



DIVISION OF  
CORPORATION FINANCE

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

April 8, 2024

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

Re: Warner Bros. Discovery, Inc. (the "Company")  
Incoming letter dated January 5, 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 requests that the board of directors create a board corporate sustainability committee to oversee and review the impact of the Company's policy positions and advocacy on matters relating to the Company's financial sustainability and issue a public report on the committee's findings.

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.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal does not address ordinary business matters.

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

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January 5, 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: *Warner Bros. Discovery, Inc.  
Shareholder Proposal Submitted by the National Center for Public Policy  
Research*

Ladies and Gentlemen:

This letter is submitted on behalf of Warner Bros. Discovery, 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 statements 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: Shareholders request that the Board of Directors create a board corporate sustainability committee to oversee and review the impact of the Company's policy positions and advocacy on matters relating to the Company's financial sustainability. The Company should issue a public report on the committee's findings by the end of 2024.

A full copy of the Proposal and statements 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)(7) because the Proposal deals with matters relating to the Company's ordinary business operations; 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)(7) Because It Deals with Matters Relating to the Company's Ordinary Business Operations.**

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the company's ordinary business operations." In Exchange Act Release No. 34-40018 (May 21, 1998), the Commission stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. The second consideration relates to the degree to which the proposal seeks to "micro-manage" 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.

More recently, in Staff Legal Bulletin No. 14L (Nov. 3, 2021), the Staff stated that it will look to whether the policy issue raised in a shareholder proposal may have broad societal impact such that it transcends the ordinary business of the company, regardless of nexus between the issue and the company's business. The Staff also provided guidance on its position on micromanagement when evaluating requests to exclude a proposal on that basis under the ordinary business exception. The Staff stated that it will no longer view proposals that seek detail or seek to promote timeframes or methods as per se micromanagement. Instead, the Staff will focus on the level of detail and granularity sought in the proposal and may look to well-established frameworks or references in considering what level of detail may be too complex for shareholder input. The Staff also noted that it will look to the sophistication of investors generally, the availability of data and the robustness of public discussion in considering whether a proposal's matter is too complex for shareholders, as a group, to make an informed judgment.

The Proposal, if interpreted to concern the content and programming of the Company's various media businesses as suggested by the Proposal's supporting statement, relates to a fundamental element of the day-to-day management of the Company's business and probes into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. The decisions relating to the selection of content to license and produce, as well as the selection of presenters for the Company's various programs is the responsibility of numerous individuals within the Company, who consider a wide range of factors while employing specialized business judgment in making such decisions. Such decisions have ordinarily been delegated by shareholders to members of management who have been specifically tasked with addressing these questions as part of their day-to-day responsibilities. In addition, given the global viewer base of the Company's programs, these decisions are made against the backdrop of wide-ranging and diverse consumer tastes, sensitivities and preferences, and shareholders, would not be able to, as a practical matter, be in a position to make an informed judgment with respect to such complex and varied matters.

The Staff has consistently permitted companies to exclude shareholder proposals relating to the nature, presentation and content of media programming as relating to companies' ordinary business operations within the meaning of Rule 14a-8(i)(7). *See, e.g., CBS Corporation* (Mar. 22, 2013) (permitting exclusion of a proposal requesting that the board ensure the company's news

programming adheres to the company's policy concerning accurate reporting and requesting a report to shareholders on the issue). *See also, General Electric Company* (Dec. 10, 2009) (permitting exclusion of a proposal requesting the GE-NBC news department "cease all of its liberal editorializing" on the basis that the proposal dealt with news programming and therefore related to the company's ordinary business operations).

In addition, the Commission has stated that when a proposal requests the preparation of a report, the relevant inquiry is whether the subject matter of the report relates to the Company's ordinary business. *See Exchange Act Release No. 34-20091* (Aug. 16, 1983) ("[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7)."). In this regard, the Staff has also permitted the exclusion of proposals that relate to a Company's programming and content decisions. *See, e.g., Netflix, Inc.* (Mar. 14, 2016) (permitting exclusion of a proposal that requested a report describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk assessment results into company policies and decision-making, noting that the proposal related to the ordinary business matter of the "nature, presentation and content of programming and film production"). *See also The Walt Disney Company* (Dec. 12, 2017) (permitting the exclusion of a proposal requesting that the board adopt a policy requiring the company's news operations to tell the truth and to prepare an annual report to shareholders explaining instances where the company has failed to do so).

The fact a proposal may touch upon a significant policy issue, however, does not preclude exclusion under Rule 14a-8(i)(7). The Staff has consistently permitted exclusion of shareholder proposals where the proposal focused on ordinary business matters, even though it also related to a potential significant policy issue. *See Apple Inc.* (Jan. 3, 2023) (permitting exclusion of a proposal that requested a report on the effects of the company's return-to-office policy on employee retention and company's competitiveness); *Kraft Foods Inc.* (Feb. 23, 2012) (permitting exclusion of a proposal requesting a report detailing the ways the company would assess risk to its supply chain, notwithstanding the proponent's claim that water scarcity risk in the supply chain is a significant policy issue); *PetSmart, Inc.* (Mar. 24, 2011) (permitting exclusion when, although the proposal addressed the significant policy matter of the humane treatment of animals, it also requested that the company's board require suppliers to provide certain certifications, an ordinary business matter); *CIGNA Corp.* (Feb. 23, 2011) (permitting exclusion when, although the proposal addressed the potential significant policy issue of access to affordable health care, it also asked CIGNA to report on expense management, an ordinary business matter); and *Capital One Financial Corp.* (Feb. 3, 2005) (permitting exclusion when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

In this instance, the Proposal is specifically focused on the content and programming of the Company's media operations, an ordinary business matter and does not raise issues with a broad societal impact, such that they transcend the ordinary business of the Company. The Staff has recently considered this issue in the context of two other recent shareholder proposals: in *Walmart Inc.* (Apr. 10, 2023), the Staff concurred with the exclusion under Rule 14a-8(i)(7) of a proposal that requested the company prepare and annually update a report to shareholders listing and

analyzing social and political statements made by or on behalf of the company in recent years. The fact that the proposal touched on social and political matters did not transform an otherwise ordinary business proposal into a proposal that transcends ordinary business. *See also McDonald's Corporation* (Apr. 3, 2023) (same). Accordingly, we ask that the Staff concur that the Company may exclude the Proposal from its 2024 Proxy Materials under Rule 14a-8(i)(7) as relating to its ordinary business operations.

## **II. 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 requests that the Company “create a board corporate sustainability committee” to oversee and review “the impact of the Company’s policy positions and advocacy” on “matters relating to the Company’s financial sustainability.” The Proposal is inherently vague and misleading as it fails to define several key terms, rendering it likely impossible for shareholders and the Company to reach a consensus on what the Proposal seeks to accomplish. For example, the Proposal focuses on “matters relating to the Company’s financial sustainability”—a term which could be interpreted by shareholders and the Company in any number of ways, including to cover matters ranging from the Company’s environmental sustainability and energy transition pathway and outlook to the Company’s financial performance and strategy over the near-, medium-, or long-term. The Proposal also asks the Company to form a “board corporate sustainability committee” which, too, can be interpreted by shareholders and the Company in a number of ways to encompass Board oversight of a wide range of distinct and unrelated matters. The Proposal adds a further layer of confusion by asking the Board to “oversee and review the impact of the Company’s policy positions and advocacy” on the matters referenced in the Proposal, a task that first requires clarity as to exactly the kinds of matters or issues the Proposal relates to. And adding further to the confusion is the supporting statement accompanying the Proposal which chastises the Company for having “embraced a partisan lineup of hosts that parroted liberal talking points” and call on the Company to “reign[sic] in the network’s liberal bias.” Such statements only further add to the myriad ways the Proposal could be interpreted by shareholders and the Company.

Accordingly, 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,

A handwritten signature in black ink, appearing to read 'Carmen X. W. Lu', written in a cursive style.

Carmen X. W. Lu

Enclosures

cc: Tara Smith, Warner Bros. Discovery, Inc.  
Scott Shepard, National Center for Public Policy Research



**EXHIBIT A**

**Proponent's Proposal and Supporting Statement**



November 29, 2023

**Via FedEx and email to**

Corporate Secretary  
Warner Bros. Discovery, Inc.  
230 Park Avenue South  
New York, NY 10003  
CorporateSecretary@discovery.com

Dear Sir/Madam,

I hereby submit the enclosed shareholder proposal (“Proposal”) for inclusion in the Warner Bros. Discovery (the “Company”) 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 the 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 forthcoming and will be delivered to the Company.

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 December 13, 2023 or December 15, 2023 from 2-5 p.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 [shepard@nationalcenter.org](mailto:shepard@nationalcenter.org)

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Shepard", with a long horizontal flourish extending to the right.

Scott Shepard  
FEP Director

Enclosures: Shareholder Proposal

## Corporate Financial Sustainability Proposal

**Supporting Statement:** In August 2022, CNN's profits fell below \$1 billion for the first time since 2016.<sup>1</sup>

CNN's ratings have likewise tanked:

- Its average audience in February 2022 was just 534,000, a 68% annual decline.<sup>2</sup>
- In June 2022, CNN averaged just 480,000 viewers, 13% down from May, its lowest daytime audience since November 2015.<sup>3</sup>
- In September 2023, CNN recorded its worst weekend ratings since 1991 among the critical 25- to 54-year-old demographic.<sup>4</sup> It totaled just 55,000 viewers for its weekend lineup, including its Sunday morning political programming.<sup>5</sup>

The Company had to abandon its \$300 million CNN+ streaming service a month after launch due to abysmal ratings. Fewer than 10,000 people used CNN+ daily in its first two weeks.<sup>6</sup>

The Board must now ask itself: "How did the network lose so many viewers and so much money?"

The answer is simple. Rather than sticking to unbiased reporting, CNN embraced a partisan lineup of hosts that parroted liberal talking points.<sup>7</sup> It thereby alienated viewers and damaged its brand. In 2014, Pew found that one-third of people who identify or lean Republican said they distrusted CNN as a political news source.<sup>8</sup> By 2019, that number had increased to 58% -- higher distrust than *The New York Times*, *The Washington Post* or MSNBC.<sup>9</sup>

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<sup>1</sup> <https://www.nytimes.com/2022/08/02/business/media/cnn-profit-chris-licht.html#:~:text=The%20network%20is%20on%20a,steep%20declines%20in%20TV%20viewership;https://nypost.com/2022/08/04/cnns-ratings-in-freefall-profits-slump-report/;https://www.foxnews.com/media/cnn-experienced-ratings-plummet-profits-slump-report>

<sup>2</sup> <https://www.forbes.com/sites/markjoyella/2022/02/21/cnns-ratings-collapse-prime-time-down-nearly-70-in-key-demo/?sh=706f79166dda>

<sup>3</sup> <https://nypost.com/2022/07/01/cnn-ratings-tank-in-first-weeks-under-new-boss-chris-licht/>

<sup>4</sup> [https://nypost.com/2023/09/19/cnn-records-lowest-ratings-in-demo-in-its-recorded-history/?utm\\_source=twitter&utm\\_campaign=nypost&utm\\_medium=social](https://nypost.com/2023/09/19/cnn-records-lowest-ratings-in-demo-in-its-recorded-history/?utm_source=twitter&utm_campaign=nypost&utm_medium=social)

<sup>5</sup> [https://nypost.com/2023/09/19/cnn-records-lowest-ratings-in-demo-in-its-recorded-history/?utm\\_source=twitter&utm\\_campaign=nypost&utm\\_medium=social](https://nypost.com/2023/09/19/cnn-records-lowest-ratings-in-demo-in-its-recorded-history/?utm_source=twitter&utm_campaign=nypost&utm_medium=social)

<sup>6</sup> <https://www.cnn.com/2022/04/12/cnn-plus-low-viewership-numbers-warner-bros-discovery.html>

<sup>7</sup> <https://www.foxnews.com/media/cnn-politico-indicate-go-woke-go-broke-applies-news-organizations;https://apnews.com/article/new-york-brian-stelter-4ad9041d8f31028f13e107cb8e32a19d>

<sup>8</sup> <https://apnews.com/article/new-york-brian-stelter-4ad9041d8f31028f13e107cb8e32a19d>

<sup>9</sup> <https://apnews.com/article/new-york-brian-stelter-4ad9041d8f31028f13e107cb8e32a19d>

Reigning in the network's liberal bias by removing polarizing hosts like Brian Stelter, John Harwood, and Don Lemon is an important step,<sup>10</sup> but it will do nothing to regain trust in the network if it continues with the same biased reporting.<sup>11</sup>

The Company's movie business has also suffered. It cancelled its \$70+ million "Batgirl" film because its "woke" version was "irredeemable," ranking as one of the most expensive movie cancellations ever.<sup>12</sup> Its recent movie "The Flash" made history for DC after the film suffered the biggest second-weekend box office drop domestically after the movie plummeted 72.5% from its opening weekend.<sup>13</sup> The movie featuring the erratic Ezra Miller earned just \$15.3 million in the U.S. in its second weekend out after a \$55 million opening weekend at the box office.<sup>14</sup> Ezra Miller, who goes by the pronoun they/them, has been accused of grooming, preying on minors, choking fans and engaging in violence, yet nonetheless starred in a film that the Company brought to market, rather than cutting its losses and shelving the film, thereby also avoiding further reputational destruction.<sup>15</sup>

The Company's privileging of executive political/social preferences over sound business judgment in its television and film productions has cost shareholders billions already.

**Resolved:** Shareholders request that the Board of Directors create a board corporate sustainability committee to oversee and review the impact of the Company's policy positions and advocacy on matters relating to the Company's financial sustainability. The Company should issue a public report on the committee's findings by the end of 2024.

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<sup>10</sup> <https://nypost.com/2022/08/23/cnn-blowing-up-its-morning-show-next-after-brian-stelter-firing-report/>;  
<https://www.axios.com/2022/02/26/cnn-chris-licht-liberal-partisanship>;  
<https://www.washingtonexaminer.com/news/washington-secrets/liberal-media-scream-lefty-bias-finally-catches-up-with-cnns-harwood>; <https://apnews.com/article/don-lemon-cnn-departure-204c35dea8e4bb1151c6cce0bf833182>

<sup>11</sup> See e.g., <https://www.mediaite.com/sports/cnns-john-avlon-acknowledges-widespread-media-failure-on-byu-racist-heckling-allegations-there-was-a-rush-to-judgment/>; <https://www.zerohedge.com/political/watch-cnn-caught-color-shifting-bidens-hell-red-rant-mid-speech>

<sup>12</sup> <https://nypost.com/2022/08/02/batgirl-movie-gets-shelved-by-warner-bros-source/>;  
<https://thepostmillennial.com/batgirl-movie-cancelled-for-being-so-woke-that-it-was-irredeemable>

<sup>13</sup> <https://www.dailywire.com/news/the-flash-suffers-largest-second-weekend-box-office-drop-in-dc-films-history>

<sup>14</sup> <https://www.dailywire.com/news/the-flash-suffers-largest-second-weekend-box-office-drop-in-dc-films-history>

<sup>15</sup> <https://www.latimes.com/entertainment-arts/story/2022-06-14/who-is-ezra-miller-tokata-iron-eyes>;  
<https://www.indiewire.com/2022/06/ezra-miller-choking-victim-speaks-out-1234738093/>;  
<https://www.vanityfair.com/hollywood/2022/08/ezra-miller-has-now-been-accused-of-grooming-minors-and-leading-a-cult>; <https://www.tmz.com/2022/06/08/ezra-miller-protection-court-groom-daughter-tokata-iron-eyes/>;  
<https://observer.com/2022/08/ezra-miller-is-seeking-treatment-but-will-it-be-enough-to-save-warner-discovery-s-flash-movie/>



February 2, 2024

**Via Online Shareholder Proposal Form**

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 Warner Bros. Discovery, 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 Warner Bros. Discovery, Inc., (the "Company" or "Warner") dated January 5, 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 asks the Company to:

create a board corporate sustainability committee to oversee and review the impact of the Company's policy positions and advocacy on matters relating to the Company's financial sustainability. The Company should issue a public report on the committee's findings by the end of 2024.

The Company seeks to exclude this Proposal (1) under Rule 14a-8(i)(3) on the basis of vagueness, and (2) under Rule 14a-8(i)(7) because it relates to the Company's ordinary business operations.

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 non-omissibility of our Proposal is established by the Staff's decision in *Alphabet, Inc.* (avail. April 11, 2022).**

Our Proposal is substantially indistinguishable, for Staff-review purposes, from the proposal that was found non-omissible in *Alphabet, Inc.* (avail. April 11, 2022). The resolution of our Proposal is based on and is conceptually indistinguishable from the Alphabet proposal. As we have noted, the resolution of our Proposal asks the Company's Board of Directors to:

create a board corporate sustainability committee to oversee and review the impact of the Company's policy positions and advocacy on matters relating to the Company's financial sustainability.

The proposal in Alphabet asked the Alphabet Board of Directors to:

create a board committee on environmental sustainability to oversee and review policies and provide guidance on matters relating to environmental sustainability.

These proposals are effectively identical in nature. Each call on the respective boards to examine how the policies and actions of each company impact key sustainability issues. Our Proposal seeks a review of the Company's public policy positions and actions on the Company's financial sustainability, whereas the proposal in Alphabet seeks a review of such policies and actions on that company's environmental sustainability. Financial sustainability more completely implicates substantial issues of particular importance to shareholders than environmental sustainability because while environmental sustainability is at best a tertiary fiduciary concern only relevant in limited instances under specific presumptions (which themselves must be tested objectively), one of significant interest to only a portion of shareholders, financial sustainability is the central fiduciary concern imputed by law and common sense to all shareholders.

In *Alphabet, Inc.* (avail. April 11, 2022), the Staff concluded that the proposal "transcends ordinary business matters and does not seek to micromanage the Company," and that "the Company has not substantially implemented the Proposal." While the Staff did not address arguments arising under Rule 14a-8(i)(3), the Alphabet proposal having been found non-omissible goes a long way to concluding our Proposal must be included as well. Were the Staff to determine otherwise, it would thereby selectively abandon its assertion in Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L") that proposals that raise issues of significant social policy concern transcend ordinary business, or effectively gut that provision of SLB 14L by establishing that companies may preclude proposals that raise only and exactly inquiries into the intersections of its policy positions on issues of significant social policy concern (in direct contravention of SLB 14L) and the company's continuing sustainability. Or it might put itself in the ludicrous position of holding that proposals may not be omitted if they raise significant policy issues in ways that are likely to detract from company value by asking the company to divert resources away from core company business toward the satisfaction of niche policy interests, but may be omitted if they ask whether a company's focus on those niche issues is hurting its bottom line. As none of these results comports with the Staff's duty of reviewing proposals fairly, objectively, consistently and coherently, however, we expect that the Staff will find our Proposal non-omissible.

**II. The Proposal is not impermissibly vague, indefinite and susceptible to various interpretations so as to be inherently misleading.**

**A. Rule 14a-8(i)(3).**

Under Rule 14a-8(i)(3), a company may exclude a shareholder proposal in its entirety “if the language of the proposal or the supporting statement render the proposal so vague and indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.”<sup>1</sup>

**B. The plain language of the Proposal is unambiguous.**

The Company argues that the phrase “matters relating to the Company’s financial sustainability” is impermissibly vague. To begin with, there can be no serious claim that the word “financial” is impermissibly vague. Furthermore, for the Company to claim “sustainability” is impermissibly vague is odd given that according to a recent search of the Company’s “Environmental, Social, and Governance” (“ESG”) webpage, the Company used the word “sustainable” or “sustainability” five times on that page without defining it once.<sup>2</sup> Were that word impermissibly vague, one would have expected the Company to define it the first time it was used. The foregoing leaves the specious argument that impermissible vagueness is somehow introduced by combining these words. However, this argument is belied by the fact that a Google search for “financial sustainability” returned about 958,000,000 results in 0.46 seconds.<sup>3</sup>

The Company next argues that the reference to a “board corporate sustainability committee” is impermissibly vague because it could “be interpreted by shareholders and the Company in a number of ways to encompass Board oversight of a wide range of distinct and unrelated matters,” and that such oversight “first requires clarity as to exactly the kinds of matters or issues the Proposal relates to.” However, the matters subject to this committee’s oversight are defined by the Proposal: “policy positions and advocacy.” In other words, the scope of oversight is “policy positions and advocacy” and these “policy positions and advocacy” are to be reviewed for their impact on “the Company’s financial sustainability.” The Company complains further about the Proposal’s reference to “a partisan lineup of hosts that parroted liberal talking points” and “the network’s liberal bias,” but the fact that the Proposal’s supporting statement provides examples of how the Company’s public-policy positions and advocacy may be harming the financial sustainability of the Company only adds to the clarity of the Proposal.

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<sup>1</sup> See Staff Legal Bulletin No. 14B (September 15, 2004) (“SLB 14B”) (emphasis added).

<sup>2</sup> <https://wbd.com/esg/>

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[https://www.google.com/search?q=financial+sustainability&sc\\_esv=601771759&biw=1536&bih=695&ei=9RW0Zfa7Ju6zqtsPnciE4A4&ved=0ahUKEwi2is2g8vuDAXumWoFHR0kAewQ4dUDCBA&uact=5&oq=financial+sustainability&gs\\_l=egxnd3Mtd2l6LXNlcnAIGGZpbmFuY2lhbCBzdXNOYWluYWJpbGl0eTIKEAAyAQYigUYQzIKEAAyAQYigUYQzIFEAAyAQYChAAGIAEGloFGEMyBRAAGIAEMgUQABiABDIFEAAyAQYBRAAGIAEMgUQABiABDIKEAAyAQYigUYQ0iiGFD3C1j3C3ACeAGQAQCYAXOgAXOqAQMWLjG4AQPIAQD4AQH4AQKoAhPCAiAQABiABBikBRjIAhIhAhjqAhi0AhiKAXi3AxiUA9gBAclJhAuGIAEGloFGOU CGOUCGMcBGNEDGOoCGLQCGIoDGLcDGNQD2AEBwglWEAAyAXiPARjIAhjqAhi0AhiMA9gBAuIDBBgAIEG6BgQIARgHugYGCAIQARgK&scient=gws-wiz-serp](https://www.google.com/search?q=financial+sustainability&sc_esv=601771759&biw=1536&bih=695&ei=9RW0Zfa7Ju6zqtsPnciE4A4&ved=0ahUKEwi2is2g8vuDAXumWoFHR0kAewQ4dUDCBA&uact=5&oq=financial+sustainability&gs_l=egxnd3Mtd2l6LXNlcnAIGGZpbmFuY2lhbCBzdXNOYWluYWJpbGl0eTIKEAAyAQYigUYQzIKEAAyAQYigUYQzIFEAAyAQYChAAGIAEGloFGEMyBRAAGIAEMgUQABiABDIFEAAyAQYBRAAGIAEMgUQABiABDIKEAAyAQYigUYQ0iiGFD3C1j3C3ACeAGQAQCYAXOgAXOqAQMWLjG4AQPIAQD4AQH4AQKoAhPCAiAQABiABBikBRjIAhIhAhjqAhi0AhiKAXi3AxiUA9gBAclJhAuGIAEGloFGOU CGOUCGMcBGNEDGOoCGLQCGIoDGLcDGNQD2AEBwglWEAAyAXiPARjIAhjqAhi0AhiMA9gBAuIDBBgAIEG6BgQIARgHugYGCAIQARgK&scient=gws-wiz-serp)



Ultimately, the Company's arguments here are troubling because either (1) the Company can identify and assess its public-policy positions and advocacy, or (2) its directors and managers are arguably incapable of properly carrying out their fiduciary duties. If the Company is truly confused as to what may impact its financial sustainability, then all shareholders should be gravely concerned as to the competence of Company leadership and whether the Company's fiduciary duties to shareholders are being met. To be sure, the Company's number one concern should be its financial sustainability, especially with regard to shareholders.

Although reasonable minds may differ as to the use of equally appropriate terms or phrases when drafting a shareholder proposal, the applicable standard as previously noted is whether the company implementing the proposal "would be able to *determine with any reasonable certainty* exactly what actions or measures the proposal requires." (emphasis added). Absolute certainty, therefore, is not required. When it comes to the instant Proposal, there is nothing about it that prevents the Company, Board, or shareholders from being able to determine with any reasonable certainty exactly what actions or measures the proposal requires. Feigning confusion as a means to exclusion should not be encouraged. We presume that the Board of Directors are able to understand simple language and basic propositions. They will understand that should shareholders vote for the Proposal, they will have instructed the Board to create a committee to oversee and review the impact of the Company's public-policy positions and advocacy, and the effect of those actions on the Company's financial sustainability. If the Directors cannot understand this intensely simple proposition, then the Company failed in its duty of care by recommending that they be elected to their positions.

Accordingly, the Proposal is not impermissibly vague, indefinite and susceptible to various interpretations so as to be inherently misleading in violation of Rule 14a-8(i)(3).

### **III. The Proposal does not relate to the Company's ordinary business operations.**

The Company argues that the subject matter of the Proposal impermissibly relates to the Company's ordinary business operations because it relates to "the nature, presentation and content of media programming." Here, it is important to emphasize the policy underlying the ordinary business exclusion, which can be summed up in two questions: (1) Does the Proposal subject a management task to impractical shareholder oversight?<sup>4</sup> (2) Does the Proposal seek "to 'micro-manage' 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"?<sup>5</sup> Here, the answer to both questions is "no." The Proposal merely requests a committee be established to "oversee and review the impact of the Company's policy positions and advocacy on matters relating to the Company's financial sustainability" and that the Company "issue a public report on the committee's findings by the end of 2024." In other words, the relevant oversight is via the board, not the shareholders. This distinguishes our Proposal from the ones addressed in *CBS Corporation* (Mar. 22, 2013), *General Electric Company* (Dec. 10, 2009), and others cited by the Company that involve shareholders taking direct action as opposed to requesting additional board oversight. The Company argues that a Proposal requesting a report shifts the analysis to the

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<sup>4</sup> See Exchange Act Release No. 34-40018 (May 21, 1998) ("The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.") (emphasis added).

<sup>5</sup> *Id.*

subject matter of the report but the report to be issued here does not transfer oversight to the shareholders, which is the critical issue when it comes to the question of subject matter.<sup>6</sup> If the Company's argument is that management should not be subject to board oversight when it comes to these matters, or that shareholders should be precluded from requesting such oversight via the shareholder proposal process, then it is claiming freedom to turn its back on good corporate governance. Furthermore, nothing is being micro-managed by the Proposal as the Proposal does not require management to take any particular action in response to the review being called for. To the extent that the no-action decisions cited by the Company permitted exclusion of proposals in contravention of the foregoing analysis, they should be deemed incorrect and ignored.

Consider the oddity of the Company's overall position. It claims that the Proposal is just too vague to be understood, but that it really seeks to get right into the ordinary, everyday decisions that the Company makes, and must be free to make without shareholder oversight. While in this instance neither of those claims are true, it certainly can't be the case that they both be true, and the Company's attempt to go for either/or illustrates that even the Company recognizes that both claims are empty.

We note that the SEC's own extensive disclosure regime rests heavily on the distinction between disclosure requirements and other types of interventions that reach the internal affairs of the corporation for which the SEC lacks authority.<sup>7</sup> In doing so it bases its own regulatory regime on the premise that disclosure is not micromanagement of a company and is instead properly linked to making markets more accessible and regular for shareholders. In fact, it has made this argument explicitly in its defense of its approval of the NASDAQ rule requiring company disclosure of private information about the surface characteristics of its board members.<sup>8</sup> Those arguments apply to our Proposal, which seeks a report (i.e., disclosure) as an efficient, inexpensive and non-burdensome way for the Company to provide shareholders information that will help them determine whether the Company is acting prudently – without in any conceivable way micromanaging anything. If the Staff asserts that merely publishing a report constitutes micromanagement of the Company, then it has contravened the SEC's own argument in *AFBR v. SEC*.<sup>9</sup>

#### **IV. The Proposal Involves a Significant Social Policy Issue that Transcends the Company's Ordinary Business Operations.**

Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L") makes clear that a corporation may not rely on the ordinary business exclusion when a proposal raises "significant social policy issues."<sup>10</sup> This significant social policy exception "is essential for preserving shareholders' right to bring important issues before

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<sup>6</sup> Id.

<sup>7</sup> Cf. James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 128 (2017) ("According to the [U.S. Supreme] Court, securities law is based on a 'philosophy of full disclosure,' while corporate law is about the 'internal affairs of the corporation.'") (quoting *Green*, 430 U.S. at 470); Bus. Roundtable v. SEC, 905 F.2d 406, 411-12 (D.C. Cir. 1990).

<sup>8</sup> Cf. All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, 85 F.4th 226, 255 (5th Cir. 2023) ("Nasdaq's disclosure-based framework does not alter the state-federal balance. It is well-established that disclosure rules do not interfere with the role of 'state corporate law' in 'regulat[ing] the distribution of powers among the various players in the process of corporate governance.'") (quoting Bus. Roundtable, 905 F.2d at 411-12).

<sup>9</sup> Id.

<sup>10</sup> SLB 14L.

other shareholders by means of the company's proxy statement."<sup>11</sup> In determining the social policy significance "of the issue that is the subject of the shareholder proposal.... the Staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company."<sup>12</sup> Put another way, proposals "focusing on sufficiently significant social policy issues. . .generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."<sup>13</sup>

Here, the Proposal implicates the significant social policy issues of media bias, the undermining of trust in mainstream media news outlets, and the increasing polarization of our society. In addition to the citations in the Proposal supporting the foregoing, Proponent notes a 2020 article titled, "Poll: More Than 8 In 10 Americans Say Media Is Biased, To Blame For Political Division."<sup>14</sup> Here is a relevant excerpt:

Eighty-six percent of Americans believe there is "a great deal" or "a fair amount" of political bias in the way the media covers news, according to a Knight Foundation/Gallup poll .... collected from polling of more than 20,000 Americans ....

Not only do most Americans recognize media bias, they also believe it's intentional. When asked about their views of news organizations they distrust, 79 percent of poll respondents said those outlets were "trying to persuade people to adopt a certain viewpoint." When news is inaccurate, 54 percent of Americans think it's because reporters are "misrepresenting the facts," while 28 percent assume they're "making them up entirely."

And more than 8 in 10 Americans — 84 percent — assign the media either a great deal (48 percent) or a moderate amount (36 percent) of blame for political division.

It's not that Americans don't have high expectations for what the media should be doing; they just don't think the news industry is hitting the mark. Eighty-four percent said news media is critical or very important to democracy, and 92 percent believe that providing "accurate and fair news reports" is a critical or very important role.

But almost three-fourths (73 percent) of Americans believe it's a "major problem" for so much bias to exist in news that's supposed to be objective. That number has increased from 65 percent in 2017.

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<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id. (quoting the 1998 Release).

<sup>14</sup> Elle Purnell, *Poll: More Than 8 In 10 Americans Say Media Is Biased, To Blame For Political Division*, THE FEDERALIST (Aug. 4, 2020), available at <https://thefederalist.com/2020/08/04/poll-more-than-8-in-10-americans-say-media-is-biased-to-blame-for-political-division/>.

These concerns go to the heart of our democracy, and if “significant discrimination matters” in employment transcend the ordinary business of hiring, firing, and promoting,<sup>15</sup> then dividing our citizens into warring factions and undermining our faith in critical institutions surely transcends “the nature, presentation and content of media programming.” In fact, the Company has itself, through its news media outlets and elsewhere, asserted the vital need for ensuring accuracy and avoiding misinformation and disinformation.<sup>16</sup> A former Company media personality has made a one-man cottage industry, both on Company outlets and elsewhere, of attacking *other* news outlets for their supposed contributions to poisonous partisanship and public misinformation (“without evidence,” it might be added – as it was so often added on Company outlets with regard to statements from some political figures and points of view, but is notably absent in those outlets’ treatment of other political figures promoting other partisan positions).<sup>17</sup> Yet the Company now argues that such concerns and the need to consider and address them are desperately vital to our democracy and so matters of the greatest social policy concern – except when review of *the Company’s* potential contributions to these problems is sought. The Staff should reject such hypocrisy.

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

Regardless, the Staff lacks 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.”<sup>18</sup> While this authority might be read “broadly,” “it is not

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<sup>15</sup> See 1998 Release.

Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.

Id.

<sup>16</sup> <https://www.cnn.com/2023/11/29/health/fight-misinformation-wellness/index.html>; <https://www.cnn.com/2021/10/07/opinions/facebook-misinformation-and-how-to-fix-it-himelfarb-howard/index.html>; <https://edition.cnn.com/2021/07/27/opinions/civics-education-democracy-schools-voting-misinformation-shi/index.html>.

<sup>17</sup> <https://www.msn.com/en-us/money/companies/brian-stelter-on-his-new-book-about-fox-news-its-787-million-settlement-and-when-it-begins-to-dawn-on-rupert-how-bad-things-were-getting-for-him/ar-AA1jXV5R>

<sup>18</sup> 15 U.S.C. § 78n(a)(1).

seriously disputed that Congress’s central concern [in enacting § 14(a)] was with disclosure.”<sup>19</sup> 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.”<sup>20</sup>

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.<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup> A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders’ power to adopt.<sup>24</sup>

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

Just as a proposal to create a board committee on environmental sustainability was found non-excludable in *Alphabet, Inc.* (avail. April 11, 2022), so too should our Proposal to create a board committee on corporate financial sustainability be non-excludable. The Proposal is not impermissibly vague and does not impermissibly encroach on the Company’s ordinary business. Furthermore, the Proposal implicates significant social policy issues that transcend the Company’s ordinary business. Finally, for the SEC to grant the Company’s request would raise serious issues of statutory authority.

The Company has clearly failed to meet its burden under Rule 14a-8(g) of persuading the Staff that it may omit our Proposal. 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].

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<sup>19</sup> *Bus. Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990).

<sup>20</sup> S. Rep. No. 792 at 12 (1934).

<sup>21</sup> *Bus. Roundtable*, 905 F.2d at 413 (internal citation omitted).

<sup>22</sup> *Id.*

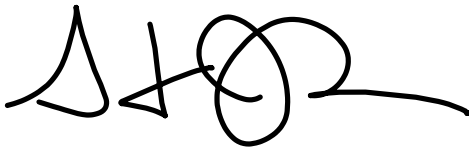
<sup>23</sup> See *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227 (Del. 2008).

<sup>24</sup> *Id.* at 232.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Shepard".

Scott Shepard  
FEP Director  
National Center for Public Policy Research

A handwritten signature in black ink, appearing to read "Stefan Padfield".

Stefan Padfield  
FEP Deputy Director  
National Center for Public Policy Research

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

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February 13, 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: *Warner Bros. Discovery, Inc.  
Shareholder Proposal Submitted by the National Center for Public Policy  
Research*

Ladies and Gentlemen:

This letter is submitted on behalf of Warner Bros. Discovery, Inc. (the "Company") in response to the letter of the National Center for Public Policy Research (the "Proponent"), dated February 2, 2024 (the "Rebuttal Letter") submitted in response to the Company's letter, dated January 5, 2024 (the "No-Action Letter") respectfully requesting the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission concur in the Company's view that the Proponent's shareholder proposal (the "Proposal") and statements in support thereof be excluded

from the Company's proxy statement and form of proxy for its 2024 annual meeting of shareholders (collectively, the "2024 Proxy Materials").

The Company respectfully seeks to clarify several mischaracterizations set forth in the Rebuttal Letter:

**I. The Proposal Is Substantively Different to the Alphabet, Inc. Proposal and Is Impermissibly Vague.**

In the Rebuttal Letter, the Proponent claims that the Proposal is "substantially indistinguishable" from *Alphabet, Inc.* (Apr. 11, 2022) (the "Alphabet Proposal") which the Staff found non-omissible. The Proponent, however, ignores several key differences between the Proposal and the Alphabet Proposal.

First, the Alphabet Proposal called on the company to create a board committee on "environmental sustainability" with the purpose of overseeing and providing guidance on matters relating to environmental sustainability. The Alphabet Proposal makes it clear that the sole issue being addressed was environmental sustainability. The Proponent's Proposal, on the other hand, calls on the Company to create a "board corporate sustainability committee" with the purpose of overseeing and reviewing the impact of the Company's "policy positions and advocacy" on matters relating to the Company's "financial sustainability." Unlike the Alphabet Proposal, the Proponent's Proposal encompasses a far broader potential range of issues that could fall under the general "sustainability" umbrella, including the concept of "financial sustainability," which is a term that is substantively and meaningfully different from "environmental sustainability." Even the Proponent distinguishes the two terms, stating that "[f]inancial sustainability more completely implicates substantial issues of particular importance to shareholders than [sic] environmental sustainability" and that "environmental sustainability is at best a tertiary fiduciary concern." The Proponent's claim that their Proposal is indistinguishable from the Alphabet Proposal is disingenuous and seeks to mislead and confuse the Company and its shareholders.

Second, the Proponent claims that the term "sustainability" is not impermissibly vague because the Company has used this term several times in its public disclosures. The Proponent omits the fact that the Company has used the term "sustainability" in solely the context of discussions around environmental sustainability. The term "financial sustainability" has not been used or defined by the Company, and as the Proponent admits in its Rebuttal Letter, implicates "substantial issues" that the Proponent has failed to clarify in the Proposal and its supporting statement. Indeed, the fact that a Google search for "financial sustainability" would return over 958 million results only further highlights the need for the Proposal to define the term, lest it be subject to a wide range of conflicting interpretations.

Third, the Alphabet Proposal's supporting statement focuses on the same issue as the proposal itself, namely environmental sustainability. On the other hand, the Proponent's supporting statement focuses on the Company's programming. As discussed in the No-Action Letter, the fact that the Proponent's supporting statement appear to address issues that are entirely new and different adds a further layer of confusion and vagueness to the Proposal. The Proponent, in its Rebuttal Letter, appears to suggest that the Proposal's reference to "policy positions and advocacy" is directly tied to the Company's programming decisions. However, the Proposal's supporting



statement make no such reference to the Company's policy positions or advocacy, but rather criticizes the Company for "privilege[ing] executive political/social preferences." Here, the Proponent appears to assume that the Company's programming decisions reflect its policy positions or advocacy. But as described in the No-Action Letter, the Company's programming decisions are made against the backdrop of wide-ranging and diverse consumer tastes, sensitivities and preferences and undertaken by numerous employees who consider a wide range of factors while employing specialized business judgment in making such decisions. In short, the Company's programming is not a reflection of the Company's policy positions or advocacy, but rather business decisions that focus on serving the Company's wide-ranging audiences. The fact that the Proponent has conflated these two separate and distinct issues further underscores the vagueness of the Proposal.

## **II. The Proposal Focuses on Ordinary Business Matters.**

The Proponent claims that the Proposal concerns the issues of media bias, which it believes to be a significant social policy issue. If this were indeed the case, then the Proposal does not address this issue and focuses instead on the concepts of "sustainability" and "financial sustainability." It is unclear that any ordinary shareholder or the Company would be able to reasonably draw a connection between the issue of media bias and the issues of sustainability or financial sustainability.

Setting aside the ambiguities in the Proposal, the Proponent has chosen, in its supporting statement, to primarily focus on the Company's programming decisions. As set forth in the No-Action Letter, matters relating to programming relate to a company's ordinary business operations, a view which the Staff has consistently upheld. Moreover, as further discussed in the No-Action Letter, the fact that a proposal may tangentially touch upon a significant policy issue does not preclude exclusion under Rule 14a-8(i)(7) where the proposal is focused on ordinary business matters.

### **CONCLUSION**

Based on the foregoing analyses and other analyses set forth in the No-Action Letter, 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: Tara Smith, Warner Bros. Discovery, Inc.  
Scott Shepard, National Center for Public Policy Research



February 27, 2024

Via Online Shareholder Proposal Form

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

**Re: Warner Bros. Discovery, Inc., No-Action Request for Shareholder Proposal by the National Center for Public Policy Research (“NCPPR” or “Proponent”)**

Ladies and Gentlemen:

This correspondence is in response to the letter of Carmen X. W. Lu on behalf of Warner Bros. Discovery, Inc. (the “Company” or “Warner”) dated February 13, 2024, supplementing the Company’s original request 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 SUPPLEMENTAL CLAIMS**

**I. The Proposal Is Not Substantively Different from the Alphabet, Inc. Proposal, and Is Not Impermissibly Vague.**

First, the Company attempts to distinguish our Proposal from the Alphabet proposal by arguing that “financial sustainability” is so much broader than “environmental sustainability” as to make our reliance on the Alphabet proposal “disingenuous.” However, the reality is precisely the opposite. When we note that financial sustainability “more completely implicates substantial issues of particular importance to shareholders than environmental sustainability” we are making the obvious point that financial sustainability is not only more germane to shareholder interests but also narrower than environmental sustainability. This is so because financial sustainability ultimately boils down to expected value calculations while a reasonable consensus on the proper yardstick for environmental sustainability remains elusive. Compare Stephen Conmy, *What’s the difference between sustainability and ESG?*, Corporate Governance Institute (“While sustainability and ESG are closely related concepts .... [s]ustainability takes a broader, holistic view ....”),<sup>1</sup> with Aneil Kovvali & Yair Listokin, *Valuing ESG*, 49 B.Y.U. L. Rev. 705, 705 (2024) (“The core problem is that ESG mixes vague environmental and social goals with a profit maximization goal and does not provide a framework for resolving the conflicts that exist between them. The result is confusion ....”). Accordingly, when it comes to scope, our Proposal is even more appropriate for inclusion than the Alphabet proposal.

Second, the Company argues that the term “sustainability” is impermissibly vague because “financial

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<sup>1</sup> Available at <https://www.thecorporategovernanceinstitute.com/insights/guides/difference-between-sustainability-and-esg/>.

sustainability” is a phrase that “has not been used or defined by the Company,” while the term “sustainability” has been used by the Company “solely [in] the context of discussions around environmental sustainability.” We note that we are not aware of the Company explicitly defining the phrase “environmental sustainability” anywhere despite using it frequently, and it presumably feels no need to do so because it deems “environmental sustainability” to be sufficiently in use to make explicit definition unnecessary. Of course, this is precisely the point of our prior reference to the ubiquity of “financial sustainability” on the internet. The Staff should therefore reject the Company’s attempt to effectively argue that the phrase “financial sustainability” is so widely used as to be confusing due to it being “subject to a wide range of conflicting interpretations” while at the same time seeing no need to define “environmental sustainability” in practice, presumably because the phrase is so widely used.

Third, the Company argues that our Proposal is materially distinguishable from the Alphabet proposal because the Alphabet proposal focuses on environmental sustainability in both the resolution and the supporting statement, while our Proposal raises a new issue in the supporting statement by referencing the Company’s programming. Trying to avoid the obvious connection between the Company’s programming and the “policy positions and advocacy” expressly referenced in the resolution, the Company asserts that “the Company’s programming is not a reflection of the Company’s policy positions or advocacy” but rather “business decisions that focus on serving the Company’s wide-ranging audiences.” This would be a good point at which to review the facts we set forth in our supporting statement regarding the destruction of shareholder value wrought by the brazen partisanship at CNN. Having done so, one may then reflect on the false dichotomy the Company is attempting to create between its “business decisions” and its “policy positions and advocacy.” Our Proposal asks the Company to take a closer look at the impact of the Company’s policy positions and advocacy on the financial sustainability of the Company, and this quite naturally and obviously includes the Company’s programming. Cf. Eliana Johnson, *CNN Chief’s Republican Apology Tour: GOP officials say they’re skeptical of Chris Licht’s pledge to tamp down on-air partisanship*, Washington Free Beacon (Aug. 1, 2022);<sup>2</sup> Andrew Stiles, *Stelter’s Revenge: Chris Licht Tried to Make CNN Less Partisan. It Cost Him His Job.*, Washington Free Beacon (June 7, 2023).<sup>3</sup>

## **II. The Proposal Focuses on Significant Social Policy Issues That Transcend Ordinary Business Matters.**

How little the Company must think of its shareholders to claim that the issue of media bias will not enter their minds as they read our Proposal. The Proposal specifically references in the supporting statement a “liberal bias” and notes that an obvious explanation for CNN’s decline is that it “embraced a partisan lineup of hosts that parroted liberal talking points.” There is no ambiguity here regarding the social significance of our Proposal.

As for that social significance, which surely transcends whatever ordinary business concerns are implicated, the Proponent rests on the explication of that issue in our original reply, highlighting here that: These concerns go to the heart of our democracy ....”

Below all the persiflage is the simple request by the Company for the Staff once again to decide that some sorts of material risks (e.g., climate-related) will receive Staff blessing as so important as to “transcend ordinary business,” while other sorts of material risk far more central to the Company’s core activities (e.g., media bias) will be denied that blessing and so be found omissible. But the Staff cannot accede to that request because it would constitute yet another instance of the Staff making

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<sup>2</sup> <https://freebeacon.com/media/chris-lichts-republican-apology-tour/>

<sup>3</sup> <https://freebeacon.com/media/stelters-revenge-chris-licht-tried-to-make-cnn-less-partisan-it-cost-him-his-job/>

decisions based on nothing but its personal policy preferences -- whether the Staff likes and wants the change that might arise from the particular material-risk analysis sought. Cf. *NCPPR sues the SEC, alleging bias*, Ballotpedia (May 2, 2023) (“NCPPR argued that the SEC was engaging in viewpoint discrimination by giving the green light to identical proposals about certain forms of discrimination (e.g., against sexual orientation and gender identity) while agreeing companies could exclude proposals about other forms of discrimination that are at least as significant to society (e.g., viewpoint and ideology, especially against conservatives).”), available at [https://ballotpedia.org/NCPPR\\_sues\\_the\\_SEC,\\_alleging\\_bias\\_\(2023\)](https://ballotpedia.org/NCPPR_sues_the_SEC,_alleging_bias_(2023)).

### III. Conclusion

The Company has clearly failed to meet its Rule 14a-8(g) burden on the issue of excluding our Proposal. Therefore, based upon the analysis set forth above and in our prior reply, 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])