social policy issue such that it transcends ordinary business and the Staff should permit exclusion pursuant to Rule 14a-8(i)(7).

D. The Proposal May Be Excluded Because It Seeks To Micromanage the Company

In addition to focusing on a core ordinary business matter and not on a significant social policy issue, the Proposal seeks to impermissibly micromanage the Company “by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.” 1998 Release. The Staff recently explained in SLB 14L that going forward, when evaluating micromanagement as a basis for exclusion, it “will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management.”

The Proposal is comparable to several proposals that the Staff permitted to be excluded last season under Rule 14a-8(i)(7) for seeking to micromanage the companies “by probing too deeply into matters of a complex nature by seeking disclosure of intricate details regarding the [companies’] employment and training practices.” In *Deere & Company* (Jan. 3, 2022), *Verizon Communications Inc.* (Mar. 17, 2022), and *American Express* (Mar. 11, 2022), the proposals requested publication of employee-training materials. Here, while the Proposal focuses on hiring and retention, rather than training, it also seeks to put shareholders in management’s shoes by having them evaluate employment practices, a quintessential component of workforce management. The company explained in *Deere & Company*:

[D]ecisions concerning internal [diversity, equity, and inclusion] efforts are multi-faceted and are based on a range of factors that are outside the knowledge and expertise of shareholders, and therefore inappropriate for such oversight and vote. The Proposal thus prescribes specific actions that the Company’s management must undertake without affording management sufficient flexibility or discretion to address and implement its policy regarding the complex matter of diversity, equality, and inclusion.

Similarly, the Proposal focuses on a complicated topic that is core to management’s ability to run the business. Decisions regarding employee benefits are not as simple as the Proposal suggests, and, accordingly, the Company did not respond in a reactionary manner when adopting its policies regarding reproductive health. Determining health benefits such as parental leave and insurance coverage for myriad issues is an extremely complicated process and is informed by a number of factors such as local market data, employee input, and financial affordability (just to name a few). The Company must consider our benefit offerings with our global workforce in mind where roughly 55% of our full-time workforce works outside of the United States and benefit packages are developed at the individual country level. In the U.S., nearly 40% of our

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workforce lives outside of the state of Indiana, which is also an important consideration for benefits packages being developed for our U.S. employees.

Like in the proposals from *Deere & Company*, *Verizon Communications Inc.*, and *American Express*, the Proposal attempts to micromanage the Company by having shareholders weigh in on a complex ordinary business matter about which they are not in a position to make an informed judgment even if the Company provided the requested report. The Proposal is therefore excludable pursuant to Rule 14a-8(i)(7) for seeking to micromanage the Company.

Because the Proposal deals with the ordinary business matter of workforce management, does not focus on a significant social policy issue, and seeks to micromanage the Company, the Proposal is excludable pursuant to Rule 14a-8(i)(7).

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CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that the Company may exclude the Proposal from the 2023 Proxy Materials. Should the Staff disagree with the conclusions set forth in this letter, or should you require any additional information in support of our position, we would welcome the opportunity to discuss these matters with you as you prepare your response. Any such communication regarding this letter should be directed to me at sarkis.jebajian@kirkland.com or (212) 446-5944.

Sincerely,



Sarkis Jebejian, P.C.

cc: Anat Hakim
Executive Vice President, General Counsel and Secretary, Eli Lilly and Company

Sarah Rehberg
The National Center for Public Policy Research

Exhibit A
[Copy of Proposal]

Report on Risks of Supporting Abortion

Resolved: Shareholders request the Company issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.

Supporting Statement: In 2022, Eli Lilly made clear its opposition to an Indiana law that restricts abortion in cases other than rape, incest, or where a woman’s life is in danger.¹ The Company claimed that as a result of this law, its ability to attract diverse employees would be hindered, and that it would be “forced to plan for more employment growth outside our home state.”² The Company also said it expanded its employee health plan coverage to include travel for abortion.³

Ironically, in spite of making these statements and policy changes that demonstrate a clear pro-abortion stance, the Company criticized state officials for taking a stance on such a controversial issue. Indeed, the Company claimed to recognize abortion as a “divisive and deeply personal issue with no clear consensus among the citizens of Indiana,” but then itself went on to take a position through its condemnation. “Despite this lack of agreement, Indiana has opted to quickly adopt one of the most restrictive anti-abortion laws in the United States,” the Company stated.⁴

We agree with the Company that abortion is a “divisive and deeply personal issue.” Views on the topic are often rooted in an individual’s religious or other core belief system, making taking a position on it a potential reputational, legal, and financial liability for a company—yet Eli Lilly has insisted on doing just that.

By criticizing laws that restrict abortion and implementing a benefit to pay for abortion access, the Company makes clear its opposition to pro-life legislation that limit abortion. This positioning is particularly troubling considering the emphasis the Company has placed on so-called “Diversity & Inclusion.” The Company claims that embracing differences drives its business success,⁵ but apparently that embrace of diversity ends at diversity of thought, opinion, and religious convictions.

¹ <https://www.cbsnews.com/news/abortion-indiana-eli-lilly-cummins-roche/>; <https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html>; <https://www.wthr.com/article/news/special-reports/indiana-abortion/eli-lilly-condemns-new-abortion-ban-looks-to-expand-outside-indiana/531-7dedb5c9-0dda-4d9e-acf1-8f18e0b988db>

² <https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html>

³ <https://www.cbsnews.com/news/abortion-indiana-eli-lilly-cummins-roche/>; <https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html>

⁴ <https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html>

⁵ <https://www.lilly.com/au/operating-responsibly/diversity-inclusion>; <https://blog.kelley.iupui.edu/2020/10/05/eli-lilly-ceo-to-lead-healthcare-focused-conversation-on-inclusive-leadership/>

Taking positions on issues the Company admits are “divisive,” “deeply personal,” and on which there is “no clear consensus,” can only serve to alienate consumers, employees, and investors and impact the Company’s bottom-line. The Company should instead focus on its pharmaceutical mission and its fiduciary duty to shareholders, a fiduciary duty that is likely to be violated by engaging in politically divisive rhetoric and actions.