



DIVISION OF
CORPORATION FINANCE

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

April 22, 2025

Sonia G. Barros
Sidley Austin LLP

Re: DaVita Inc. (the "Company")
Incoming letter dated February 28, 2025

Dear Sonia G. Barros:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the New York State Common Retirement Fund for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the board of directors issue a public report detailing and analyzing the impacts of racial and ethnic disparities in healthcare outcomes on the Company's business, including data on the extent of such racial and ethnic disparities, information about impediments to collecting such data, and efforts taken by the Company to reduce such disparities by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal seeks to micromanage the Company. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2024-2025-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: John W. White
New York State Common Retirement Fund



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February 28, 2025

Via Online Submission Form

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

Re: DaVita Inc.
Stockholder Proposal of New York State Common Retirement Fund

Ladies and Gentlemen:

This letter is submitted by DaVita Inc., a Delaware corporation (the “Company” or “DaVita”) pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, to request confirmation that the staff (the “Staff”) of the Securities and Exchange Commission (the “Commission” or the “SEC”) will not recommend enforcement action if, in reliance on Rule 14a-8, the Company excludes from the proxy materials (the “Proxy Materials”) for the Company’s 2025 Annual Meeting of Stockholders a proposal submitted by the New York State Common Retirement Fund (the “Proponent”) on December 3, 2024 (the “Proposal”) and accompanying supporting statement (the “Supporting Statement”).

The Company intends to omit the Proposal from its Proxy Materials and respectfully requests confirmation that the Staff will not recommend to the Commission that enforcement action be taken if the Company excludes the Proposal from its Proxy Materials for the reasons set forth below.

Pursuant to Rule 14a-8(j) of the Exchange Act, the Company is submitting this letter, together with the Proposal and related attachments, to the Commission electronically, with copies of this letter and the attachments provided concurrently to the Proponent. While this submission is occurring later than 80 calendar days before the Company intends to file its definitive Proxy Materials with the Commission, the Company has good cause under Rule 14a-8(j)(i) as this submission’s legal arguments relate to *Staff Legal Bulletin No. 14M* (Feb. 12, 2025) (“SLB 14M”). The printing deadline for the Company’s Proxy Materials is on or about April 22, 2025, and the Company expects to file its definitive Proxy Materials on or about April 23, 2025.

Rule 14a-8(k) and *Staff Legal Bulletin No. 14D* (Nov. 7, 2008) (“SLB 14D”) provide that stockholder 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 pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal reads as follows:

RESOLVED: Shareholders of DaVita Inc. (DaVita) request that the Board of Directors issue a public report detailing and analyzing the impacts of racial and ethnic disparities in healthcare outcomes on DaVita’s business. The report should include data on the extent of such racial and ethnic disparities, information about impediments to collecting such data, and efforts taken by DaVita to reduce such disparities by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.

The report should be prepared at reasonable cost and omit confidential and proprietary information. It should be publicly disclosed on DaVita’s website.

In the Supporting Statement, the Proponent cites statistics regarding the impact of end stage kidney disease (“ESKD”) on Americans and particular inequitable impacts on the Black and Hispanic communities. The Proponent then describes the movement by the Centers for Medicare and Medicaid Services (“CMS”) towards a value-based care model. Proponent asserts the importance of “improv[ing] patient outcomes, prioritiz[ing] kidney health equity, and manag[ing] costs” in this new model and asserts how each impacts the reimbursement from CMS of DaVita’s services. Proponent alleges benefits to investors through the publication of a report by DaVita on a variety of equity programs and policy initiatives, including “improving access to care, increasing ESKD awareness and screening, reducing treatment disparities, eliminating provider and involuntary discharge biases, and the overall reduction of racially and ethnically disparate health outcomes.”

A copy of the Proposal and the Supporting Statement is attached hereto as Exhibit A.

BASIS FOR EXCLUSION

The Company respectfully requests that the Staff concur in its position that the Proposal may be properly excluded from the Proxy Materials pursuant to Rule 14a-8(i)(7), on the basis that the Proposal relates to, and does not transcend, the Company’s ordinary business operations, and seeks to micromanage the Company.

ANALYSIS

The Proposal May be Excluded Pursuant to Rule 14a-8(i)(7).

Rule 14a-8(i)(7) Background

Rule 14a-8(i)(7) permits a company to omit a proposal from its proxy materials if the proposal “deals with a matter relating to the company’s ordinary business operations.” The purpose 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.” *See Release No. 34-40018* (May 21, 1998) (the “1998 Release”). As explained by the Commission, 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 providing management with flexibility in directing certain core matters involving the company’s business and operations.” *Id.*

The 1998 Release explains that there are two central considerations underlying the ordinary business exclusion. The first is that “[c]ertain 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.” *Id.* However, such proposals are not excludable if they focus on “significant social policy issues” that “transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” *Id.* In assessing whether a particular proposal raises a “significant social policy issue,” the Staff will review the terms of the proposal as a whole, including the supporting statement. *Id.*

Where a shareholder proposal requests the issuance of a report or disclosure, as is the case with the Proposal, the Staff has stated that it will look to whether the underlying subject matter of the report or disclosure concerns an ordinary business matter of the company. *See Staff Legal Bulletin No. 14E* (Oct. 27, 2009).

The second consideration underlying the ordinary business exclusion “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.” *Id.* As stated in *Staff Legal Bulletin No. 14K* (Oct. 16, 2019) (“SLB 14K”), “[w]hen a proposal prescribes specific actions that the company’s management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted.”

The Proposal Is Excludable Under Rule 14a-8(i)(7) Because It Deals with Matters Relating to the Company’s Ordinary Business and Does Not Focus on an Issue that Transcends Ordinary Business Matters.

The Proposal is excludable under Rule 14a-8(i)(7) because it deals with matters relating to ordinary business activities that underly the Company’s comprehensive kidney care services,¹ and does not focus on an issue that transcends ordinary business matters. The Proposal seeks through the commissioning of the report to manage the Company’s business, including with respect to (i) the provision of services, including quality of care, and (ii) policies with respect to the provision of services and workforce training. The stated significant social policy issue – racial and ethnic disparities in healthcare outcomes – does not transcend these ordinary business activities.

The Proposal Relates to the Manner in which the Company Provides Services.

The Staff has concurred that the manner in which a company provides its particular products or services is part of a company’s ordinary business operations within the meaning of Rule 14a-8(i)(7). For example, in *AT&T Inc.* (Jan. 4, 2017) (“AT&T”), the Staff concurred in the exclusion of a shareholder proposal requesting the AT&T board review and report on AT&T’s progress toward providing internet service and products for low-income customers, noting that “the proposal relates to the products and services offered by the company.” In its request for relief, AT&T argued that although the underlying social policy issue was important to management, the proposal itself focused on the company’s decisions regarding its products and offerings, including decisions that required management’s factual analyses and judgments regarding deployment of capital and use of technologies and services. *Id.* See also *Pepco Holdings, Inc.* (Feb. 18, 2011) (proposal urging the company to pursue renewable solar energy was excludable as concerning the manner in which particular products and services are sold); and *Delta Air Lines, Inc.* (Mar. 28, 2018) (concurring in the exclusion of a proposal requesting a report on the discriminatory impacts of airline seat sizes on overweight and obese passengers as related to ordinary business operations, including product design and the manner in which the company provides its products and services).

Moreover, the 1998 Release identified certain “fundamental” tasks it considered to be ordinary business, including “decisions on [] quality and quantity.” See 1998 Release. Thus, to the extent that the Proposal focuses on decision-making by the Company regarding its services, including with respect to quality of care provided by those services, it may be deemed to “[deal] with a matter relating to the company’s ordinary business operations” within the meaning of Rule 14a-8(i)(7). See also *HCA Healthcare, Inc.* (Mar. 6, 2023) (concurring with the exclusion of a proposal requesting provision of particular food options to patients as it related to “complex operational, business and quality of care issues requiring knowledge of ordinary business and

¹ The Company is a comprehensive kidney care provider, serving approximately 281,100 patients at 3,166 outpatient dialysis centers in the U.S. and abroad, and additionally contracts to provide hospital inpatient dialysis services in approximately 760 hospitals throughout the U.S. The Company’s business is comprehensive kidney care, utilizing a patient-centric care model to leverage its platform of kidney care services to maximize patient choice in both models and modalities of care.

operational matters”); and *McDonald’s Corporation* (Mar. 12, 2019) (concurring in the exclusion of a proposal relating to food quality and integrity, on the basis that the proposal related to “the Company’s ordinary business operations”).

The Proposal is directly related to the Company’s provision of services that are at the core of the Company’s business. For example, the Proposal requests information with respect to “efforts taken by DaVita to reduce [racial and ethnic] disparities [in healthcare outcomes] by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.” In particular, the Supporting Statement lobbies for an increasing focus on quality of care (i.e., “value-based care”), including the provision of the Company’s U.S. dialysis services in a way that would maximize the Company’s reimbursement from CMS by improving patient outcomes, prioritizing kidney health equity and managing costs by tying reimbursement directly to the quality of care delivered rather than the sheer volume of services provided. Determining how to provide value-based care in a way that would maximize CMS reimbursement involves detailed, factual analyses and knowledge of the services provided by the Company to its patients and the ways in which those services are submitted to payors, such as CMS, for reimbursement. Each of these decisions (including the foundational decision regarding whether to make maximization of CMS reimbursement the Company’s primary goal) relies on the expertise and judgment of management.²

As a comprehensive kidney care provider, a crucial part of the Company’s business is maximizing healthcare outcomes, which is the central focus of the Proposal. In order to produce the Proposal’s requested report, the Company would need to analyze healthcare outcomes of all its patients and compare outcomes of all patients to patients of particular races or ethnicities. Yet health outcomes are influenced by a variety of factors, including quality of care, which the Company strives to increase by using patient-centered care models to empower every patient with the opportunity to achieve their best health outcomes, regardless of race, ethnicity or other social determinants. Quality of care and other factors that improve healthcare outcomes are the very matters the Company considers on a day-to-day basis in the management of its business. Thus, consistent with the precedent cited above, the Proposal focuses on the Company’s ordinary business decisions regarding the provision of its services and the quality of its care and may therefore be excluded pursuant to Rule 14a-8(i)(7).

² For example, if the Proponent were familiar with the Company’s business at the level of management, then it would understand that the CMS value-based care model identified by the Proponent (the Framework for Health Equity and End Stage Renal Disease Treatment Choices Model (the “ETC Model”)) is a pilot program that does not apply to all of the Company’s clinics. It is not clear whether the ETC Model will continue after the pilot period. Thus, implementing the ETC Model throughout the Company’s operations, as Proponent appears to suggest, may not benefit the Company.

The Proposal Relates to Management of the Company’s Policies Concerning its Services and Management of its Workforce.

The Staff has recognized that management of company policies regarding products and services is ordinary business and subject to exclusion under Rule 14a-8(i)(7). *See Amazon.com, Inc.* (Mar. 28, 2019) (concurring in the exclusion of a shareholder proposal focused on “ongoing review of corporate policies and procedures” related to the Company’s products and services as a matter of “ordinary business operations.”); and *Wal-Mart Stores, Inc.* (Apr. 10, 1991) (concurring in the exclusion of a proposal under Rule 14a-8(c)(7) as it required information regarding “employment practices and policies” and “practices and policies for selecting suppliers of goods and services”).

Policies related to the management of the workforce are likewise excludable as ordinary business matters. *See* 1998 Release (identifying “the management of the workforce” as a task “fundamental to management’s ability to run a company on a day-to-day basis”). In *United Technologies Corp.* (Feb. 19, 1993), the Staff specifically enumerated “employee training” in a list of excludable ordinary business categories. *See also, Merck & Co., Inc.* (Feb. 16, 2016) (permitting exclusion of a policy concerning employee hiring and promotion procedures because “[p]roposals concerning a company’s management of its workforce are generally excludable under rule 14a-8(i)(7)”).

Here, the Proposal seeks information regarding DaVita’s policies, including regarding its services and its workforce training. Specifically, the Proposal requests information regarding the Company’s overall efforts to “improv[e] prevention outreach, remediation and educational programs[.]” The Supporting Statement further explains that the report should address specific Company policies and procedures, including with respect to “progress on improving access to care, increasing ESKD awareness and screening, reducing treatment disparities, [and] eliminating provider and involuntary discharge biases...[.]”

All of these topics are matters of policy related directly to the provision of the Company’s services. For example, for over ten years, DaVita has offered no-cost educational courses focused on kidney disease for patients and their families through Kidney Smart, which has been associated with higher rates of individuals starting home dialysis and lower hospitalization and mortality rates in the first year of treatment.³ The Kidney Smart courses are offered in over ten languages to help temper the impact that language barriers may have on health education for the kidney care population. As another example, in 2023, DaVita launched its Health Tour, a mobile health screening and kidney care education program to help identify and raise awareness of risk factors that may lead to chronic kidney disease and enable individuals at risk to work with care providers

³ DaVita Inc. (Jul. 19, 2022). *Kidney Smart Education Tied to Improved Health Outcomes for Patients* [Press release]. <https://newsroom.davita.com/Kidney-Smart-Study>

to plan early intervention, as needed.⁴ Whether and how management chooses to implement programs like these, which are focused on prevention outreach, remediation and education, and whether to implement additional programs to increase awareness and screening is a matter of policy that constitutes an ordinary business matter for management and thus is excludable under Rule 14a-8(i)(7).

In addition, DaVita’s management has made the decision to train its care teams on cultural humility and unconscious bias to promote the delivery of personalized treatment, a principle of DaVita’s patient-centered care models.⁵ The Company’s decisions with respect to the training of its care teams on provider and involuntary discharge biases, including the type of training and frequency, are inherent in the day-to-day operations of the Company. Consistent with the Commission’s statement in the 1998 Release and the above precedent, matters related to the Company’s implementation of anti-bias education and training involves the manner in which the Company hires and trains its workforce and other care partners and, therefore, may be excluded under Rule 14a-8(i)(7).

The Proposal Does Not Transcend the Company’s Ordinary Business.

While some of the issues that would be addressed in the report requested by the Proposal may touch upon significant policy issues, *i.e.*, racial and ethnic disparities in healthcare outcomes, the Proposal can be properly excluded under Rule 14a-8(i)(7) because the underlying subject matter of the report sought by the Proposal encompasses a wide range of issues implicating the Company’s ordinary business operations, including those related to the manner in which the Company provides its healthcare services, including the quality of its care, and its workforce policies and training. The Staff has consistently concurred in the exclusion of proposals even if they are deemed to touch upon a “significant policy issue” within the meaning of Rule 14a-8(i)(7) if the proposals also encompass ordinary business matters and the policy issue does not transcend these ordinary business matters. *See, e.g., The TJX Companies, Inc.* (Apr. 9, 2021) (concurring in the exclusion of a proposal seeking information about monitoring of suppliers’ compliance with the company’s policy prohibiting prison labor because the proposal “[did] not transcend the [c]ompany’s ordinary business operations”). This position prevents proponents from circumventing the standards of Rule 14a-8(i)(7) by combining ordinary business matters with a significant policy issue.

For example, in *Amazon.com, Inc.* (Mar. 28, 2019) the Staff concurred in the exclusion of a proposal requesting the establishment of a particular committee that would conduct and publish a report on “an ongoing review of corporate policies and procedures . . . to assess the potential societal consequences of the Company’s products and services.” Although the proposal and

⁴ DaVita Inc. (Sept. 13, 2023). *DaVita launches community health tour to provide free kidney screenings and education coast-to-coast* [Press release]. <https://newsroom.davita.com/2023-09-13-DaVita-launches-community-health-tour-to-provide-free-kidney-screenings-and-education-coast-to-coast>

⁵ *See* Jeffrey Giullian, MD, MBA, and Thomas H. Lee, MD, MSc (Sept. 7, 2022). *Equitable Kidney Disease Care: Far from Perfect, Far from Done*. NEJM Catalyst. <https://catalyst.nejm.org/doi/full/10.1056/CAT.22.0276>

supporting statement contained generalized references to “potential societal consequences” such as civil liberties and privacy, the principal focus of the risks that the proposal addressed related to the company’s ordinary business operations, including its products and services and related policies, business practices and operations, strategic decisions; and choice of technologies.

Here, although the Proposal and Supporting Statement identify the issue of racial and ethnic disparities in healthcare, the principal focus of the risks to the Company’s business identified by the Proposal and Supporting Statement relate to the Company’s day-to-day operational performance and does not transcend day-to-day operations, including as it relates to:

- (1) The provision of services that result in “value-based care” in a manner that increases reimbursement from CMS. (*See* Supporting Statement.)
- (2) A focus on preventative measures and efficient treatment plans. (*See* Supporting Statement.)
- (3) The quality of the Company’s patient services, specifically as related to reduction of treatment disparities through prevention outreach, access to care, awareness of ESKD and screening for ESKD. (*See* Supporting Statement.)
- (4) The implementation of workforce policies and procedures, including as related to remediation and educational programs and training to eliminate provider and involuntary discharge biases. (*See* Proposal and Supporting Statement.)

Finally, the Staff has indicated that, when evaluating whether the significant policy exception applies, it will take a “company-specific approach in evaluating significance” instead of determining that “particular issues or categories of issues are universally ‘significant.’” *SLB 14M*. While racial and ethnic disparities in healthcare outcomes may reflect a significant policy issue, there is not a sufficient nexus to the Company’s business operations such that it transcends the Company’s ordinary business operations. The presence of such a nexus is a critical component of the analysis as to whether the significant policy exception should apply. *See id.* and footnote 32 to *Staff Legal Bulletin No. 14H* (Oct. 22, 2015). *See, e.g., Omnicom Group Inc.* (Mar. 17, 2021) (concurring in the exclusion of a proposal regarding civil and human rights where there was an “insufficient nexus” between the identified policy and the company’s advertising policies) and *PayPal Holdings Inc.* (Mar. 6, 2018) (concurring in the exclusion of a proposal addressing climate change which did not have a sufficient nexus to the company’s technology and digital payment business).

The Company endeavors to empower every patient with the opportunity to achieve their best health outcomes, regardless of race, ethnicity or other social determinants. However, because the primary business of the Company is to serve as a comprehensive kidney care provider, there is insufficient nexus between the policy issue at the heart of the Proposal and DaVita, the Proposal is properly excludable under Rule 14a-8(i)(7).

The Proposal Is Excludable Under Rule 14a-8(i)(7) Because It Seeks to Micromanage the Company by Probing Too Deeply Into Complex Matters and Aspects of the Company’s Internal Operations.

The Staff has concurred with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that seek to micromanage a company’s ordinary business operations, including when proposals provide a specific method for implementing complex policies as a substitute for the judgment and discretion of management. *See* SLB 14M, Annex A (reinstating SLB 14K). In addition, SLB 14K notes that “if the method or strategy for implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company.” Further, “[w]hen a proposal prescribes specific actions that the company’s management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted.” Finally, proposals seeking “an intricately detailed study or report may be excluded on micromanagement grounds.” *See* SLB 14M, Annex A (reinstating SLB 14J).

Based on the standard articulated in SLB 14M and SLB 14K, the Staff has consistently concurred with the exclusion of proposals attempting to micromanage a Company. In *State Street Corporation* (Mar. 26, 2021) (“State Street”), the proponent requested that the board of State Street provide a report as to how State Street’s voting and engagement policies affect the majority of its clients and shareholders. The proposal sought to dictate the standards to be used in developing engagement and voting policies, thereby seeking to supplant the company’s judgment. The Staff permitted the exclusion of the proposal as it micromanaged the company to such a degree that exclusion was warranted. *See also*, *JPMorgan Chase & Co.* (Mar. 30, 2018) (concurring in exclusion of a proposal on the basis of micromanagement as it requested a report on the reputational, financial and climate risks associated with project and corporate lending, underwriting, advising and investing of tar sands projects); and *The Goldman Sachs Group, Inc.* (Mar. 12, 2019) (concurring in the exclusion of a proposal requesting that the company adopt a policy to reduce the carbon footprint of its loan and investment portfolios).

In addition, under Rule 14a-8(i)(7), a proposal may be excluded as micromanaging the company, even if it focuses on a significant social issue or transcends the company’s ordinary course operations. *See* *SeaWorld Entertainment, Inc.* (Apr. 20, 2021) (concurring that a proposal seeking a report on specific changes to the company’s business to address animal welfare concerns was excludable as an attempt to micromanage the company); *Exxon Mobil Corporation* (Mar. 6, 2020) (concurring with the exclusion of a proposal requesting that the company’s board charter a new board committee on climate risk, noting that as a result, “the Proposal unduly limits the board’s flexibility and discretion in determining how the board should oversee climate risk”).

Like the *State Street* proposal, the Proposal seeks to micromanage the Company by requesting an intricately detailed report probing deeply into complex areas of healthcare treatments

Office of Chief Counsel
Division of Corporation Finance
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and patient outcomes across the Company's business. The Proposal requests an analysis of the broad topic of the impacts of racial and ethnic disparities in healthcare outcomes on DaVita's entire patient population, and the intricate details of the Company's business must underpin this analysis. The decisions made by the Company to support the best clinical outcome for each patient are complex and require critical input and judgment from treating physicians and other highly trained medical professionals. DaVita's shareholders, as a group, would not be in a position to provide meaningful input on these very important and nuanced decisions. Such considerations are complex and cannot, as a practical matter, be subject to shareholder oversight.

Moreover, the Proposal limits the specific methods by which the Company should work to reduce racial and ethnic disparities: "by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes." By prescribing the acceptable methods by which the Company may reduce racial and ethnic disparities, the Proposal limits the ability of management to manage complex matters facing the Company's business without affording management flexibility or discretion in the manner in which to accomplish such matters. Consequently, the Proposal is excludable under Rule 14a-8(i)(7) as seeking to micromanage the Company.

CONCLUSION

For the foregoing reasons, the Company requests your confirmation that the Staff will not recommend any enforcement action to the Commission if the Proposal is omitted from the Proxy Materials.

We would be happy to provide any additional information and answer any questions regarding this matter. Should you have any questions, please contact the undersigned at sbarros@sidley.com or (202) 736-8387.

Sincerely,

Sonia Barros

Sonia G. Barros

Enclosures

cc: Kathleen A. Waters, Chief Legal and Public Affairs Officer, DaVita Inc.
Samantha A. Caldwell, Vice President, Deputy General Counsel and Corporate Secretary,
DaVita Inc.
John White, Corporate Governance Officer, New York State Common Retirement Fund

EXHIBIT A

THOMAS P. DINAPOLI
COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

December 3, 2024

Samantha A. Caldwell
Corporate Secretary
DaVita Inc.
2000 16th Street
Denver, CO 80202

Dear Samantha A. Caldwell:

The Comptroller of the State of New York, Thomas P. DiNapoli, is the Trustee of the New York State Common Retirement Fund (the "Fund") and the Administrative Head of the New York State and Local Retirement System. The Comptroller has authorized me in my capacity as Corporate Governance Officer for the New York State Common Retirement Fund to inform you of his intention to offer the enclosed shareholder proposal for consideration of stockholders at the next annual meeting.

I submit the enclosed proposal to you in accordance with Rule 14a-8 of the Securities Exchange Act of 1934 and ask that it be included in your proxy statement.

A letter from J.P. Morgan Chase, the Fund's custodial bank, verifying the Fund's ownership of DaVita Inc. shares with a market value of at least \$25,000, continually for over one year, is enclosed. The Fund intends to continue to hold at least \$25,000 worth of these securities through the date of the annual meeting.

We would be happy to discuss this initiative with you. Should DaVita Inc. decide to endorse its provisions as company policy, the Comptroller will ask that the proposal be withdrawn from consideration at the annual meeting. A staff member from our office is available to meet with the

company via teleconference no less than 10 days, nor more than 30 days after the date of this letter. Specifically, we are available during business hours on December 13, or December 20.

Additionally, please direct any mail correspondence related to this proposal to “New York State Common Retirement Fund” at 110 State Street, 14th Floor, Albany, NY 12236.

Please feel free to contact me at [REDACTED] PII [REDACTED] should you have any further questions on this matter.

Sincerely,

john w. white

John White
Corporate Governance Officer

Enclosures

Resolved:

Shareholders of DaVita Inc. (DaVita) request that the Board of Directors issue a public report detailing and analyzing the impacts of racial and ethnic disparities in healthcare outcomes on DaVita's business. The report should include data on the extent of such racial and ethnic disparities, information about impediments to collecting such data, and efforts taken by DaVita to reduce such disparities by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.

The report should be prepared at reasonable cost and omit confidential and proprietary information. It should be publicly disclosed on DaVita's website.

Supporting Statement:

End Stage Kidney Disease (ESKD) affects over 780,000 Americans and is associated with morbidity and premature death. Evidence demonstrates that Black and Hispanic communities are significantly less likely to be treated with home dialysis or receive kidney transplantation, even though they face much higher rates of kidney disease. These inequities have, according to a 2023 paper by Walker and Gadegbeku in *Cardiovascular Diagnosis and Therapy*, the "combined devastating impact of worse outcomes and quality of life for patients and families at a significant financial cost on the healthcare system."

Most of DaVita's U.S. dialysis revenues are from the Center for Medicare and Medicaid Services (CMS). CMS, DaVita's largest payer, has been moving from a fee-for-service model to a value-based care model, incentivizing dialysis providers to improve patient outcomes, prioritize kidney health equity, and manage costs by tying their reimbursement directly to the quality of care delivered, rather than the sheer volume of services provided, thus encouraging them to focus on preventative measures and efficient treatment plans for their patients with kidney disease.¹

Shareholders would benefit from disclosure of whether the company's efforts to integrate CMS's value-based Framework for Health Equity are, in fact, building health equity, reducing disparities and improving outcomes for patients and therefore mitigating risks to DaVita's business.

We believe that DaVita can best serve its investors' long-term interests by reporting to shareholders about progress on improving access to care, increasing ESKD awareness and screening, reducing treatment disparities, eliminating provider and involuntary discharge biases, and the overall reduction of racially and ethnically disparate health outcomes.

Accordingly, we urge shareholders to support this proposal calling on DaVita to issue a report examining the impacts of racial and ethnic disparities in healthcare outcomes on DaVita's business.

¹ <https://www.cms.gov/medicare/quality/value-based-programs>

J.P.Morgan

Miriam G. Awad
Vice President
CIB Client Service Americas

December 3, 2024

Samantha A. Caldwell
Corporate Secretary
DaVita Inc.
2000 16th Street
Denver, CO 80202

Dear Ms. Caldwell,

This letter is in response to a request by The Honorable Thomas P. DiNapoli, New York State Comptroller, regarding confirmation from JP Morgan Chase that the New York State Common Retirement Fund has been a beneficial owner of Davita Inc. continuously for at least one year as of and including December 3, 2024.

Please note that J.P. Morgan Chase, as custodian for the New York State Common Retirement Fund, held a total of 32,354 shares of common stock as of December 3, 2024 and continues to hold shares in the company. The value of the ownership stake continuously held by the New York State Common Retirement Fund had a market value of at least \$25,000.00 for at least twelve months prior to, and including, said date.

If there are any questions, please contact me at [REDACTED] PII [REDACTED].

Regards,



Miriam Awad

cc: John White- NYSCRF
Kyle Seeley - NYSCRF
Lynn Wilson – NYSCRF

Sanford Lewis & Associates

PO Box 231
Amherst, MA 01004-0231
413 549-7333
sanfordlewis@strategiccounsel.net

April 2, 2025
Via online portal

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

Re: Shareholder Proposal to DaVita Inc. Regarding Racial and Ethnic Disparities in
Healthcare Outcomes on behalf of New York State Common Retirement Fund

Ladies and Gentlemen:

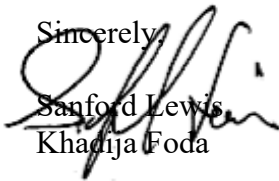
New York State Common Retirement Fund (the “Proponent”) is beneficial owner of common stock of DaVita Inc. (“DaVita” or “the Company”) and has submitted a shareholder proposal (the “Proposal”) to the Company.

We have been asked by the Proponent to respond to the letter dated February 28, 2025 (“Company Letter”) sent to the Securities and Exchange Commission by Sonia G. Barros, of Sidley Austin LLP, acting on behalf of the Company. In that letter, the Company contends that the Proposal may be excluded from the Company’s 2025 proxy statement.

We have redacted personal information consistent with the Staff’s guidance. A copy of this letter is being emailed concurrently to Sonia G. Barros.

If you have any questions, please contact Sanford Lewis at 413-549-7333 or sanfordlewis@strategiccounsel.net.

Sincerely,



Sanford Lewis
Khadija Foda

Cc: Sonia G. Barros

SUMMARY

The Company touts its health equity programs but fails to provide investors or the public with sufficient disclosure on the outcomes of those efforts. Therefore, the Proposal requests that DaVita Inc. (“DaVita” or “the Company”) issue a public report that details and analyzes the impacts of racial and ethnic disparities in healthcare outcomes on DaVita’s business. The Proposal asks that the report include data on the extent of such disparities, information about any impediments to collecting such data, and efforts taken by the Company to reduce such disparities by improving prevention outreach, remediation and educational programs, and overall health outcomes.

The Company Letter asserts that the Proposal is excludable under Rule 14a-8(i)(7) as relating to ordinary business operations and seeking to “micromanage” DaVita. However, racial and ethnic disparities in healthcare outcomes are a transcendent policy issue. They are also significant to the Company, which has articulated in its own materials that this is a significant focus for the company, that “[w]e are committed to enabling equity at every step of the kidney care journey.” While making progress on some aspects, the Company’s own disclosures acknowledge that it is “continuing to work to reduce other disparities at key journey points.”¹ Yet, the Company does not disclose statistics on those disparate health outcomes or the impact on its business.

Investors have an important stake in this issue. In a world and market in which payments received by the Company increasingly depend on patient outcomes, poorer kidney care outcomes for significant blocs of patients is likely to affect the Company’s operations or financial returns.

The Proposal does not attempt to micromanage the Company. The form of the request of the Proposal is not granular or prescriptive in nature, but can be fulfilled with information at a summary level. Asking the Company to track and report on disparities, the impact on the Company, and anything it is doing to address the disparities is not micromanagement. Nor does the discussion on the relationship of disparate outcomes to quality of care and value-based fees by the Company’s largest payer render the proposal micromanagement. Instead, it highlights a critical and material issue of investor interest.

Contrary to the Company’s assertions, the Proposal does not attempt to dictate the types of products or services that the Company offers, nor the form or content of company training or management of its workforce. Nowhere in the Proposal or Supporting Statement does the Proposal request that the Company change any products or services either directly or via the policies it has surrounding those matters.

The Proposal is not excludable under Rule 14a-8(i)(7).

¹ DaVita 2023 Community Care Report at 9, https://www.davitacommunitycare.com/_files/ugd/57a08e_a4f166903a10474cbaa361a68f394c9e.pdf

PROPOSAL

Resolved:

Shareholders of DaVita Inc. (DaVita) request that the Board of Directors issue a public report detailing and analyzing the impacts of racial and ethnic disparities in healthcare outcomes on DaVita's business. The report should include data on the extent of such racial and ethnic disparities, information about impediments to collecting such data, and efforts taken by DaVita to reduce such disparities by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.

The report should be prepared at reasonable cost and omit confidential and proprietary information. It should be publicly disclosed on DaVita's website.

Supporting Statement:

End Stage Kidney Disease (ESKD) affects over 780,000 Americans and is associated with morbidity and premature death. Evidence demonstrates that Black and Hispanic communities are significantly less likely to be treated with home dialysis or receive kidney transplantation, even though they face much higher rates of kidney disease. These inequities have, according to a 2023 paper by Walker and Gadegbeku in *Cardiovascular Diagnosis and Therapy*, the "combined devastating impact of worse outcomes and quality of life for patients and families at a significant financial cost on the healthcare system."

Most of DaVita's U.S. dialysis revenues are from the Center for Medicare and Medicaid Services (CMS). CMS, DaVita's largest payer, has been moving from a fee-for-service model to a value-based care model, incentivizing dialysis providers to improve patient outcomes, prioritize kidney health equity, and manage costs by tying their reimbursement directly to the quality of care delivered, rather than the sheer volume of services provided, thus encouraging them to focus on preventative measures and efficient treatment plans for their patients with kidney disease.¹

Shareholders would benefit from disclosure of whether the company's efforts to integrate CMS's value-based Framework for Health Equity are, in fact, building health equity, reducing disparities and improving outcomes for patients and therefore mitigating risks to DaVita's business.

We believe that DaVita can best serve its investors' long-term interests by reporting to shareholders about progress on improving access to care, increasing ESKD awareness and screening, reducing treatment disparities, eliminating provider and involuntary discharge biases, and the overall reduction of racially and ethnically disparate health outcomes.

Accordingly, we urge shareholders to support this proposal by calling on DaVita to issue a report examining the impacts of racial and ethnic disparities in healthcare outcomes on DaVita's business.

¹ <https://www.cms.gov/medicare/quality/value-based-programs>

BACKGROUND

Health equity is a growing concern in the US, as some racial and ethnic minorities experience poorer health and more premature, preventable mortality than their white counterparts.²

The disparities are of particular concern to the healthcare industry. DaVita is one of the leading kidney care companies in the US. Across the kidney care sector, Black and Hispanic patients experience poorer outcomes and barriers to access.³ Indeed, one commentary has described “disparities in renal care” as “the poster child of health care inequality in the United States.”⁴

Among other things, the emergence of value-based reimbursement models, that focus on the quality and outcomes rather than just the volume of care provided, means that poor health outcomes for a portion of the population could reduce financial outcomes for DaVita’s business.⁵

For instance, in its 2023 Community Care Report, DaVita states “[w]e are committed to enabling equity at every step of the kidney care journey.” It reports on favorable issues with specificity, noting that certain outcomes for DaVita patients are equivalent across racial and ethnic populations, namely “hospitalizations, readmissions and infection rates in our U.S. outpatient dialysis centers.”

Yet when it comes to discussing the disparate outcomes, instead of even naming the issues, the existing reporting merely says that the Company is “continuing to work to reduce other disparities at key journey points.”⁶ Similarly, the Company also provides some information on efforts being undertaken,⁷ yet it does not articulate or quantify the other disparate health outcomes or the impact on its business.

Investors are requesting insight into DaVita’s management of racial and ethnic disparities in their patients’ outcomes. As such, the Proponent believes the current Proposal represents a vital concern for consideration as an issue significant to the Company’s investors.

² [https://www.commonwealthfund.org/publications/fund-reports/2024/apr/advancing-racial-equity-us-health-care#:~:text=Health%20outcomes%2C%20as%20measured%20primarily%20by%20death,greater%20loss%20of%20life%20from%20COVID%2D19%20infections](https://www.commonwealthfund.org/publications/fund-reports/2024/apr/advancing-racial-equity-us-health-care#:~:text=Health%20outcomes%2C%20as%20measured%20primarily%20by%20death,greater%20loss%20of%20life%20from%20COVID%2D19%20infections;); <https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/>

³ See, e.g., https://www.kidney.org/sites/default/files/memolegcounsel_healthequity_2021.pdf; <https://www.niddk.nih.gov/health-information/health-statistics/kidney-disease#>; <https://www.nature.com/articles/s41581-023-00745-6>

⁴ <https://www.scu.edu/ethics/healthcare-ethics-blog/racism-in-kidney-care-exposing-disparities-and-seeking-solutions/>

⁵ <https://healthcareappraisers.com/2020-outlook-dialysis-clinics-and-esrd/>

⁶ DaVita 2023 Community Care Report at 9, https://www.davitacommunitycare.com/_files/ugd/57a08e_a4f166903a10474cbaa361a68f394c9e.pdf

⁷ For instance, the Company states its health strategy centers on, among other things, “[a]ddressing inequities with intentional, sustainable, root-cause focused interventions that can have a meaningful impact at the local and national level.

ANALYSIS

I. The Proposal is not excludable under Rule 14a-8(i)(7) because it solely focuses on a significant social policy issue and does not micromanage.

A. Framework on ordinary business and micromanagement

The legal framework for Rule 14a-8(i)(7) developed by the Commission, Staff, and the courts, including under Staff Legal Bulletins, comprises a three-part test:

Question 1. Ordinary Business. Does the proposal touch on “ordinary business”? That is, does it touch on issues that are integral to the day-to-day management and operations of the company?

Question 2. Significant Policy Issue. If the answer to Question 1 is yes, is the subject matter nevertheless a significant policy issue? In those cases, in which a proposal’s underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote. Examples recognized by the Commission and the Staff include such topics as climate change, environmental impact, human rights, discrimination, as well as virtually all governance issues.

Under recently issued Staff Legal Bulletin 14 M (SLB 14M), the staff expressed the view that interpretation of whether a proposal transcends ordinary business will be assessed based on whether the subject matter is significant to the company in addition to addressing a significant policy issue.

Question 3. Micromanagement. Even if the proposal’s subject matter transcends ordinary business, the proposal still may be excludable if the granularity of the proposal micromanages the company’s business.

B. Regardless of whether the proposal touches upon the day-to-day business operations of DaVita it focuses solely on an important social policy issue significant to the Company: racial and ethnic disparities in healthcare outcomes

The Proposal here focuses on the significant public policy issue of the impacts of racial and ethnic disparities in healthcare outcomes. This issue transcends ordinary business and is significant to DaVita in particular. The Company concedes that “racial and ethnic disparities in healthcare outcomes *may* reflect a significant policy issue,” but contends there is not a “sufficient nexus” to the Company’s business operations. *See* Company Letter at 9-10. This claim is hard to reconcile with the many statements of the Company about its efforts to ensure health equity.

DaVita itself reports on how “[c]hronic kidney disease disproportionately affects many communities of color, including Black, Hispanic and Native American communities.”⁸ DaVita has also conducted clinical research that confirms there is racial disparity in kidney

⁸ DaVita 2023 Community Care Report at 9, https://www.davitacommunitycare.com/_files/ugd/57a08e_a4f166903a10474cbaa361a68f394c9e.pdf

transplantation, reporting that “[k]idney failure affects Black individuals at four times the rate of white individuals in the U.S., but fewer Black patients are put on kidney transplant waiting lists and even fewer receive transplants than their White counterparts across the country.”⁹ Dr. Francesca Tentori, the Vice President of Outcomes Research and Patient Empowerment for DaVita Clinical Research, stated that “[t]he kidney community has known for some time now that racial disparities exist” and that the goal of DaVita’s racial disparity study “was to identify steps in the transplant process where inequity exists so that we can start to address specific issues.”¹⁰ Other research confirms these findings that kidney disease disproportionately affects communities of color.¹¹

The Company recognizes the problem and has also stated that it is taking some actions intended to affect outcomes. DaVita’s Chief Medical Officer, Jeffrey Giullian, expounded on DaVita’s efforts to increase health equity during a 2022 interview on equitable kidney disease care. Among other things, he mentioned “identifying potential biases”, “providing cultural humility and unconscious bias training”, and “working to address social determinants of health directly in our clinics.”¹²

Given the Company statements, it belies logic for DaVita to then assert in the Company Letter that there is an “insufficient nexus” between the Proposal’s request that the Company disclose the results of these efforts. Investors with a wide range of perspectives are likely to be united by the need to improve disclosure of the *outcomes* of these efforts and resource commitments.

Critical role of value-based fees on improving healthcare disparities

As noted by the Supporting Statement, the Company’s “core business” is providing dialysis and related laboratory services.¹³ **In 2024, the Company’s U.S. dialysis revenues constituted approximately 88% of the Company’s consolidated revenues.**¹⁴ DaVita has further reported that the sources of its U.S. dialysis revenues are principally from government-based programs such as Medicare and Medicaid plans, which together constituted 64% of DaVita’s 2024 U.S. dialysis revenues.¹⁵

As such, the Center for Medicare and Medicaid Services (CMS) is one of DaVita’s largest payors.¹⁶ CMS has been moving from a fee-for-service model to a value-based care model

⁹ <https://newsroom.davita.com/racial-disparity-transplant>

¹⁰ *Id.*

¹¹ *See, e.g.*, <https://www.niddk.nih.gov/health-information/health-statistics/kidney-disease#;https://publichealth.jhu.edu/2020/the-racial-inequities-of-kidney-disease>

¹² <https://catalyst.nejm.org/doi/full/10.1056/CAT.22.0276>

¹³ DaVita 2024 10-K at 7,

<https://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=318917081&type=PDF&symbol=DVA&cdn=c7499130ae168d5efaa30cfa853b3064&companyName=DaVita+Inc.&formType=10-K&dateFiled=2025-02-13>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ <https://www.cms.gov/about-cms#:~:text=CMS%20is%20the%20federal%20agency,in%20the%20health%20care%20system.>

For instance, in 2022, the Medicare program alone was expected to pay an estimated \$8.8 billion to dialysis facilities in the U.S. for dialysis services—DaVita and a competitor, Fresenius received the majority of this money,

which, in the context of renal diseases, incentivizes dialysis providers to improve the quality of treatment provided by tying reimbursement to that metric, rather than on the volume of services provided.¹⁷ Indeed, DaVita’s own 10-K specifically notes that “[v]alue-based care arrangements continue to impact the kidney health space”¹⁸ and identifies as a risk its “ability to successfully implement our strategy with respect to integrated kidney care, value-based care and home-based dialysis.”¹⁹

DaVita’s Form 10-K for 2024 notes CMS regulatory changes that affect home-based dialysis services (which represented approximately 19% of DaVita’s U.S. dialysis patient service revenues in 2024) which are intended “to encourage dialysis facilities and healthcare providers to seek to decrease disparities in health outcomes across racial and socioeconomic status in rates of home dialysis and kidney transplants among ESRD patients.”²⁰

Issues of racial equity as significant policy issue

In a long line of prior letters Staff have repeatedly found the issue of racial equity a significant public policy issue. For instance, in *Johnson & Johnson* (January 19, 2021), Staff did not concur with the exclusion on Rule 14a-8(i)(7) grounds of a proposal that sought a third-party audit assessing the racial impact of Johnson & Johnson’s corporate policies, practices, products and services. Proponents there argued that, even though the proposal touched on ordinary business matters, it transcended these matters by its focus on racial equity.

As another example, in *Wells Fargo & Company* (February 21, 2006) the resolution asked the Board of Directors to prepare a special report providing explanations of racial and ethnic disparities in the cost of loans provided by the company. Although the cost of loans provided by a company might generally be considered a matter of ordinary business, this resolution was nonexcludable, both because it transcended ordinary business and did not micromanage, even though it asked for fairly specific details with regard to rate setting:

1) How does Wells Fargo explain the racial and ethnic disparities pertaining to high-cost mortgages revealed in the company’s Home Mortgage Disclosure Act data?

2) Does Wells Fargo believe that the company’s racial and ethnic disparities in high cost loans affect the home affordability or wealth-building benefits of homeownership for their minority

as both companies have a combined market share of around 70%-75% of all U.S. dialysis treatments.

<https://pmc.ncbi.nlm.nih.gov/articles/PMC10564339/>

¹⁷ <https://www.cms.gov/medicare/quality/value-based-programs>

¹⁸ <https://www.sec.gov/Archives/edgar/data/927066/000092706625000012/dva-20241231.htm>

¹⁹ *Id.* at 24. DaVita’s 10-K further notes:

“Our integrated kidney care business manages patients and coordinates their care through value-based care arrangements with commercial payors and through government programs. **We have continued to grow this portion of our business both with commercial payors ... and with government programs as CMS and CMMI implement new payment models focused on comprehensive and integrated kidney care.** As part of our growth strategy, we have invested and expect to continue to invest substantial resources in the further development of our integrated care business and value-based care initiatives.” *Id.* at 34.

²⁰ *Id.* at 35.

customers?

3) Does Wells Fargo believe some of these disparities are explained by the racial wealth divide prevalent in the United States? If so, what does Wells Fargo believe can be done to lessen this divide?

See also The Travelers Companies, Inc. (March 30, 2023) (proposal found to transcend ordinary business that requested a third-party audit assessing and producing recommendations for improving the racial impacts of the company's policies, practices, products and services and specified that input from identified stakeholders should be considered); *Amazon.com, Inc.* (April 7, 2021) (unable to concur with exclusion under Rule 14a-8(i)(7) of a proposal requesting a racial equity audit analyzing Amazon's impacts on civil rights, equity, diversity, and inclusion).

The importance of racial equity was also recognized in *ACTWU v. Wal-Mart*, 821 F. Supp. 877 (S.D.N.Y. 1993). In that case, the shareholder proposal focused on the fundamental ordinary business matter of employee hiring, firing, recruitment, promotion and retention. The court held that, because the proposal also focused on the significant policy issue of racial discrimination and its impacts, it transcended the ordinary business of the company and was appropriate for shareholder consideration in the proxy.

Additionally, the precedents relied upon by DaVita here are inapposite. For instance, in *TJX Companies, Inc.* (April 9, 2021), the Staff, in concurring with exclusion of a proposal that sought a report "evaluating whether the company is supporting systemic racism through undetected supply chain prison labor", noted that the company "already prohibits prison labor and [the proposal] does not otherwise explain how its compliance program raises a significant issue for the [c]ompany." By contrast, here, the Company's existing disclosures do not adequately inform investors how what the impacts are on DaVita's business of racial and ethnic disparities in healthcare outcomes and what steps the Company is taking to remediate these impacts. As such, the *TJX Companies, Inc.* precedent is inapplicable to the current Proposal.

The *Amazon.com, Inc.*, (March 28, 2019) precedent is also inapplicable. There, as noted by the Staff, the proposal did not have a clear focus on an issue that transcends ordinary business matters. The proposal there asked for the establishment of a "Societal Risk Oversight Committee" that would "assess the potential societal consequences of the [Amazon's] products and services, and . . . offer guidance on strategic decisions". By contrast, here, the Proposal is clear in its focus on racial and ethnic disparities in healthcare outcomes — it is not asking DaVita to broadly report on societal risks or impacts as a result of its operations.

The Company argues that the principal focus of the Proposal is on the risks to DaVita's business that relate to "day-to-day operational performance and does not transcend day-to-day operations" because the Proposal related to the provision of services that result in "value-based care" to maximize CMS reimbursement, a focus on preventative measures and efficient treatment plans, the quality of patient services specifically related to reduction of treatment disparities such as ESKD (End Stage Kidney Disease) screening, and the implementation of workforce policies and procedures, such as training to eliminate involuntary discharge biases. Company Letter at 8. However, this argument again ignores the fact that the Proposal is merely

asking DaVita to report on these topics, *as it relates to the central focus of the proposal, racial and ethnic disparities in healthcare outcomes*. The Supporting Statement is clear in its focus, stating that “[e]vidence demonstrates that Black and Hispanic communities are significantly less likely to be treated with home dialysis or receive kidney transplantation, even though they face much higher rates of kidney disease.”

. The Company Letter mischaracterizes the Staff’s decision in the *Omnicom Group Inc.* (March 17, 2021), where the proposal sought a report assessing whether and how the company ensures its policies were not contributing to violations of civil or human rights. The Company Letter states that Staff concurred in the exclusion because there was an “insufficient nexus” between the identified policy and the company’s advertising policies. Company Letter at 8. However, Staff there did not issue a letter explaining in detail their decision to concur with exclusion but merely stated that Rule 14a-8(i)(7) provides a basis to exclude. Similarly, in *PayPal Holdings Inc.* (March 6, 2018), Staff found that a proposal addressing climate change sought to micromanage the company. Yet the Company Letter asserts that the basis for exclusion was not micromanagement, but rather an insufficient nexus between the policy issue of climate change and the company’s technology and digital payment business. Company letter at 8. Regardless, here there is a clear nexus between the Proposal and DaVita’s business.

C. The Proposal does not focus on ordinary business matters

The Company Letter asserts that the Proposal is attempting to dictate how it offers its U.S. dialysis services by pressing for an increased focus on quality of care (i.e., value-based care). Company Letter at 4-5. This argument mischaracterizes the Proposal given the clarity of the resolved clause’s focus, not on value-based care considerations broadly, but rather on racial and ethnic disparities in health outcomes. The Supporting Statement merely provides additional color for investors on how this particular aspect of the business, among others, makes these health disparity issues relevant to DaVita.

Contrary to the Company Letter, the Proposal does *not* attempt to make “maximization of CMS reimbursement the Company’s primary goal” by directing the Company towards “improving patient outcomes, prioritizing kidney health equity and managing costs”. Company Letter at 5. Nor does the Proposal suggest that the End State Renal Disease Treatment Choices Model (the “ETC Model”), be implemented throughout the Company’s operations.

The Company Letter also argues that the Proposal is seeking to “manage” policies regarding products and services, which constitutes ordinary business under Rule 14a-8(i)(7). Company Letter at 6-7. Regardless, just because the Proposal seeks information about DaVita’s efforts to reduce disparate outcomes through “prevention outreach, remediation and educational programs” does *not* mean that the Proposal is seeking to manage the content of these activities or indeed whether the Company even offers them at all. The same reasoning applies to the belief, included in the Supporting Statement, that reporting would best serve investors’ long-term interests if it included information “about progress on improving access to care, increasing ESKD awareness and screening, reducing treatment disparities, eliminating provider and involuntary discharge biases, and the overall reduction of racially and ethnically disparate health outcomes.” Regardless, any information in the Supporting Statement constitutes additional color that the Company can choose to reject or accept as it deems appropriate.

DaVita provides examples of educational courses it offers to support its argument. However, in doing so the Company again mischaracterizes the form of the Proposal which is *not* asking management to implement any programs, but rather to give investors more information about its efforts in this area.

D. The Proposal is also not excludable under 14a-8(i)(7) because it does not attempt to dictate products and services sold

The Company argues that the Proposal is excludable as an ordinary business matter as relating to its products and services. Company's Supplemental Letter at 4-5. However, this argument disregards the central focus of the Proposal on racial and ethnic disparities in healthcare outcomes and how this impacts DaVita's business.

It is well-established that a proposal is not excludable merely because it touches upon the sale of a company's products or services where the sole focus of the request is on a significant policy issue without dictating what products or services the company provides. For example, a proposal correctly framed to ask a company to disclose or raise its voluntary standards, or to curtail social impacts, related to the products or services that it sells does not lead to "products and services" exclusions.

For instance, in *Alphabet Inc.* (April 12, 2022), the proposal requested a report assessing the company's policies on support for military and militarized policing agencies' activities and the impact of such on stakeholders, user communities, and the company's reputation and finances. The company raised a products and services argument, asserting that the proposal related to the provision of its technologies to certain customers, but Staff declined to concur with exclusion under Rule 14a-8(i)(7). Similarly, here, while the Proposal might relate to the provision of the Company's services, the primary focus is clearly on the impacts of disparate health outcomes linked to racial and ethnic discrimination.

Similarly, in *Bank of America Corporation* (February 26, 2009), the proposal requested a report evaluating, with respect to practices commonly deemed to be predatory, the company's credit card marketing, lending and collection practices and the impact of those practices on borrowers. Despite the focus on products and services, the prominence of predatory and subprime lending as an issue of concern transcended the ordinary business concern. *See also JPMorgan Chase & Co.* (March 4, 2009) (same); *Citigroup Inc.* (February 11, 2009) (same); *Wells Fargo & Company* (February 11, 2009) (same).

See also Meta Platforms, Inc. (April 2, 2022) (denying exclusion on 14a-8(i)(7) grounds where shareholders requested a report on the company's metaverse product that assessed, among other things, the "potential psychological and civil and human rights harms to users").

See also J.P. Morgan Chase (March 13, 2020), where the proposal asked JPMorgan Chase to describe how it plans to respond to rising reputational risks for the Company and questions about its role in society related to its involvement in Canadian oil sands production, oil sands pipeline companies, and Arctic oil and gas exploration and production. This was not excludable as focused on ordinary business despite a similar relationship to products and services as in the current Proposal.

Precedents that the Company relies on for its “products and services” argument are inapplicable

DaVita relies on precedents that are clearly distinguishable in support of its position that the current Proposal focuses on ordinary business because it relates to product offerings. The precedents DaVita cites include proposals which very clearly attempted to dictate particular products being sold by the company, delved into details of company-customer relations, tried to micromanage how and on what terms a specific product should be offered, or sought information on profit margins related to certain products and services. The current Proposal is solely asking the company to provide information on whether and how it addresses potential risks and opportunities related to the social impacts of its transition finance efforts.

For instance, in *Pepco Holdings, Inc.* (February 18, 2011), the proposal stated the company “should aggressively study, implement, and pursue the solar market” and included a list of initiatives Pepco should do to effectuate this goal, such as marketing on the website and developing a finance plan for customers. The proposal further mandated reporting on progress related to non-commercial renewable solar power within six months of the annual meeting. By contrast, the current Proposal does *not* ask DaVita to provide a certain type of dialysis service let alone delve into the details of how DaVita should provide financing for, or market to, customers.

Other precedents cited to by the Company involved requests that would modify *how* a company offered its products or services. For instance, in *Delta Air Lines, Inc.* (March 28, 2018), the proposal sought a report on the “discriminatory effects of smaller cabin seat sizes on overweight and obese passengers”, which was directly relating to the design of the Delta’s products. *See also HCA Healthcare, Inc.* (March 6, 2023) (proposal would require “hospitals to provide plant-based food options to patients at every meal, within vending machines and in the cafeterias used by outpatients, staff and visitors.”); *McDonald’s Corporation* (March 12, 2019) (proposal related to how McDonald’s offered food by focusing on operational concerns related to food quality and integrity, such as sanitation and safety systems). Here, the Proposal is concerned about documenting impacts on DaVita’s business and understanding what DaVita does to remediate such impacts, such as prevention outreach. However, the Proposal is *not* requesting DaVita undertake these efforts (which the Company asserts it already does) but just to report on it to shareholders.

Nor is the current Proposal asking the Company to offer its services to a certain type of customer, unlike the proposal at issue in *AT&T Inc.* (January 4, 2017), where shareholders requested a report on AT&T’s progress on providing Internet service and products for low-income customers. While the current Proposal asks the Company to report on efforts taken to reduce disparities by methods, such as remediation and educational programs, this is not equivalent to dictating how DaVita offers its core services, as suggested by the Company Letter.

Finally, *Wal-Mart Stores, Inc.* (April 10, 1991) is inapplicable for the Company Letter’s products and services argument because, unlike the proposal at issue there, the current Proposal does not implicate or touch upon any practices or policies for selecting suppliers of goods and services.

E. The Proposal is not a granular request for employee training but rather focuses on

biased healthcare outcomes

The Company Letter asserts that the Proposal seeks to dictate policies related to the management of DaVita's workforce and, as such, is excludable. Company Letter at 6-7.

The Company asserts that, by asking for reporting about educational programs, remediation, and prevention outreach, the Proposal is seeking to influence how the Company decides to hire and train its care teams on provider and involuntary discharge biases, and points to its existing training programs. *Id.* Again, the Company fundamentally misunderstands the purpose of the Proposal, which is to gain information about the business impacts of racial and ethnic disparate health outcomes and existing Company efforts to remediate such impacts, which touches upon employee training programs, but does *not* ask the Company to modify or implement new programs.

As such, the current Proposal contrasts sharply with the proposal the Staff found excludable in *Merck & Co., Inc.* (February 16, 2016), which proposed that the company "assigns new employees to entry-level positions only and selects individuals for its higher level research and management positions exclusively from the ranks of its long-time employees". There, the proposal directly sought to mandate on what basis Merck & Co. hired employees. Here, the Proposal just seeks information about programs that relate to employee training.

Furthermore, a proposal could touch upon workplace management and training policies, so long as it has a countervailing focus on an issue that transcends ordinary business.²¹ For instance, in *Eli Lilly and Company* (March 10, 2023), Staff declined to concur with the exclusion of a proposal asking for a report on the company's diversity, equity, and inclusion efforts which would include "quantitative metrics for hiring, retention, and promotion of employees, including data by gender, race, and ethnicity." In doing so, Staff noted that the proposal raised human capital management issues with a broad societal impact.

See also CVS Health Corporation (March 18, 2022) (declining to concur with exclusion of a proposal that asked CVS to adopt a policy relating to employees sick leave).

Additionally, the *Wal-Mart Stores, Inc.* (April 10, 1991) and the *United Technologies Corp.* (February 19, 1993) precedents the Company Letter cites to are not relevant for the assertion that "employee training" or "employment practices and policies" is a basis for exclusion under Rule 14a-8(i)(7). Both precedents were decided by the SEC prior to the issuance of the 1998 Release, which reversed a prior SEC decision, *Cracker Barrel Old Country Store, Inc.*, (October 13, 1992), which had stated that all employment-related shareholder proposals raising social policy issues would be excludable under the "ordinary business" exclusion. In the 1998 Release, the Division clarified that this stance was reversed, and it would return to a case-by-case approach.

²¹ The current proposal however relates only tangentially to workplace management or training.

F. The Proposal does not attempt to micromanage the company

The Commission's 1998 Release — the most recent and authoritative Commission-level statement regarding the application of micromanagement — specified that proposals could ask for a reasonable level of detail without being seen as micromanaging.

... in the Proposing Release we explained that one of the considerations in making the ordinary business determination was the degree to which the proposal seeks to micromanage the company. We cited examples such as where the proposal seeks intricate detail, or seeks to impose specific timeframes or to impose specific methods for implementing complex policies. **Some commenters thought that the examples cited seemed to imply that all proposals seeking detail, or seeking to promote timeframes or methods, necessarily amount to ordinary business. . .**

We did not intend such an implication. Timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations. (Emphasis added).²²

The Staff has long recognized that it is the form of a proposal, rather than the subject matter, that makes it proper or improper for shareholder consideration:

It is important to note, however, that the staff's concurrence with a company's micromanagement argument does not necessarily mean that the subject matter raised by the proposal is improper for shareholder consideration. Rather, in that case, it is the manner in which a proposal seeks to address an issue that results in exclusion on micromanagement grounds.²³

Under SLB 14L, the Division stated “we 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.” Here, the Proposal is intentionally broad and flexible to respect management's and the board's discretion.

Under SLB 14L, the Division stated “We would expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer's

²² Under Staff Legal Bulletin 14M (SLB 14M), which reinstates prior Staff guidance with respect to Rule 14a-8(i)(7), the Division has clarified that it will, in assessing whether a proposal micromanages a company, “look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board.”

²³ Staff Legal Bulletin 14 J (reinstated by SLB 14 M).

impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input....” Here, the Proposal requests an appropriate level of detail without seeking to micromanage the Company.

The most restrictive staff interpretations of micromanagement is provided under recently announced Staff Legal Bulletin 14 M, which revived the SLB 14K articulation of micromanagement:

In considering arguments for exclusion based on micromanagement, and consistent with the Commission’s views, we look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board.

Examining the text of the Proposal for micromanagement concerns

An examination of the Proposal’s text demonstrates substantial flexibility for board and management discretion. The Proposal’s resolved clause reads as follows:

Shareholders of DaVita Inc. (DaVita) request that the Board of Directors issue a public report detailing and analyzing the impacts of racial and ethnic disparities in healthcare outcomes on DaVita’s business. The report should include data on the extent of such racial and ethnic disparities, information about impediments to collecting such data, and efforts taken by DaVita to reduce such disparities by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.

The report should be prepared at reasonable cost and omit confidential and proprietary information. It should be publicly disclosed on DaVita’s website.

The Supporting Statement clause adds “Black and Hispanic communities are significantly less likely to be treated with home dialysis or receive kidney transplantation, even though they face much higher rates of kidney disease” and that, given the Company’s reliance on CMS as a client and the emergence of more value-based care models, shareholders would benefit from disclosure of how the Company analyzes and addresses the impacts of these disparate health outcomes, such as reporting on “progress on improving access to care, increasing ESKD awareness and screening, reducing treatment disparities, eliminating provider and involuntary discharge biases, and the overall reduction of racially and ethnically disparate health outcomes.” *See* Supporting Statement.

As noted above, the Proposal is *not* asking the Company to reduce treatment disparities, although the Supporting Statement notes this would likely be in the Company’s best interests, but rather asks DaVita to examine the impacts of such disparities and provide information to shareholders about its efforts in this arena. The requested report might conclude there is a

minimal impact on DaVita’s business and/or the Company makes sufficient remediation efforts. The main thrust of the Proposal is to provide investors with *information* to understand more clearly whether the investment the Company is making in health equity are paying off in outcomes.

Increased clarity will be beneficial for both the Company and its investors. But the Proposal retains ample flexibility for the board and management to implement as they see fit. It does not intervene in nitty-gritty decisions but rather seeks transparency and better disclosure of outcomes.

The Company’s arguments mischaracterize the nature of the Proposal’s request

The Company Letter asserts that the Proposal micromanages by requesting an intricately detailed report that would probe too deeply “into complex areas of healthcare treatments and patient outcomes across the Company’s business.” Company Letter at 9-10. DaVita argues that Company decisions relating to clinical outcomes for patients are complex and require critical input and judgment from treating physicians and other highly trained medical professionals.

The Proposal is not attempting to manage the important, patient-by-patient care decisions that are reserved to providers. Instead, it is seeking information on outcomes at a summary level. The current Proposal also requests a level of information less detailed than other proposals previously found permissible by Staff. For instance, in *Alphabet Inc.* (April 15, 2022), the proposal requested disclosure on quantitative and qualitative information on the company’s algorithmic systems, suggesting that Alphabet include information on how it used “algorithmic systems to target and deliver ads, error rates, and the impact these systems had on user speech and experiences.” Staff found that that proposal did not micromanage the Company.

The Company Letter further argues that the Proposal “**limits** the specific methods by which the Company should work to reduce racial and ethnic disparities” through the request that the public report include information on DaVita’s efforts to reduce disparities “by improving prevention outreach, remediation and educational programs, and overall healthcare outcomes.” Company Letter at 9-10 (emphasis added). The Proposal is *not* mandating that DaVita undertake these actions nor limiting the range of actions that it may take, but rather seeking disclosure of whether and how it does. The Proposal is carefully worded to give management and the board discretion and flexibility — the Company’s attempts to suggest otherwise mischaracterize shareholders’ request here.

Precedents the Company relies on for its micromanagement argument are inapplicable

The Company’s cited precedents in support of its micromanagement argument are inapplicable.²⁴

²⁴ The Company Letter mischaracterizes the *State Street Corporation* (March 26, 2021) precedent it relies heavily on. See Company Letter at 9-10. The proposal in *State Street Corporation* was focused on the policy issue of externalizing costs to shareholders and asked the board to “provide a report as to how its voting and engagement policies, which focus solely on individual corporation materiality to the exclusion of capital markets materiality, affect the majority of its clients and shareholders”. The Company Letter asserts that the Staff “permitted the exclusion of the proposal as it micromanaged the company to such a degree that exclusion was warranted.” *Id.* at 9.

JPMorgan Chase & Co. (March 30, 2018) is inapposite. There, the proposal requested a report on the reputational, financial and climate risks associated with project and corporate lending, underwriting, advising and investing for tar sands production and transportation. In doing so, that proposal targeted a specific business segment of the company and delved deeply into the range of day-to-day activities of the company, mandating that the report should include, among other things, assessments of “Short- and medium-term risk of portfolio devaluation due to stranding of high-cost tar sand assets [and]....Reducing risk by establishing a specific policy, similar to that of other banks, restricting financing for tar sands projects and companies.” The Staff noted that the proposal sought to “impose specific methods for implementing complex policies.” Unlike the present Proposal which just asks the Company to report on, at a summary level across the enterprise, impacts to its business and the Company’s existing activities with respect to reducing disparate health outcomes, the *JPMorgan Chase* proposal asked for a complex and in depth analysis of an array of climate risks associated with its day-to-day decision-making in one small business segment.

Nor does the current Proposal ask DaVita to adopt any kind of policy, unlike the proposal at issue in *The Goldman Sachs Group, Inc.* (March 12, 2019), which requested the company adopt a policy to reduce the carbon footprint of the company’s loan and investment portfolios and to issue annual reports describing targets, plans, and progress under this policy.

The Proposal also does not restrict management discretion to such an extent that constitutes micromanagement. As such, the current Proposal is not analogous with the proposal in *SeaWorld Entertainment, Inc.* (April 20, 2021). There, Staff found a proposal sought to micromanage that requested SeaWorld “conduct a study to determine how soon SeaWorld could feasibly eliminate animal-based programs, excluding legitimate animal rescue work.” The company argued that the proposal micromanaged the company and concerned a central decision regarding “the attractions, rides, presentations and exhibits it will feature at its parks”, i.e., essentially relating to the company’s decision whether or not to sell a product or service. In contrast, here, the current Proposal does not ask the DaVita to assess the feasibility of eliminating any of its product lines.

Similarly, in *Exxon Mobil Corporation* (Adam Seitchik) (March 6, 2020), the proposal requested that the company “charter a new Board Committee on Climate Risk” to evaluate the company’s climate strategy and stated that the charter “should explicitly require the committee to report to the full board” on assessments of the company’s responses to climate related risks and opportunities, and articulated a long list of impacts that should be considered by the committee. As such, the proposal there was much more prescriptive and the issue, in the words of Staff, was that it “unduly limits the board’s flexibility and discretion in determining how the board should oversee climate risk.” By contrast, here, the Proposal does *not* include a prescriptive list of impacts that must be considered, DaVita is free to define “impacts” as it deems appropriate. As

However, Staff in *State Street Corporation* did not issue a response letter and merely responded that the Division concurred “that Rule 14a-8(i)(7) provides a basis to exclude (ordinary business).” <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/shareholder-proposal-no-action-responses-2020-2021.htm>. Elsewhere in the same chart, the staff distinguished proposals specifically excluded as micromanagement. Since the Staff did *not* state the basis for its decision beyond Rule 14a-8(i)(7), the Staff might have found the policy issue there was not significant enough to transcend ordinary business, without determining that the proposal micromanaged the company. As such, the *State Street Corporation* precedent is inapplicable to the current Proposal.

such, the *Exxon Mobil* precedent is inapposite.

CONCLUSION

Based on the foregoing, we believe the Company has provided no basis for the conclusion that the Proposal is excludable from the 2025 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the Company that it is denying the no action letter request.