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

DIVISION OF
CORPORATION FINANCE

February 15, 2019

Ronald O. Mueller
Gibson, Dunn & Crutcher LLP
shareholderproposals@gibsondunn.com

Re: Bank of America Corporation

Dear Mr. Mueller:

This letter is in regard to your correspondence dated February 15, 2019 concerning the shareholder proposal (the "Proposal") submitted to Bank of America Corporation (the "Company") by Harrington Investments, Inc. (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Your letter indicates that the Proponent has withdrawn the Proposal and that the Company therefore withdraws its December 21, 2018 request for a no-action letter from the Division. Because the matter is now moot, we will have no further comment.

Copies of all of the correspondence related to this matter will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Kasey L. Robinson
Special Counsel

cc: John C. Harrington
john@harringtoninvestments.com

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February 15, 2019

VIA E-MAIL

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

Re: *Bank of America Corporation*
*Stockholder Proposal of Harrington Investments, Inc.*
*Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

In a letter dated December 21, 2018, we requested the staff of the Division of Corporation Finance concur that our client, Bank of America Corporation (the "Company"), could exclude from its proxy statement and form of proxy for its 2019 Annual Meeting of Stockholders a stockholder proposal (the "Proposal") and statements in support thereof received from Harrington Investments, Inc. (the "Proponent").

Enclosed as Exhibit A is a letter from the Proponent verifying that the Proponent has withdrawn the Proposal. In reliance thereon, we hereby withdraw the December 21, 2018 no-action request relating to the Company's ability to exclude the Proposal pursuant to Rule 14a-8 under the Securities Exchange Act of 1934.

Please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company's Corporate Secretary, at (980) 388-6878.

Sincerely,

Ronald O. Mueller

Enclosures

cc: Ross E. Jeffries Jr., Bank of America Corporation
John C. Harrington, Harrington Investments, Inc.

**EXHIBIT A**

Ross E. Jeffries, Jr
Deputy General Counsel
Corporate Secretary

February 5, 2019

John C. Harrington
Harrington Investments, Inc.
1001 2nd Street, Suite 325
Napa, CA 94559

Dear Mr. Harrington:

Bank America Corporation (the "Company") appreciates the opportunity to discuss with Harrington Investments, Inc. (the "Proponent") the stockholder proposal that the Proponent submitted for the Company's 2019 Annual Meeting of Stockholders (the "Proposal") and the Company's Board of Directors' oversight of the Company's Human and Indigenous Peoples' Rights Policy. The Company hereby agrees that, if you sign below to confirm withdrawal of the Proposal, the Company will withdraw its SEC no-action request relating to the Proposal and will agree to meet again with the Proponent during 2019 to continue our dialogue on this topic.

Sincerely,

Ross E. Jeffries, Jr.
Deputy General Counsel, Corporate Secretary

* * *

AGREED AND ACCEPTED:
Based on the Company's agreement set forth above, the Proponent hereby agrees to withdraw the Proposal.

John C. Harrington
President and C.E.O.
Harrington Investments, Inc.

Feb 5, 2019
Date

T 980.388.6878 F 704.602.5709
ross.jeffries@bankofamerica.com

Bank of America, NC1-007-53-31
100 No. Tryon St., Charlotte, NC 28255

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December 21, 2018

***VIA E-MAIL***
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Bank of America Corporation*
*Stockholder Proposal of Harrington Investments, Inc.*
*Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Bank of America Corporation (the "Company"), intends to omit from its proxy statement and form of proxy for its 2019 Annual Meeting of Stockholders (collectively, the "2019 Proxy Materials") a stockholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") received from Harrington Investments, Inc. (the "Proponent").

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2019 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Proponent.

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 of the Division of Corporation Finance (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 this 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 SLB 14D.



*** FISMA & OMB Memorandum M-07-16

## THE PROPOSAL

The Proposal states:

> **Therefore, Be It Resolved,** shareholders request that Bank of America Board of Directors amend the Company's bylaws to expressly extend the fiduciary duties of directors to oversight of the Human and Indigenous Peoples' Rights policy.

A copy of the Proposal, as well as related correspondence with the Proponent, is attached to this letter as Exhibit A.

## BASES FOR EXCLUSION

We believe that the Proposal may properly be excluded from the 2019 Proxy Materials pursuant to:

- Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal;
- Rule 14a-8(i)(2) because implementing the Proposal in the manner that the Proposal requests would cause the Company to violate Delaware law;
- Rule 14a-8(i)(6) because the Company lacks the power or authority to implement the Proposal in the manner that the Proposal requests; and
- Rule 14a-8(i)(3) because the Proposal is materially false and misleading.

## BACKGROUND

The Company is strongly committed to fundamental human rights, and the Company has adopted policies and practices that are overseen by the Company's Board of Directors (the "Board") and demonstrate the Company's commitment to consider and promote human rights, including the rights of indigenous peoples. Moreover, the Board provides oversight of activities that may expose the Company to risks, including reputational risks.

The Company strives to conduct its business in a manner consistent with the United Nations Universal Declaration of Human Rights and the International Labor Organization's Fundamental Conventions. The Company's commitment to fair, ethical and responsible business practices is

embodied in the Company's Code of Conduct, Human Rights Statement,[1] and Environmental and Social Risk Policy Framework (the "ESRP Framework").[2] The ESRP Framework articulates how the Company manages and governs environmental and social risks across all of its businesses, including in the context of general corporate and commercial financing relationships, specifically addressing environmental and social issues most relevant to the Company and its business operations. In developing the ESRP Framework, the Company benchmarked its existing environmental and social policies and positions against industry practices, and evaluated the relevance of environmental and social issues to the Company's business activities.

The Human Rights Statement and the ESRP Framework document the Company's policies and practices for considering indigenous peoples' rights when relevant to the Company's activities. The Company has joined other financial institutions in adopting The Equator Principles, which provide a framework for determining, assessing and managing environmental and social risk in project-related lending and finance. Specifically, as stated on page 2 of the Human Rights Statement, "Bank of America has policies to prevent the illegal use of our products and services, including abuse that may result in human rights violations. These policies include a rigorous Customer Due Diligence process, compliance with U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act and the Modern Slavery Act." The Company's Customer Due Diligence process is explained further at pages 6 and 7 of the ESRP Framework. As discussed under the heading, "Committee Review of Reputational Risk," if due diligence reveals that a business activity presents significant environmental and social risk, that activity—including customer relationships, transactions, new products or other corporate activities—is escalated to the appropriate committee responsible for reputational risk management for further evaluation. The Company employs a variety of internal subject matter experts who participate in these reviews as appropriate.

As reported on page 12 of the ESRP Framework under the heading "Indigenous peoples," the Company conducts enhanced due diligence for transactions in which the majority use of proceeds is attributed to identified activities that may negatively impact an area used by or traditionally claimed by an indigenous community. For these transactions, the Company expects customers to demonstrate alignment with the objectives and requirements of the International Finance Corporation (IFC) Performance Standard 7, which addresses impacts to indigenous peoples, including free, prior and informed consent.

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[1] The Company's Human Rights Statement is attached hereto as Exhibit B and available at https://about.bankofamerica.com/assets/pdf/human_rights_statement_2014.pdf.

[2] The ESRP Framework is attached hereto as Exhibit C and available at https://about.bankofamerica.com/en-us/global-impact/environmental-social-risk-policy-framework.html.

The Company's Global Environmental, Social and Governance Committee (the "ESG Committee"), which comprises business and staff leaders from across the Company, helps to identify, debate and guide the Company's response to emerging environmental, social and governance risks and opportunities. A critical part of the ESG Committee's role is to engage in the ongoing evaluation and development of the Company's policies and procedures to help ensure that the Company is able to respond to emerging material issues in real time. The ESG Committee reviews and approves the ESRP Framework, including those provisions that address human rights and indigenous peoples' rights, at least every two years.

As stated on page 4 of the ESRP Framework under the caption "Governance," the ESG Committee routinely reports to the Board's Corporate Governance Committee (the "Governance Committee") on environmental and social issues.[3] As set forth in the Governance Committee's charter, the Governance Committee is specifically responsible for "reviewing the Company's activities and practices regarding environmental, social and related governance ('ESG') matters."[4] Thus, as an integral part of the Company's commitment to fundamental human rights, the Board actively oversees and receives regular reports on the Company's policies and practices concerning emerging environmental, social and governance risks and opportunities, including with respect to the Company's activities that may impact the rights of indigenous peoples.

In addition, the Company's policies also provide for Board-level oversight of issues bearing upon the Company's reputation, including human rights-related issues. At the Board level, as set forth in the Board's Corporate Governance Guidelines, the Board "is committed to having the Company maintain . . . effective policies and practices designed to protect the Company's reputation."[5] In addition, the Board's Enterprise Risk Committee ("Risk Committee") is specifically responsible for oversight of the Company's reputational risks.[6] Under its charter, the Risk Committee oversees the Company's overall risk framework, reviews with senior management the Company's significant

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[3] *Id.* At p. 4. *See also*, https://about.bankofamerica.com/en-us/global-impact/environmental-social-risk-policy-framework.html#fbid=KK_DHRI_JU1.

[4] The Governance Committee Charter is available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjUzNDIwfENoaWxkSUQ9LTF8VHlwZT0z&t=1.

[5] The Company's Corporate Governance Guidelines are available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjUzNDE1fENoaWxkSUQ9LTF8VHlwZT0z&t=1.

[6] The Risk Committee Charter is available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjY1NjQ4fENoaWxkSUQ9LTF8VHlwZT0z&t=1.

policies and procedures for identifying, managing and planning for risks, and reviews the Company's compliance with and performance against risk-related policies, procedures and tolerances.[7]

**ANALYSIS**

**I. The Proposal May Be Excluded Under Rule 14a-8(i)(10) Because It Has Been Substantially Implemented.**

As discussed further below and in the legal opinion provided by Richards, Layton & Finger, P.A. attached hereto as Exhibit D (the "Delaware Law Opinion"), under Delaware law, the Company's directors owe fiduciary duties of care and loyalty to only the Company and its shareholders. The directors' fiduciary responsibilities are immutable, and cannot be changed through an amendment of the Company's Bylaws.[8] As a result, the fiduciary duties of the Board to oversee the Company's Human rights and Indigenous Peoples' rights policies already extend as far as permitted under Delaware law. Therefore, by operation of Delaware law, the essential objective of the Proposal has already been obtained, and accordingly, as discussed below, the Proposal is excludable because it has been substantially implemented.

*A. Background On The Substantial Implementation Standard Under Rule 14a-8(i)(10)*

Rule 14a-8(i)(10) permits the exclusion of a stockholder proposal "[i]f the company has already substantially implemented the proposal." The Commission stated in 1976 that the predecessor to Rule 14a-8(i)(10) was "designed to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See* Exchange Act Release No. 12598 (July 7, 1976). Originally, the Staff narrowly interpreted this predecessor rule and granted no-action relief only when proposals were "'fully' effected" by the company. *See* Exchange Act Release No. 19135 (Oct. 14, 1982). By 1983, the Commission recognized that the "previous formalistic application of [the Rule] defeated its purpose" because proponents were successfully convincing the Staff to deny no-action relief by submitting proposals that differed from existing company policy by only a few words. Exchange Act Release No. 20091 at § II.E.6 (Aug. 16, 1983). Therefore, in 1983, the Commission adopted a revised interpretation to the rule to permit the omission of proposals that had been "substantially implemented." *Id.* The 1998 amendments to Rule 14a-8 codified this position. *See* Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"), at n.30 and accompanying text.

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[7] Risk Committee Charter at page 2.

[8] The Company's Bylaws are publicly available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mjc2NTAwfENoaWxkSUQ9LTF8VHlwZT0z&t=1.

Under this standard, when a company can demonstrate that it already has taken actions to address the underlying concerns and essential objectives of a stockholder proposal, the Staff has concurred that the proposal has been "substantially implemented" and may be excluded as moot. The Staff has noted that "a determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal." *Texaco, Inc.* (avail. Mar. 28, 1991).

A company need not implement a proposal in exactly the same manner as set forth by the proponent. *See* 1998 Release at n.30 and accompanying text. The Staff has not required that a company implement the action requested in a proposal exactly in all details but has been willing to issue no-action letters under the predecessor of Rule 14a-8(i)(10) in situations where the "essential objective" of the proposal had been satisfied. *See General Motors Corp.* (avail. Mar. 4, 1996) (Staff concurred in exclusion of a proposal where the company argued, "If the mootness requirement of paragraph (c)(10) were applied too strictly, the intention of [the rule]—permitting exclusion of 'substantially implemented' proposals—could be evaded merely by including some element in the proposal that differs from the registrant's policy or practice."). For example, in *Goldman Sachs Group, Inc.* (avail. Mar. 12, 2018), the Staff concurred with exclusion under Rule 14a-8(i)(10) of a similar proposal from the Proponent requesting that the company "modify its committee charters or other directives to ensure board committee oversight of issues of Human and Indigenous Peoples' Rights." The Staff concurred that, notwithstanding that the company had not modified its board committee charters as requested in the proposal, "the [c]ompany's policies, practices and procedures compare[d] favorably with the guidelines of the [p]roposal" because the board's Public Responsibilities Committee had ongoing oversight over existing policies that related to human and indigenous peoples' rights. Similarly, in *PNM Resources, Inc.* (avail. Mar. 20, 2018), the Staff concurred with exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company "take steps necessary to establish more effective board oversight of our company's policies and programs addressing climate change" and report to stockholders. The Staff concurred that the company had substantially implemented the proposal where the company's board oversaw climate change related programs as part of its normal oversight responsibilities and the company described specific board oversight over climate change related programs in its climate change report. *See also, The Boeing Co.* (avail. Feb. 17, 2011) (concurring with the exclusion under Rule 14a-(8)(i)(10) of a proposal requesting that the company review its policies related to human rights and report its findings, where the company had already adopted human rights policies and provided an annual report on corporate citizenship).

Further, the Staff consistently has concurred in the exclusion of proposals under Rule 14a-8(i)(10) where companies' compliance with legal or regulatory requirements, rather than specific management or board action, addressed the concerns underlying the proposals. For example, in *Honeywell International Inc.* (avail. Feb. 21, 2007), the Staff concurred with Honeywell's

determination that it had substantially implemented a proposal requesting that Honeywell's board of directors adopt a policy requiring disclosure of the material terms of all relationships between (i) each director nominee deemed to be independent within NYSE listing standards and (ii) Honeywell or any of its executive officers that were considered by Honeywell's board of directors in determining whether the nominee was independent. Honeywell argued that the essential objective of the proposal was satisfied because it was required to comply with the Commission's then newly adopted amendments to Item 404 and new Item 407 of Regulation S- K and NYSE Section 303A.02, which collectively required substantially similar disclosure to that requested in the proposal. In *Intel Corp.* (Feb. 14, 2005), the Staff concurred that Intel could exclude under Rule 14a-8(i)(10) a proposal requesting that Intel establish a policy of expensing all future stock options granted by the company on the basis that the proposal had been substantially implemented through the Financial Accounting Standards Board's adoption of Statement No. 123 (revised 2004), *Share-Based Payment* ("FAS 123(R)"), which required that public companies recognize share-based payments as an expense in their financial statements. Although the proponent asserted in correspondence with the Staff that adoption of an accounting standard was different than management's adoption of a policy as requested under the proposal, the Staff concurred that the proposal had been substantially implemented because its essential objective had been satisfied. *See also Johnson & Johnson* (avail. Feb. 17, 2006) (concurring in the exclusion of a proposal that required the company to verify employment eligibility of current and future employees and to terminate any employee not authorized to work in the United States on the basis that the company already was required to take such actions under federal law); *AMR Corp.* (avail. Apr. 17, 2000) (concurring in the exclusion of a proposal recommending that the company's audit, nominating and compensation committees consist entirely of independent directors on the basis that the company was subject to the independence standards set forth in New York Stock Exchange ("NYSE") listing standards, Section 162(m) of the Internal Revenue Code and Exchange Act Rule 16b-3 for directors serving on such committees); and *Eastman Kodak Co.* (avail. Feb. 1, 1991) (concurring in the exclusion of a proposal recommending that the company's board of directors adopt a policy of publishing in the company's annual report the costs of all fines paid by the company for violations of environmental laws based on a representation by the company that it complied with Item 103 of Regulation S-K, which requires similar (albeit not identical) disclosure).

*B. The Board's Existing Oversight Over Company Activities And Policies Already Substantially Implements The Proposal*

The Proposal requests that the Board amend the Company's Bylaws to "extend the fiduciary duties of directors to oversight of the Human and Indigenous Peoples' Rights policy." As discussed further below and in the Delaware Law Opinion, under Delaware law, the business and affairs of a Delaware corporation such as the Company "shall be managed by or under the direction of a board of directors," except as may be otherwise provided in the Delaware General Corporation Law (the

"DGCL") or in a company's certificate of incorporation.[9] As stated by the Delaware Supreme Court, "[i]n discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders…. The fiduciary nature of a corporate office is immutable."[10] As a result, the Board already has oversight responsibility over all Company business activities and policies. The fiduciary duties of the Board to oversee the Company's Human rights and Indigenous Peoples' rights policies therefore already extend as far as permitted under Delaware law.

The scope of the Board's duties are already affirmatively addressed in the Company's Bylaws, which track Section 141(a) of the DGCL by stating that "[t]he business and affairs of the Corporation shall be managed under the direction of its Board of Directors, except as otherwise provided in the Certificate of Incorporation or permitted under the [DGCL]."[11] The fact that the Board's fiduciary duties encompass oversight of the Company's Human rights and Indigenous Peoples' rights policies also is reflected in the ESRP Framework, which provides that the ESG Committee will routinely report to the Governance Committee, and in the Governance Committee's charter, which provides that the Governance Committee is specifically responsible for reviewing the Company's activities and practices regarding environmental, social and related governance matters. Similarly, the existing Board-level oversight of reputational issues, including human rights-related issues, is reflected in the Board's Corporate Governance Guidelines and the charters of the Governance Committee and Risk Committee.

We view the essential objective of the Proposal as seeking to confirm that the Board's fiduciary duties extend to oversight of the Company's Human rights and Indigenous Peoples' rights policies to the fullest extent permitted by Delaware law. By operation of Section 141(a) of the DGCL, which is already expressly set forth in the Bylaws, this essential objective of the Proposal has already been accomplished. Thus, consistent with *Honeywell International Inc.*, *Intel Corp.* and the other precedent cited above, the fact that the Proposal has been implemented through the operation of Delaware law, and not by an action taken in response to receipt of the Proposal, does not matter; the essential objective has already been satisfied and accordingly the Proposal properly is excludable under Rule 14a-8(i)(10).

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[9] *See* "DGCL" §141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

[10] *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

[11] *See* Article IV, Section 1 of the Bylaws. The Company's Certificate of Incorporation does not contain any provision purporting to limit or modify the Board's fiduciary responsibilities.

The conclusion that the Proposal has been substantially implemented through the operation of Delaware law is not altered by the language in the Proposal requesting that the Bylaws "expressly" extend the fiduciary duties of the Company's directors to oversight of the Company's Human rights and Indigenous Peoples' rights policies. For example, in *The Cato Corp.* (avail. Mar. 29, 2018), the proposal requested that Cato Corp. amend its written equal employment opportunity policy to "explicitly" prohibit discrimination based on sexual orientation and gender identity or expression. The company argued that under existing EEOC interpretations, the reference in the company's policy prohibiting discrimination on the basis of sex encompassed the prohibition requested in the proposal. Over the proponent's objection that the company's policy did not "explicitly" include language requested in the proposal, the Staff concurred that the essential objective of the Proposal had been addressed and that the proposal could be excluded under Rule 14a-8(i)(10).

Just as the absence of an "explicit" statement in the operative document in *The Cato Corp.* did not alter the conclusion under Rule 14a-8(i)(10), here the fact that the Bylaws do not "expressly" refer to the Company's Human rights and Indigenous Peoples' rights policies does not prevent the Proposal from being substantially implemented. The Board's fiduciary duties to oversee those policies already exist to the maximum extent provided under Delaware law. The Proponent previously has acknowledged that directors' fiduciary responsibilities exist without express language in a company's bylaws. Specifically, in a letter to the Staff dated January 29, 2018, included in the correspondence for the *Goldman Sachs Group, Inc.* no-action letter discussed above, the Proponent did not claim that including language in a board committee charter is necessary to create or modify a board's fiduciary duties, but instead acknowledged that any such language operates only to "clarify the fiduciary duties of boards of directors to address environment and human rights."[12] No one would maintain that the board of directors of a company incorporated in Delaware does not have fiduciary duties unless those duties are explicitly addressed in the company's bylaws. Likewise, it would be impossible – and, because those duties are established in the DGCL and have been interpreted over decades of legal precedent, serve no purpose – to attempt to expressly describe the full extent of a board's fiduciary duties in a company's bylaws. Finally, and as discussed further below, Delaware case law establishes that the power of stockholders to amend a company's bylaws cannot be used as a means to alter a board's fiduciary duties to manage the business and affairs of a company under DGCL Section 141(a).[13] Accordingly, the Proposal's request to "expressly" address the Board's fiduciary duties to

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[12] Letter to the Office of Chief Counsel, Division of Corporation Finance, from Harrington Investments, Inc. dated January 29, 2018, at pages 3 and 4, included in *Goldman Sachs Group, Inc.* (avail. Mar. 12, 2018). Notably, the Staff concurred with the company that the language changes sought by the proposal were not necessary in order to substantially implement the proposal.

[13] As explained in a leading treatise on Delaware Law:

oversee the Company's Human rights and Indigenous Peoples' rights policies would not and could not change the nature or scope of the Board's existing fiduciary duties. Requiring the Bylaws to be amended in order to address the Proposal would result in a "formalistic application" of Rule 14a-8 that would place form over substance, contrary to the intent behind the "substantially implemented" standard.[14] Because the essential objective of the Proposal already is accomplished without express language in the Company's Bylaws, consistent with the precedents cited above, the Company has already implemented the Proposal and the Proposal therefore may be excluded from the 2019 Proxy Materials pursuant to Rule 14a-8(i)(10).

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> In *CA, Inc. v. AFSCME Employees Pension* Plan, [953 A.2d 227 (Del. 2008)], the Delaware Supreme Court addressed the interplay between [DGCL] section 109 (vesting in stockholders the power to adopt, amend or repeal bylaws) and [DGCL] section 141(a) (vesting in directors the power to manage the business and affairs of the corporation). The Court examined a stockholder proposed amendment to CA's bylaws requiring reimbursement for proxy expenses. The Court explained that "the shareholders' statutory power to adopt, amend or repeal bylaws is not coextensive with the board's concurrent power and is limited by the board's management prerogatives under Section 141(a)." Thus, while the Court determined that the proposed amendment was a proper subject for stockholder action, it concluded that the amendment was invalid under Delaware law because it had the potential to prevent the board of directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate.
>
> Similarly, in *Gorman v. Salamone*, [C.A. No. 10183-VCN, slip op. at 14-15 (Del. Ch. July 31, 2015)], the Court of Chancery invalidated a bylaw that permitted stockholders to remove and replace officers without cause because it "unduly constrain[ed] the board's ability to manage the Company." The court held that the amended bylaw "does more than simply dictate how officers are appointed and removed" and found that it "permits stockholders to remove and replace officers without cause, which would allow them to make substantive business decisions for the Company" which impermissibly interfered with the board's management powers in violation of section 141(a).

Welch, Saunders, Land, and Voss, *Folk on the Delaware General Corporation Law*, §109.05[A] (2018) (citations omitted).

[14] Exchange Act Release No. 20091 at § II.E.6 (Aug. 16, 1983).

**II. The Proposal May be Excluded Under Rule 14a-8(i)(2) Because Implementing The Proposal In The Manner That The Proposal Requests Would Cause The Company To Violate Delaware Law.**

Rule 14a-8(i)(2) allows the exclusion of a proposal if implementation of the proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." *See Kimberly-Clark Corp.* (avail. Dec. 18, 2009); *Bank of America Corp.* (avail. Feb. 11, 2009). As discussed in the Delaware Law Opinion, the substantive responsibilities of the Board in the management of the Company's business and affairs cannot be prescribed by the Bylaws, and the fiduciary duties of the Board cannot be "extended" through an amendment of the Bylaws. Moreover, to the extent that the Supporting Statement suggests that implementation of the Proposal in the manner that the Proposal requests would result in the Company's fiduciaries placing the interests of others ahead of the interests of the Company's stockholders, implementing the Proposal also would violate Delaware law.

On numerous occasions, the Staff has concurred with the exclusion of shareholder proposals where the proposal, if implemented, would violate state law. For example, in *Bank of America Corp.* (avail. Jan. 6, 2012), the Staff concurred with the Company's exclusion of a proposal under Rule 14a-8(i)(2) that requested that the Company take action, including amending the Bylaws, to "minimize" the indemnification of directors because it would violate the indemnification provisions of the DGCL. *See also Citigroup Inc.* (avail. Feb. 22, 2012) (same). Similarly, in *Bank of America Corp.* (avail. Feb. 11, 2009), the Staff concurred with the exclusion of a proposal to amend the Bylaws to establish a board committee and authorize the board chairman to appoint members of the committee. The proposal was excluded under Rule 14a-8(i)(2) as Delaware law provides that only the board can appoint members of the board committees; shareholders cannot specify how committee members are to be appointed. *See* 8 Del. C. § 141(c)(2); § 141(a). In *CA, Inc.* (avail. Jul. 17, 2008), the Staff concurred with exclusion under Rule 14a-8(i)(2) of the proposal discussed in note 13 of this letter because the bylaw amendment requested by the proposal had the potential to prevent the board of directors from exercising their full managerial power in accordance with their fiduciary duties, and therefore was invalid under Delaware law. *See also, IDACORP, Inc.* (avail. Mar. 13, 2012) (concurring in exclusion of a proposal requesting that the Company amend its bylaws to implement majority voting for director elections where state law provided for plurality voting unless a company's certificate of incorporation provided otherwise).

The Proposal asks the Board to amend the Company's Bylaws to "extend the fiduciary duties of directors to oversight of the Human and Indigenous Peoples' Rights policy." The Company is a Delaware corporation subject to Delaware law. Under Delaware law, directors have fiduciary duties to the Company and its stockholders that require "that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term" for the benefit of the company's

stockholders.[15] As discussed in greater detail in the Delaware Law Opinion, the existence and parameters of these fiduciary duties are determined by Delaware common law and, except as provided under the DGCL,[16] cannot be modified or expanded, including through a bylaw amendment. Under Delaware law, "[t]he fiduciary nature of a corporate office is immutable."[17] Thus, as the Delaware Law Opinion concludes, "the Proposal, if implemented as requested, would violate Delaware law in that it would mandate the adoption of a bylaw which would purport to extend the Board's fiduciary duties whereas such duties are only established via the Delaware common law, and thus would violate Section 109(b) of the General Corporation Law."

Moreover, the Supporting Statement to the Proposal suggests that the goal of the Proposal is to "ensure that the Bank's fiduciaries investigate and prevent material impacts on Human and Indigenous Peoples' Rights." As discussed in "Background" above, the Company's business activities already consider Human rights and Indigenous Peoples' rights through vigorous and thoughtful governance practices. However, as discussed in the Delaware Law Opinion with respect to a Delaware corporation's board of directors, "[t]he sole provisions of the General Corporation Law contemplating the extension of common law fiduciary duties to communities other than stockholders apply only to public benefit corporations," and therefore do not apply to the Company. Thus, to the extent that the Supporting Statement suggests that implementing the Proposal in the manner that the Proposal requests would result in the Company's fiduciaries placing the interests of others ahead of the interests of the Company's stockholders, the Proposal also would violate Delaware law.

Finally, Section 141(a) of the DGCL provides that the Board's oversight of the business and affairs of the Company may only be altered to the extent permitted and provided for under the DGCL and the Company's Certificate of Incorporation. Thus, as explained in the Delaware Law Opinion, by

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[15] *Frederick Hsu Living Trust v. ODN Hldg. Corp.*, 2017 WL 1437308, at *18 (Del. Ch. Apr. 14, 2017); *accord TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) ("[B]roadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders.").

[16] The DGCL allows for modification of directors' fiduciary duties in only one respect which is not implicated by the Proposal. Specifically, DGCL §102(b)(7) allows a company's certificate of incorporation to include a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of the fiduciary duty of care. Notably, even this provision does not alter directors' fiduciary duties, but only addresses the extent of liability for any breach of that duty.

[17] *Mills Acquisition Co. v. Macmillan, Inc.*, *supra*, note 10.

seeking to define the scope of the Board's oversight responsibilities through the Bylaws, the Proposal, if implemented, would impermissibly direct the Board in managing the business and affairs of the Company in contravention of Section 141(a) of the General Corporation Law, and thus would violate Delaware law. In this respect, the bylaw language requested in the Proposal has the same flaw as the bylaw amendment that was considered by the Delaware Supreme Court in *CA, Inc. v. AFSCME Employees Pension Plan*, *supra* note 13, and by the Staff in *CA, Inc.*, *supra*. Just as in *CA, Inc.*, because the Proposal has the potential to prevent the board of directors from exercising their full managerial power in accordance with their fiduciary duties, the Proposal would violate Delaware law, and therefore may properly be excluded under Rule 14a-8(i)(2).

In each of the foregoing respects, the Proposal requests adoption of a Bylaw provision that would be void under Delaware law. Accordingly, just as in the *Bank of America*, *CA, Inc.* and other precedent cited above, the Proposal may properly be excluded under Rule 14a-8(i)(2) because, as cited in the Delaware Law Opinion, implementing the Proposal in the manner that the Proposal requests would cause the Company to violate Delaware law.

## III. The Proposal May Be Excluded Under Rule 14a-8(i)(6) Because The Company Lacks The Power Or Authority To Implement The Proposal In The Manner That The Proposal Requests.

Rule 14a-8(i)(6) permits a company to exclude a stockholder proposal "[i]f the company would lack the power or authority to implement the proposal." The Company believes that this exclusion applies to the Proposal because the Company lacks the power and authority to implement a proposal that would violate Delaware law. The Staff has concurred on numerous occasions that a company may exclude a proposal under both Rule 14a-8(i)(2) and Rule 14a-8(i)(6) if the proposal's adoption would cause the company to violate state law. *See*, *e.g.*, *RTI Biologics*, *Inc*. (avail. Feb. 6, 2012); *NiSource Inc*. (avail. Mar. 22, 2010). As discussed more fully in Section II above and in the Delaware Law Opinion, because the Proposal seeks to create or expand directors' fiduciary duties in the Company's Bylaws, amending the Bylaws in the manner that the Proposal requests would violate the DGCL. Therefore, because the Company lacks the power and authority under Delaware law to implement the Proposal in the manner that the Proposal requests, the Proposal is excludable under Rule 14a-8(i)(6).

## IV. The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because It Is Materially False And Misleading.

Rule 14a-8(i)(3) permits the exclusion of a stockholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. As discussed above, the Proposal is materially false and misleading because it indicates that the Company can "extend the fiduciary duties of directors" through a Bylaw amendment, which, as noted, violates Delaware law.

The Staff consistently has concurred that where a proposal contains false and misleading assertions regarding the effect of implementation of the proposal under state law, the proposal as a whole is excludable under Rule 14a-8(i)(3). For example, in *Ferro Corp.* (avail. Mar. 17, 2015), the Staff concurred in the exclusion of a proposal requesting that the company reincorporate in Delaware because the proposal was materially false and misleading when it improperly suggested that stockholders would have increased rights if Delaware law governed the company instead of Ohio law. Here, the Proposal's statement that the Company can "extend the fiduciary duties of directors" through its Bylaws is similarly materially false and misleading. As explained in the Delaware Law Opinion, fiduciary duties are created by Delaware common law and cannot be modified or expanded in a company's bylaws. This false and misleading statement is central to the Proposal's entire premise of expanding the Board's oversight powers and renders the Proposal as a whole false and misleading.

Similarly, when a proposal is premised on a false or inaccurate concept or predicate, the Staff has permitted exclusion of the entire proposal under Rule 14a-8(i)(3). *See, e.g.*, *Microsoft Corp.* (avail. Oct. 7, 2016) (concurring in the exclusion of a proposal requesting that the "board shall not take any action whose primary purpose is to prevent the effectiveness of shareholder vote without a compelling justification for such action" because neither the company nor its stockholders could determine which situations the proposal applied to or what types of conduct it was intended to address); *General Electric Co.* (avail. Jan. 6, 2009) (concurring in the exclusion of a proposal under which any director who received more than 25% in "withheld" votes would not be permitted to serve on any key board committee for two years because the company did not typically allow stockholders to withhold votes in director elections); *Johnson & Johnson* (avail. Jan. 31, 2007) (concurring in the exclusion of a proposal to provide stockholders a "vote on an advisory management resolution . . . to approve the Compensation Committee [R]eport" because the proposal would create the false implication that stockholders would receive a vote on executive compensation); *State Street Corp.* (avail. Mar. 1, 2005) (concurring in the exclusion of a proposal requesting stockholder action pursuant to a section of state law that had been recodified and was thus no longer applicable); *General Magic, Inc.* (avail. May 1, 2000) (concurring in the exclusion of a proposal requesting that the company make "no more false statements" to its stockholders because the proposal created the false impression that the company tolerated dishonest behavior by its employees when in fact the company had corporate policies to the contrary). "[W]hen a proposal and supporting statement will require detailed and extensive editing in order to bring them into compliance with the proxy rules, [the Staff] may find it appropriate for companies to exclude the entire proposal, supporting statement, or both, as materially false or misleading." Staff Legal Bulletin No. 14 (July 13, 2001) ("SLB 14").

As discussed above, the Proposal falsely suggests, and is predicated on the inaccurate assumption, that directors' fiduciary duties can be "extended" through a bylaw amendment. Just as *Ferro Corp.*, *Microsoft*, *General Electric*, *Johnson & Johnson*, *State Street* and *General Magic* created false impressions that would impermissibly mislead stockholders considering the proposals, the

Proposal's materially false and misleading statements make the Proposal so fundamentally misleading that it would "require detailed and extensive editing in order to bring [the Proposal and Supporting Statement] into compliance with the proxy rules." SLB 14.

**CONCLUSION**

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2019 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company's Corporate Secretary, at (980) 388-6878.

Sincerely,

Ronald O. Mueller

Enclosures

cc: Ross E. Jeffries Jr., Bank of America Corporation
John C. Harrington, Harrington Investments, Inc.

**EXHIBIT A**

HARRINGTON
INVESTMENTS, INC.

October 12, 2018

OFFICE OF THE

OCT 13 2018

CORPORATE SECRETARY

Corporate Secretary
Bank of America Corporation
Hearst Tower
214 North Tryon Street
NC1-027-18-05
Charlotte, North Carolina 28255

**RE: Shareholder Proposal**

Dear General Counsel and Secretary,

As a shareholder in the Bank of America Corporation, I am filing the enclosed shareholder resolution pursuant to Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934 for inclusion in the Bank of America Corporation Proxy Statement for the 2019 annual meeting of shareholders.

I am the beneficial owner of at least $2,000 worth of the Bank of America Corporation stock. I have held the requisite number of shares for over one year, and plan to hold sufficient shares in the Bank of America Corporation through the date of the annual shareholders' meeting. In accordance with Rule 14a-8 of the Securities Exchange Act of 1934, verification of ownership is included. I or a representative will attend the stockholders' meeting to move the resolution as required by SEC rules.

If you have any questions, I can be contacted at (707) 252-6166.

Sincerely,

John C. Harrington

President and C.E.O.
Harrington Investments, Inc.

1001 2ND STREET, SUITE 325 NAPA, CALIFORNIA 94559 707-252-6166 800-788-0154 FAX 707-257-7923
WWW. HARRINGTONINVESTMENTS.COM

**Bank of America - 2019**

**Whereas**, our Company has been identified as one of the banks financially supporting companies engaged in development or construction of the Dakota Access Pipeline (DAPL) (Bakken Pipeline), a controversial project which received extensive media coverage and public condemnation for its environmental destruction, pollution and encroachment upon sacred Sioux Nation land;

**Whereas**, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, Article 11, asserts "the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites..."

**Whereas**, Article 29 of the Declaration states "Indigenous Peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources";

**Whereas**, in 1948, the United Nations adopted the Universal Declaration of Human Rights and the United Nations Human Rights Council, and in 2011 adopted the United Nations Guiding Principles on Business and Human Rights;

**Whereas**, our Company's financial support of the Dakota Access Pipeline and corporations involved in the pipeline's construction has resulted in Human and Indigenous Peoples' Rights violations, threatened negative impacts on customer loyalty and shareholder value,[1] and harmed project companies with reputational damage,[2] delays, disruption and litigation;

**Whereas**, many financial institutions including our Company attempt to differentiate in their Human Rights oversight between project or transactional financing and direct corporate loans for general purposes, bringing much less Human Rights oversight to general corporate or commercial loans, even if Human Rights concerns are relevant;

**Whereas**, financial institutions face reputational damage or even liability for Human Rights abuses associated with general financing. For example, holocaust victims and other victims of Human Rights violations have successfully sought redress from banks that provided general financial services to Human Rights violators;

**Whereas, we believe** it is a fiduciary duty of the Board and Management to consider Human Rights when making all executive decisions (including loan agreements and related business affairs) where there is significant potential impact or consequence of our Company's involvement, along with significant risk to our Company;

**Whereas**, reputational damage, negative publicity and loss of customer business can result in negative consequences for our Company regardless of whether the underlying financing was conducted as general or project-based financing;

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[1] https://www.thenation.com/article/these-cities-are-divesting-from-the-banks-that-support-the-dakota-access-pipeline/

[2] https://sandiegofreepress.org/2017/02/calpers-joins-investors-calling-on-banks-to-address-concerns-about-dakota-access-pipeline/

**Therefore, Be It Resolved,** shareholders request that Bank of America Board of Directors amend the Company's bylaws to expressly extend the fiduciary duties of directors to oversight of the Human and Indigenous Peoples' Rights policy.

**Supporting statement**

The proponent believes our Company's Human and Indigenous Peoples' Rights Policy should at minimum establish effective policies ensure that the Bank's fiduciaries investigate and prevent material impacts on Human and Indigenous Peoples' Rights.

charles SCHWAB

October 12, 2018

Corporate Secretary
Hearst Tower -Bank of America Corporation
214 North Tryon Street
NC1-027-18-05
Charlotte, NC 28255

Account #: ***
Reference #: AM-1945932
Questions: Please call Schwab Alliance at 1-800-515-2157.

**RE: Account *** John C. Harrington TTEE Harrington Investments, Inc. 401k Plan John Harrington – FBO**

Dear Corporate Secretary,

This letter is to confirm that Charles Schwab is the record holder for the beneficial owner of the John C. Harrington TTEE Harrington Investments, Inc. 401k Plan account and which holds in the account 600 shares of common stock in Bank of America Corporation. These shares have been held continuously for at least one year prior to and including October 12, 2018.

The shares are held at Depository Trust Company under the Participant Account Name of Charles Schwab & Co., Inc., number 0164.

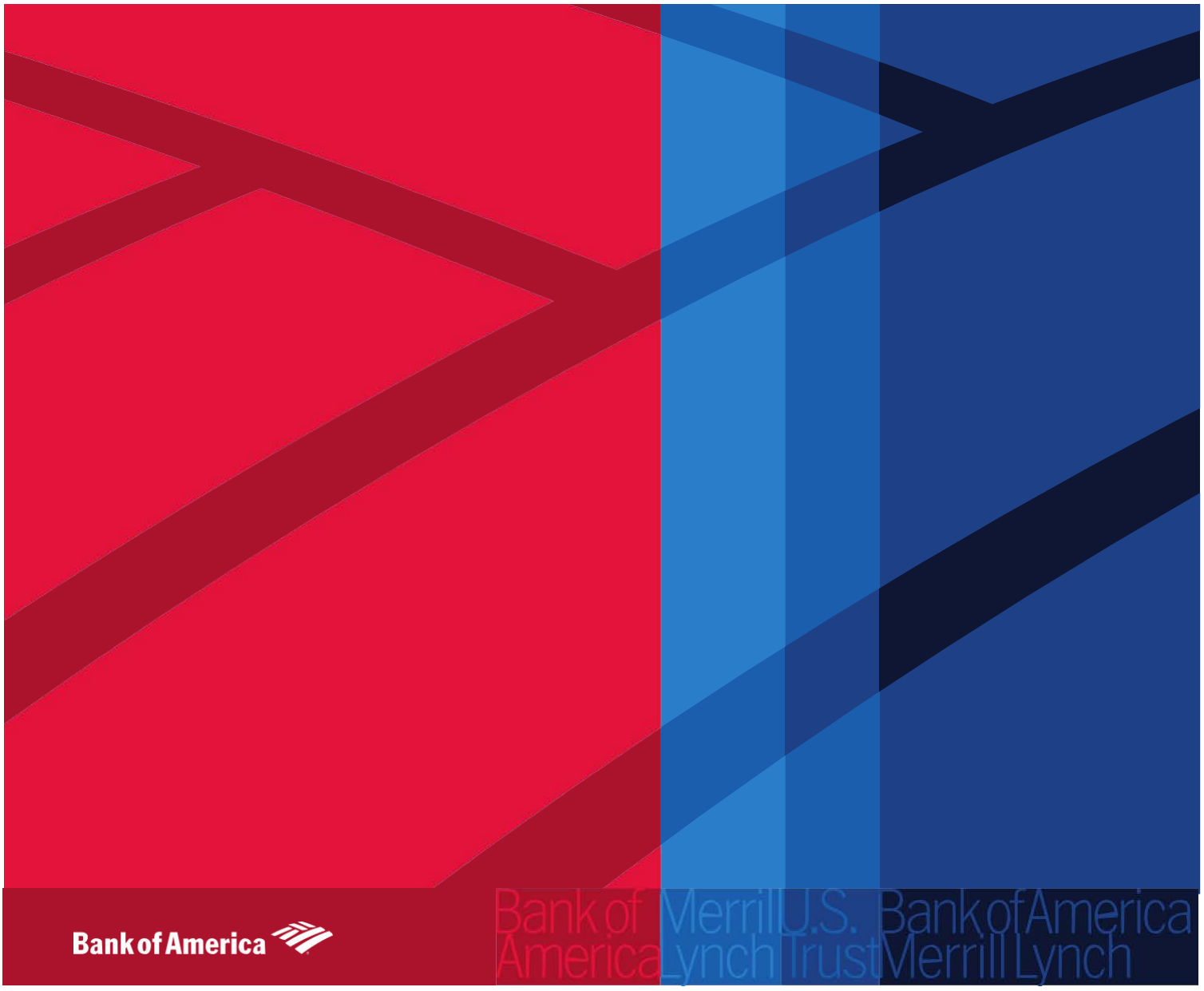
This letter serves as confirmation that the account holder listed above is the beneficial owner of the above referenced stock.

Should additional information be needed, please feel free to contact me directly at 877-393-1951 between the hours of 11:30am and 8:00pm EST.

Sincerely,
Michael Woolums
Advisor Services
2423 E Lincoln Dr
Phoenix, AZ 85016-1215

**EXHIBIT B**

# Bank of America
# Human Rights Statement



Bank of America supports fundamental human rights and demonstrates leadership in responsible workplace practices across our enterprise and in all regions where we conduct business. While national government's bear the primary responsibility for upholding human rights, our company policies and practices promote and protect human rights, and we strive to conduct our business in a manner consistent with the United Nations Universal Declaration of Human Rights and the International Labor Organization's Fundamental Conventions. Our commitment to fair, ethical and responsible business practices, as we engage with our employees, clients, vendors and communities around the world, is embodied in our values and Code of Conduct.

## Employees

Our success as a company is driven by the people supporting our customers and clients each day. Bank of America is committed to treating every employee with respect and dignity and protecting their human rights. We offer equal employment opportunity to all, do not tolerate discrimination or harassment, and are proud to be a leader in supporting diversity and inclusion. We abide by labor laws and regulations in the regions where we conduct business including those that address child labor, forced labor, equal pay and nondiscrimination in our workforce. We strive to provide a safe and healthy work environment for all employees. We also acknowledge and support the rights of each employee and value an open dialogue with our employees so we may continue to improve their work environment as well as the service we provide customers and clients around the world.

## Customers, Clients and Vendors

Bank of America has policies to prevent the illegal use of our products and services, including abuse that may result in human rights violations. These policies include a rigorous Customer Due Diligence process, compliance with U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act and the Modern Slavery Act as well as anti-money laundering controls. All employees are required to complete annual training on many of these subjects, as well as acknowledge our Code of Conduct.

We have endorsed a number of international charters, principles and initiatives that address social and environmental issues, including the United Nations Principles for Responsible Investment, the Equator Principles, Carbon Principles, United Nations Global Compact and CERES Principles. Our Environmental and Social Risk Policy Framework (ESRPF) articulates how we approach environmental and social risks across our business, as well as outlining the environmental and social issues most relevant to us. The policies referenced in the ESRPF are reviewed as a part of our internal audit process, which evaluates our adherence to all policies in place within each of our lines of business.

Bank of America strives to work with vendors whose policies and practices regarding human rights are consistent with our own. We have set out clear expectations for our vendors in their management of human rights and other key areas in the bank's Vendor Code of Conduct.

## Communities

At Bank of America, our purpose is to make financial lives better. This purpose informs our company's values and reinforces our mission to help local economies grow and prosper. We believe by working with key partners to address critical human rights issues, such as economic empowerment, hunger, jobs, improved health, and access to sustainable energy and water, we can help improve the economic and social health of the communities we serve.

**EXHIBIT C**

# Bank of America Corporation Environmental and Social Risk Policy Framework

November 2016

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# Overview

## Introduction

As a financial institution, risk is inherent in all of our business activities. At Bank of America, managing risk well – including environmental and social risk – is a key part of our responsible, sustainable growth strategy. It contributes to the strength and sustainability of our company for the future, and supports the work we do today to serve our customers, communities, shareholders, and employees. Risk management is fundamental to our culture and critical to our success. The principles of sound risk management are embodied in our values, operating principles and Code of Conduct that all employees are expected to follow.

We have established this environmental and social risk policy framework, our ESRP Framework, to provide additional clarity and transparency around how we approach environmental and social risks. Overall, there are seven key risk types (strategic, credit, market, liquidity, operational, compliance and reputational)[1] we face as an organization. Environmental and social issues can cross many of these risk types, but most often present reputational risk.

Our Risk Framework describes our risk management approach and provides for the clear ownership and accountability for managing risk well across the company.

## An evolving risk environment

We take a proactive approach to identifying and managing risks, including environmental and social risks. We engage internal and external stakeholders to determine which environmental and social issues pose the greatest challenges. These conversations help us to better understand these issues and determine which ones should be included in our ESRP Framework.

In developing this ESRP Framework, we have benchmarked all of our existing environmental and social policies and positions against industry best practices. We also have reviewed the results of our ESG materiality assessment and evaluated the relevance of environmental and social issues to our business activities.[2]

[1] See page 31 of ESG Report.

[2] We have completed a detailed Environmental, Social and Governance (ESG) materiality assessment, in line with the Global Reporting Initiative's G4 Sustainability Reporting Guidelines, and published the results in our 2015 Business Standards Report and Environmental, Social and Governance Addendum (ESG Report). We update and review this materiality assessment with our Global Environmental, Social & Governance Committee (ESG Committee, see discussion below) on a regular basis.

# Environmental and social risk governance and process

## Governance

Environmental and social risks touch almost every aspect of our business. Like all risks, environmental and social risks require coordinated governance, clearly defined roles and responsibilities, and well-developed processes to ensure risks are identified, measured, monitored and controlled appropriately and in a timely manner. This ESRP Framework is aligned to our overall Risk Framework, which outlines Bank of America's approach to risk management and each employee's responsibilities for managing risk. Key to managing risk well is our philosophy that all employees are accountable for identifying, escalating and debating risks facing the company.

To strengthen our oversight of environmental, social and governance issues, we established our Global Environmental, Social & Governance Committee (ESG Committee), a management-level committee comprised of senior leaders across every major line of business and support function. The ESG Committee engages other management committees as necessary, including the Management Risk Committee which is responsible for management oversight and approval of key risks of the company. The ESG Committee also routinely reports to the Corporate Governance Committee of the Board of Directors on environmental and social issues.

The ESRP Framework is overseen by the chair of the ESG Committee and is reviewed and approved by the ESG Committee at least every two years. If interim changes are needed to the Framework, they will be approved by the ESG Committee and will be reflected, as appropriate, in internal policies and procedures. Although implementation of the ESRP Framework and management of environmental and social risk are the responsibilities of all employees, our front line units are the primary owners of risk.

## Process

Risk management is both an essential component of our daily business activities and an integral part of our strategic, capital and financial planning processes. Our strategic planning process consists of a top-down approach based on risk appetite, financial considerations, business priorities and economic assumptions, integrated with a bottom-up approach driven by front line units. The front line units have primary responsibility for managing all risks, including the environmental and social risks inherent within their businesses.

## Customer selection and transaction due diligence and onboarding

As part of our Know Your Customer (KYC), due diligence and other onboarding processes, front line units and risk teams determine if a proposed transaction or relationship presents potential environmental or social risks. This determination is driven by a number of factors, including: cross-referencing our prohibition list and heightened sensitivity list, which are both part of this ESRP Framework; understanding our customers' business, industry, management and reputation; application of our policies; adherence to regulation; and consultation with subject matter experts and those teams focused on customer screening and onboarding.

## Due diligence, heightened risk review and the prohibited list

### Standard due diligence

Standard due diligence is conducted when environmental and social risks are well understood or expected to be relatively low for the customer, business activity, industry or geography. Due diligence begins with the front line unit, and this process may include, but is not limited to, client engagement, media searches or other screening tools. This standard review may result in a customer relationship or transaction being approved, conditionally approved subject to specific mitigating actions, or declined in line with the line of business approval process. If, during this due diligence, the customer, business activity, industry or geography is identified as posing heightened risk, then enhanced due diligence will be conducted.

### Enhanced due diligence

A customer relationship or transaction may require enhanced due diligence related to environmental and social issues due to a policy or standard, because it is referred by a risk manager after standard due diligence, or if the customer, business activity, industry or geography is deemed sufficiently sensitive. In these instances, enhanced due diligence is required before the relationship or transaction can proceed toward approval. Enhanced due diligence may include engagement of subject matter experts, use of internal resources, media searches and information sources, and client websites and disclosures. Additional review may be conducted by the front line unit and risk management for any identified issues. Enhanced due diligence related to environmental and social issues is not intended to replace or supersede enhanced due diligence required by other policies or guidance.

### Committee review of reputational risk

If due diligence reveals that a business activity presents significant environmental and social risk, that activity – including customer relationships, transactions, new products or other corporate activities – may be escalated to the appropriate committee responsible for reputational risk management for further evaluation. These committees are comprised of the business heads and senior executives from our Global Risk, Global Compliance and Legal groups, and can approve, conditionally approve, or decline a business activity. If the committee does not approve a business activity, the business head may appeal the matter to the executive management team.

### Prohibited list

Bank of America will not knowingly engage in illegal activities including:

- Bribery – Including giving, offering, receiving or requesting of bribes;
- Child labor, forced labor or human trafficking – Including engaging with companies or transactions in which a customer is directly involved in child labor, forced labor or human trafficking;
- Illegal logging or uncontrolled fire – Including transactions in which a customer engages in illegal logging or uncontrolled use of fire for clearing forest lands; and
- Transactions for illegal purposes – Including transactions involving internet gaming in certain jurisdictions.

In addition, we will not knowingly engage in the following types of activities that, while not illegal, are contrary to our values, operating principles or Code of Conduct:

- Payday lending services – Directly to our consumer customers and credit to business customers with significant payday lending activities;
- Predatory lending – Including securitization of assets obtained through predatory lending practices;
- Natural resource extraction in UNESCO World Heritage sites – Engaging in transactions focused on natural resource extraction within UNESCO World Heritage sites, unless there is prior consensus between UNESCO and the host country governmental authorities that activities will not adversely affect the natural or cultural value of the site;
- Transactions designed to manipulate financial results – Including transactions or activities designed to artificially or unfairly manipulate or change the reported value of a client, instrument or transaction or inappropriately reduce tax liabilities; and
- Transactions for speculative purposes, with no clear source of repayment.

## Subject matter expertise

Bank of America employs a variety of internal subject matter experts (SMEs) who participate in the environmental and social risk management process. These SMEs include employees from our front line units, as well as our Environmental Services Department, Global Environmental, Social and Governance Group, Global Risk Management and Public Policy teams. Risk assessments may be conducted by consultants along with internal or external experts, and they range from simple questionnaires to complex evaluations that may include geological, engineering and other studies.

# Positions, standards and policies

## Positions on key issues

Climate change and human rights are two areas of significant concern to many of our stakeholders. We have established high-level positions on each of these issues to ensure we are appropriately addressing them across our enterprise.

### Climate change

The consensus among scientists and organizations (including the United Nations Intergovernmental Panel on Climate Change) continues to support the urgent need for action to address climate change. We recognize that climate change poses a significant risk to our business, our customers, and the communities where we live and work.

As one of the world's largest financial institutions, Bank of America has a responsibility to help mitigate climate change by using our expertise and resources, as well as our scale, to help accelerate the transition from a high-carbon to a low-carbon society. As a financial institution, we have a critical role to play in helping to provide capital for renewable energy, energy efficiency and other low-carbon related financing.

In our work around the globe, we also recognize that certain sectors may be more exposed to climate change related risks than others. As needed for these higher risk sectors, we engage in further customer and transactional review and due diligence to evaluate the associated risks, including identification of physical, regulatory and reputational risks.

**Carbon markets**

Global carbon markets or taxes on carbon are seen by both policymakers and business leaders as a critical step in promoting a shift to a low-carbon economy. Bank of America supports an economy-wide market-based approach to reducing carbon emissions, which we believe will drive innovation and economic growth. We will continue to monitor developments in carbon pricing and the potential implications for our company and our customers.

### Human rights

Bank of America is strongly committed to fundamental human rights, and we've demonstrated clear leadership in responsible workplace practices in all regions where we do business. While national governments bear the primary responsibility for upholding human rights, our policies and practices protect and promote human rights.

We abide by labor laws and regulations in the regions where we conduct business, including those that address child labor, forced labor, human trafficking, equal pay and non-discrimination in our workforce. Bank of America will not knowingly do business with customers that engage in child labor, forced labor or human trafficking. We evaluate other human rights issues, as relevant, in our due diligence review of customer relationships and transactions.

In our operations around the world, we strive to conduct our business in a manner consistent with the United Nations Universal Declaration of Human Rights and the International Labor Organization's (ILO) Fundamental Conventions, and also strive to work with vendors whose policies and practices are consistent with our own. We have set clear expectations for our vendors in their management of human rights and other key areas in our Vendor Code of Conduct, including expecting vendors and their subcontractors to abide by labor laws and regulations in the regions where they conduct business including those that address child labor, forced labor, slavery, human trafficking, equal pay and non-discrimination in their workforce and not to engage in any practice that could reasonably be considered as employing or encouraging child labor, forced labor, slavery or human trafficking.

To learn more please see our Bank of America Human Rights Statement.

## External standards

We are participants in or signatories to the following principles (listed alphabetically) and use these principles to help guide our approach to lending, investing and other financing decisions relating to critical environmental and social issues.

### The Carbon Principles

The Carbon Principles' due diligence standard is considered to be an industry best practice for evaluating financing for companies that are considering new power plant construction in the United States and for ensuring that the long-term costs of carbon are being taken into account, even in the absence of regulation. Bank of America is a signatory to The Carbon Principles and continues to support these principles as an industry best standard.

### Equator Principles

The Equator Principles provide a framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects. They are primarily intended to establish a minimum standard for due diligence in project-related lending and finance. By following and supporting the Equator Principles, we help to ensure financing for projects in a manner that is socially responsible and reflective of sound environmental management practices. Bank of America continues to support these principles as an industry best standard.

### Green Bond Principles

The Green Bond Principles are voluntary process guidelines that advance disclosure, transparency and integrity in the fast-growing green bond market. Bank of America partnered with other institutions to establish the principles and has been an active participant in their implementation through a multi-stakeholder process that brings together issuers, investors and intermediaries, with the support of the International Capital Market Association.

### Principles for Responsible Investing

Bank of America's Global Wealth and Investment Management business is the first major wealth management firm to become a signatory to the United Nations-supported Principles for Responsible Investment (PRI). Since its launch in 2006, the PRI has been instrumental in raising awareness about responsible investment among the global investment community and fostering collaboration among companies and policymakers on ESG issues.

## Our business – environmental and social areas of heightened sensitivity

This section contains a summary (in alphabetical order) of environmental and social topics that Bank of America recognizes as being of heightened sensitivity and importance to us and our stakeholders, along with our approach to each area. While we expect our customers to comply with environmental laws and regulations, we also take additional measures to identify, evaluate and mitigate environmental and social risks for certain customers, business activities, industries or geographies.

Our wealth management clients are increasingly interested in the role that environmental, social and governance (ESG) criteria can play in evaluating portfolio risks and long-term investment opportunities. Our Global Wealth and Investment Management (GWIM) division has developed an offering that provides our clients access to strategies across multiple asset classes that integrate ESG into their investment approach. GWIM is committed to continuously providing education and thought leadership to advisors, portfolio managers and clients on the benefits of incorporating ESG. As our work in this area progresses, we will take the ESRP Framework into consideration. However we do not require all investment strategies on our platform to incorporate ESG considerations, nor do we apply these considerations to our investment recommendations or decisions or the asset allocation of GWIM clients unless they request us to do so.

## Arms and munitions

Our Arms and Munitions Policy establishes an enhanced due diligence standard for customers and transactions involved in arms and munitions trade finance, with a primary focus on managing reputational risk concerns. Maintenance and execution of this policy is conducted by subject matter experts with specialized industry knowledge and follows a clear process with senior executive checkpoints, escalation routines and risk management.

## Biodiversity and ecosystems

We recognize that there are many areas of the planet with rich biodiversity and sensitive ecosystems that are particularly vulnerable to negative impacts from irresponsible development and unsustainable practices. As an organization, we evaluate potential biodiversity impacts as our business changes and the science on biodiversity evolves. When issues of concern are identified by the front line unit or a control function, they are escalated for further review.

### Agricultural commodity trading

We recognize the risks associated with trading in agricultural commodities, where certain types of financial trading or speculation have the potential to increase the cost of food and/or food poverty, especially in developing economies. After a thorough review by our commodities trading group, we have determined that we do not take significant market risk in agricultural commodities; however, we continue to monitor this issue.

### Forestry

The world's forests play a vital role in the carbon cycle and can help mitigate global climate change. We developed our Forests Protection Policy, including our position on Forest Certification and paper procurement policy, in consultation with our customers who have expertise in the sector and with environmental partners focused on developing best practices, including forestry certification. Our Forests Protection Policy places additional value on forestry certification by using it as a due diligence tool. The Forests Protection Policy includes explicit prohibition of illegal logging and practices involving uncontrolled fire.

### Palm oil

The increased use of palm oil has raised concerns regarding the potential impacts to forests and land use in sensitive tropical environments. At Bank of America, transactions where the majority use of proceeds is identified as supporting palm oil production are subject to enhanced due diligence. For these transactions, we require customers whose business is focused on ownership and management of palm oil plantations and operations, including growers and mills, to have their operations certified, or have in place an outlined action plan and schedule for certification. We use the Roundtable on Sustainable Palm Oil (RSPO) certification or equivalent certification standards as a minimum requirement of customers, and closely monitor developments relating to the sustainable sourcing of palm oil.

## Energy and extractives

Activities involving mineral or resource extraction raise the risk of disturbing sensitive environments, with impacts on both biodiversity, and the human communities that depend on them. Bank of America has developed customer and transaction standards and guidance, informed by international standards and best practices, to govern particularly sensitive areas where energy and extractive activity occurs.

### Arctic drilling

Bank of America recognizes that the Arctic is a unique region with specific considerations to take into account including those of marine and wildlife, a fragile ecosystem and the rights of Indigenous Peoples. Considering these sensitivities, we require enhanced due diligence for any transactions where the majority use of proceeds is identified as supporting petroleum exploration or production activities in the Arctic. We define the Arctic as any lands subject to permafrost and extensive seasonal ice cover (generally above the Arctic Circle) and major sections of the Arctic Ocean and its component water bodies that are also subject to extensive or permanent ice cover.

### Coal

Energy companies and their subsidiaries focused on coal face significant challenges. These include greater regulatory scrutiny related to both extraction and combustion, changes in economic conditions, and increased pricing pressure from the proliferation of natural gas and new energy technologies. Bank of America's Coal Policy ensures that we will continue to play a role in promoting the responsible use of coal and other energy sources, while balancing the risks and opportunities to our shareholders and the communities we serve. Over the past several years, we have significantly reduced our exposure to coal extraction companies. Going forward, we will also continue to reduce our credit exposure to coal extraction companies. This commitment applies globally to companies focused on coal extraction and to divisions of diversified mining companies that are focused on coal.

Other ongoing transactions involving companies focused on coal mining are subject to enhanced due diligence that incorporates evolving market dynamics, as well as specific risks and regulations related to coal mining. In keeping with our commitment to reduce credit exposure to extraction companies focused on coal mining, Bank of America will continue to reduce our exposure to coal mining companies that utilize Mountaintop Removal Mining practices in Appalachia.

Outside of the U.S., our enhanced due diligence around coal mining companies operating globally includes those core elements we evaluate for U.S. companies. We also consider potential gaps in existing regulatory frameworks that might ordinarily better evaluate and address environmental risks, as well as health and safety risks.

### Large dams

Bank of America recognizes that the construction of dams to control water flow can bring much needed economic opportunity and development to certain regions of the world. It can also have impacts on the ecological systems in which it is constructed and connected to, as well as potential social impacts on the surrounding communities. Any transactions in which the majority use of proceeds is identified as supporting large scale dam construction for hydroelectric generation, or lands involved in such construction, are subject to enhanced due diligence. This scrutiny includes adherence to the Equator Principles, which we have adopted and follow, and the Hydropower Sustainability Assessment Protocol as guidance.

### Nuclear energy

Nuclear power delivers an important part of many nations' energy portfolios and is an alternative to carbon-intensive fuels. Bank of America understands the particular sensitivities regarding use of nuclear energy, including safety and handling of nuclear fuel and wastes. Transactions in which the majority use of proceeds is identified as or are clearly for the development of nuclear projects are subject to enhanced due diligence, which includes a requirement that customers adhere to regional, national, international and industry best practices in this sector.

### Oil sands

We recognize the concerns raised over extraction of bitumen and its refinement into crude oil, particularly in sensitive ecosystems such as those found in Northern Canada. As such, Bank of America conducts enhanced due diligence for any transactions in which the majority use of proceeds is identified as or are clearly for the development of oil sands. This is in addition to meeting the requirements of the Equator Principles, if applicable.

### Renewable energy

Bank of America has increased our focus on renewable energy sources as part of our efforts to finance the transition to a low-carbon economy through our $125 billion environmental business commitment. We recognize that some renewable energy projects pose other environmental and social issues, and we include review of these risks in our due diligence processes. When environmental or social issues of concern are identified, they undergo further review.

### World heritage sites

We respect the designation of United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Sites, including areas of cultural and natural value and deemed to be of national or international significance. Bank of America will not knowingly engage in transactions focused on natural resource extraction within UNESCO World Heritage sites unless there is prior consensus between UNESCO and the host country's governmental authorities – such that the activities will not adversely affect the natural or cultural value of the site.

## Financial products and services

Acting responsibly is a core value at Bank of America – that applies to the financial products we provide directly to consumers, as well as our relationships with other businesses that provide financial products to consumers. We are focused on making our customers' financial lives better by providing education and support and responding to their needs. Our product review and business review committees – together with external input that we solicit from stakeholders like regulators and consumer advocates – ensure that our products are responsible, in line with Bank of America's values, and are not overly complex or unclear.

### Consumer debt sales

We do not sell our customers' consumer debt to predatory third parties (such as, collection agencies that employ predatory practices), nor will we knowingly provide credit to these same predatory buyers of consumer debt. For sales of consumer debt to approved third parties, and for advisory or capital markets transactions, in which a customer is involved in consumer debt sales or purchases, enhanced due diligence is required.

### Consumer protection

Bank of America offers a suite of simple, safe and transparent banking products to help customers manage their financial affairs and goals. All of our consumer banking products and services are subjected to a rigorous review process and are designed to address customer needs at a fair and equitable cost, with terms our customers understand. We constantly solicit external feedback to help ensure that our products, solutions and services meet the needs of our customers.

We are committed to fairly and consistently meeting the credit needs of our customers and to complying fully with our Fair Lending Policy and applicable consumer laws and regulations. This includes fair and non-discriminatory access to credit products, terms and conditions, and services throughout the entire credit life cycle. Our commitment to fair lending is the cornerstone of our culture and is clearly articulated in our Fair Lending Policy. All Bank of America employees must comply with the policy, and failure to do so may result in disciplinary action up to and including termination. Our employees participate in mandatory Fair Lending training annually.

As a financial institution, we understand that certain products and services present unique opportunities and challenges for low and moderate-income (LMI) customers. Bank of America has worked closely with customers and advocacy groups to develop products specifically tailored to meet the needs of LMI customers. We also have made changes to our products and services to address those that have the potential to disproportionately impact LMI communities, such as overdraft and payday lending. Our lending, investment and service activities with low- and moderate-income customers are overseen by the ESG Committee, as are our Community Reinvestment Act (CRA) initiatives and performance.

### Overdrafts

We do not allow customers to overdraw their checking accounts through a debit card transaction at a point of sale (e.g., grocery store, gas station, etc.). In addition, in order to overdraw their accounts at an ATM, customers must affirm that they understand a fee will be charged for doing so.

**Payday lending**

A payday loan is a short-term loan, generally for $500 or less, that is typically due on the borrower's next payday and requires the borrower to give lenders access to his or her checking account or to write a post-dated check for the full loan balance that a lender may deposit when the loan is due. At Bank of America we do not offer payday lending services directly to our consumer customers. We also do not provide credit to business customers for which providing payday lending services to consumers is a significant part of their business. Advisory and capital markets transactions involving businesses significantly engaged in payday lending require enhanced due diligence.

**Subprime lending**

Bank of America is committed to providing responsible lending products to customers who have the ability to repay their obligations. Recently, there has been significant public focus on financial products with unaffordable, unfair or predatory terms provided to consumers with certain higher risk characteristics, such as low credit scores, previous bankruptcies or foreclosures, recent loan delinquencies, or legal judgments ("subprime products"). Bank of America does not offer subprime products to consumer customers. For credit, advisory and capital markets transactions with business customers involving a pool of assets, a significant portion of which is from consumers with higher risk characteristics such as described above, enhanced due diligence is required.

### Gaming

To reflect the regulatory determination that gaming establishments are vulnerable to manipulation by money laundering and other financial risks, Bank of America has long maintained an industry-focused approach to the gaming sector. Gaming activities include legal businesses providing gambling activities (operations designed to attract wagering, including gaming devices like slot machines, table games, etc.). Bank of America conducts enhanced due diligence on this sector and requires that all credit requests be underwritten and approved in designated specialty units within the bank.

### Indigenous peoples

Bank of America recognizes that Indigenous Peoples, Native Communities and First Nations have cultural beliefs, values, and lands that are often under threat. We conduct enhanced due diligence for transactions in which the majority use of proceeds is attributed to identified activities that may negatively impact an area used by or traditionally claimed by an indigenous community. For these transactions, we expect our customers to demonstrate alignment with the objectives and requirements of the International Finance Corporation (IFC) Performance Standard 7 which addresses impacts to Indigenous Peoples including free, prior and informed consent.

## Our operations and vendors

### Operations management

Bank of America recognizes that a focus on environmental and social issues must begin with addressing impacts from our own operations. We are therefore committed to tracking and managing our progress toward our own aggressive goals to reduce greenhouse gas (GHG) emissions, paper and water consumption, and waste sent to landfill, as well as increasing the percentage of our occupied space that is Leadership in Energy and Environmental Design (LEED) certified. For full details on our operational efforts please see our latest ESG Report.

**Environmental management system (EMS)**

We employ an EMS that relies on a comprehensive compliance database to help the Global Real Estate Services Environmental Risk team identify, manage and mitigate risk, and improve performance across our corporate real estate portfolio. Our EMS encourages:

- Stringent compliance with applicable environmental laws and regulations;
- Pollution prevention and environmentally sustainable practices;
- Continuous improvement in all areas of environmental management.

Our EMS covers all key areas, including roles and responsibilities, training, inspections, inventory procedures, formal targets, documentation, measurement, complaint response and emergency procedures. One component of our EMS – Integrated Data for Environmental Applications – is an online tool that enables our employees and partners to understand and manage environmental compliance across our global real estate footprint. Bank of America's strong record of compliance across our real estate portfolio is a direct result of the successful implementation of our EMS.

**Greenhouse gas emissions reductions**

In 2016, we set a goal to become carbon neutral by 2020 and to reduce our location-based GHG emissions by 50% by 2020. This builds on a strong track record of setting and achieving previous GHG emissions reduction goals. More detail on our GHG emissions reduction progress and our suite of operational goals can be found in our ESG Report and our submission to CDP.

**Scope 3 emissions**

We maintain an active dialogue with our global peers in the banking sector, as well as other stakeholders, relating to the indirect GHG emissions attributed to products and services we provide customers in support of their activities. These discussions build on the lessons we've learned from historical tracking and reporting of GHG emissions attributed to our U.S. power utility loan portfolio, which we continue to include in our annual reporting. More detail on our utility portfolio emissions can be found in our latest ESG Report.

### Our vendors

**Vendor code of conduct**

Our Vendor Code of Conduct sets forth Bank of America's expectations for human rights, labor and environmental standards throughout our global operations and vendor value chain. The principles contained within the code are consistent with the United Nations' Universal Declaration of Human Rights and the International Labour Organization's Fundamental Conventions.

## Our workforce and employment practices

Our employees are central to everything we do. This is reflected in our values and our employment policies and programs, which are continuously improved. Examples include diversity and inclusion, equal employment opportunity, harassment and discrimination prevention, workplace health and safety, benefits for work and life, military recruiting, health and financial wellness and our employee networks.

### Diversity and inclusion

Being a diverse and inclusive company is core to our ability to serve the needs of our customers and clients. We are strengthened by the diverse backgrounds, experiences and perspectives of our employees, and we strive to ensure our workforce represents the communities we serve — in thought, style, experience, culture, race, ethnicity, gender identity, and sexual orientation.

We have a long history of being recognized as a leader in maintaining a diverse and inclusive workplace free of discrimination. Consistent with this, we support in both policy and practice equal opportunity for employment, advancement and professional development, and prohibit discrimination or harassment of any kind on the basis of race, color, religious creed, religion, sex (including pregnancy, childbirth or related medical condition), genetic information, gender, gender identity, gender expression, sexual orientation, national origin, citizenship status, age, ancestry, marital status, medical condition, physical or mental disability status, military and veteran status or any other factor that is irrelevant to employment and advancement or prohibited by law.

# ESRP framework reporting and training

## Reporting

Bank of America reports annually in our ESG Report on certain transactions that are escalated due to heightened environmental and social risks. This reporting provides transparency to stakeholders on the nature of transactions and issues that are escalated and demonstrates robust risk management routines and governance.

As part of this, we report and disclose:

- Details of transactions subject to the Equator Principles and Carbon Principles;
- The number and nature of transactions reviewed by the committees responsible for reputational risk review;
- Case studies of specific transactions that were reviewed and what the issues were, with customer information removed; and
- The number of employees who have received training regarding the ESRP Framework.

## Training

Bank of America employees across the enterprise receive high-level awareness training on our ESRP Framework as part of our annual enterprise Risk training. As necessary, we also conduct specialized training on the ESRP Framework and related policies for relevant employees who regularly deal with specific environmental and social issues.

## Summary

Environmental and social risks touch almost every part of our business, managing these and other risks well is a key part of our responsible, sustainable growth strategy. This ESRP Framework is designed to provide additional clarity and transparency around how we approach environmental and social risks. It will evolve along with changes in business and risk tolerance, and to meet the needs of our customers, shareholders and communities we serve. Moving forward, we will continually review this framework in light of feedback from stakeholders, future materiality assessments, market developments, evolving best practices and regulatory developments.

**EXHIBIT D**

RICHARDS LAYTON & FINGER
Attorneys at Law

December 21, 2018

Bank of America Corporation
Bank of America Corporate Center
100 North Tyron Street
Charlotte, North Carolina 28255

Re: Stockholder Proposal Submitted by John C. Harrington

Ladies and Gentlemen:

We have acted as special Delaware counsel to Bank of America Corporation, a Delaware corporation (the "Company"), in connection with a stockholder proposal (the "Proposal"), dated October 12, 2018, that has been submitted to the Company by John C. Harrington of Harrington Investments, Inc. (the "Proponent") for the 2019 annual meeting of stockholders of the Company (the "Annual Meeting"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware. For the purpose of rendering our opinion as expressed herein, we have been furnished with and have reviewed the following documents: (i) the Amended and Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on April 28, 1999, as amended by the Certificates of Amendment of the Company, as filed with the Secretary of State on March 29, 2004, December 9, 2008, February 23, 2010, April 28, 2010 and May 7, 2014, respectively, the Certificates of Designation of the Company, as filed with the Secretary of State on March 29, 2004, August 1, 2006, September 13, 2006, November 3, 2006, February 15, 2007, September 25, 2007, November 19, 2007, January 28, 2008, April 29, 2008, May 22, 2008, October 27, 2008, December 31, 2008, January 8, 2009, January 16, 2009, December 3, 2009, August 31, 2011, May 28, 2013, June 17, 2014, September 5, 2014, September 9, 2014, October 23, 2014, January 26, 2015, March 17, 2015, January 29, 2016, March 10, 2016, April 25, 2016, March 15, 2018, May 16, 2018 and July 24, 2018, respectively, and the Certificates of Merger of the Company, as filed with the Secretary of State on March 31, 2004, December 29, 2005 and September 30, 2013, respectively (collectively, the "Certificate of Incorporation"); (ii) the Bylaws of the Company, as amended and restated on March 17, 2015 (the "Bylaws"); and (iii) the Proposal and accompanying supporting statement (the "Supporting Statement") from the Proponent.

With respect to the foregoing documents, we have assumed: (i) the authenticity of all documents submitted to us as originals; (ii) the conformity to authentic originals of all documents submitted to us as copies; (iii) the genuineness of all signatures and the legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. We have not reviewed any document other than the documents listed above for purposes of rendering this opinion, and we assume that there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. In addition, we have conducted no independent factual investigation of our own but rather have relied solely on the foregoing documents, the statements and information set forth therein and the additional factual matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

## THE PROPOSAL

The Proposal states the following:

> **Whereas,** our Company has been identified as one of the banks financially supporting companies engaged in development or construction of the Dakota Access Pipeline (DAPL) (Bakken Pipeline), a controversial project which received extensive media coverage and public condemnation for its environmental destruction, pollution and encroachment upon sacred Sioux Nation land;
>
> **Whereas,** in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, Article 11, asserts "the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites..."
>
> **Whereas,** Article 29 of the Declaration states "Indigenous Peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources";
>
> **Whereas,** in 1948, the United Nations adopted the Universal Declaration of Human Rights and the United Nations Human Rights Council, and in 2011 adopted the United Nations Guiding Principles on Business and Human Rights;
>
> **Whereas,** our Company's financial support of the Dakota Access Pipeline and corporations involved in the pipeline's construction

has resulted in Human and Indigenous Peoples' Rights violations, threatened negative impacts on customer loyalty and shareholder value, and harmed project companies with reputational damage, delays, disruption and litigation;

**Whereas,** many financial institutions including our Company attempt to differentiate in their Human Rights oversight between project or transactional financing and direct corporate loans for general purposes, bringing much less Human Rights oversight to general corporate or commercial loans, even if Human Rights concerns are relevant;

**Whereas,** financial institutions face reputational damage or even liability for Human Rights abuses associated with general financing. For example, holocaust victims and other victims of Human Rights violations have successfully sought redress from banks that provided general financial services to Human Rights violators;

**Whereas,** we believe it is a fiduciary duty of the Board and Management to consider Human Rights when making all executive decisions (including loan agreements and related business affairs) where there is significant potential impact or consequence of our Company's involvement, along with significant risk to our Company;

**Whereas,** reputational damage, negative publicity and loss of customer business can result in negative consequences for our Company regardless of whether the underlying financing was conducted as general or project-based financing;

**Therefore, Be it Resolved,** shareholders request that Bank of America Board of Directors amend the Company's bylaws to expressly extend the fiduciary duties of directors to oversight of the Human and Indigenous Peoples' Rights policy.

The Supporting Statement states:

The proponent believes our Company's Human and Indigenous Peoples' Rights Policy should at minimum establish effective policies ensure that the Bank's fiduciaries investigate and prevent material impacts on Human and Indigenous Peoples' Rights.

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for the Annual Meeting under, among other reasons, Rules 14a-8(i)(2) and 14a-8(i)(6) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." Rule 14a-8(i)(6) allows a proposal to be omitted if "the company would lack the power or authority to implement the proposal." In this connection, you have requested our opinion as to whether, under Delaware law (i) the Proposal, if implemented, would violate Delaware law and (ii) the Company has the power and authority to implement the Proposal.

For the reasons set forth below, the Proposal, which mandates the adoption of a bylaw purporting to extend the fiduciary duties of the Board of Directors of the Company (the "Board"), if implemented, would violate the prohibition on modifying the fiduciary duties of directors under Delaware law. Moreover, because the Proposal contemplates adoption of a bylaw directing the Board to oversee the Company's human and indigenous peoples' rights policy, for the reasons set forth below, the Proposal, if implemented, would violate Delaware law in that it would mandate the adoption of a bylaw that would impermissibly attempt to direct the manner in which the Board would be required to exercise its fiduciary duties and contravene the management structure of Section 141(a) of the General Corporation Law of the State of Delaware (the "General Corporation Law"). In addition, because the Proposal, if implemented, would violate Delaware law, the Company lacks the power and authority to implement the Proposal.

## DISCUSSION

### I. The Proposal, if Implemented, Would Violate Delaware Law

#### A. The Proposal, if Implemented, Would Violate Delaware Law by Purporting to Extend the Fiduciary Duties of the Board

A corporation's bylaws are subject to the provisions of the General Corporation Law. The limitations imposed by the General Corporation Law on a corporation's bylaws are set forth in Section 109(b), which provides:

> The bylaws may contain any provision, *not inconsistent with law or with the certificate of incorporation*, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.[1]

[1] 8 *Del. C.* § 109(b) (emphasis added).

The phrase "not inconsistent with the law" or similar variants of that phrase used in the provisions of the General Corporation Law have been interpreted to mean that the provision must "not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself."[2] Thus, "[a] bylaw that is inconsistent with any statute or rule of common law . . . is void."[3]

The Proposal mandates the adoption of a bylaw that would purport to "extend the fiduciary duties of directors to oversight of the Human and Indigenous Peoples' Rights policy." The Supporting Statement states indicates that the Company's Human and Indigenous Peoples' Rights Policy should "ensure that the Bank's fiduciaries investigate and prevent material impacts on Human and Indigenous Peoples' Rights."

The fiduciary duties of directors of Delaware corporations, however, are determined by Delaware common law. Those common law duties require "that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term" for the benefit of its stockholders.[4] Outside of the public benefit corporation context (which does not apply to the Company), it is well-established that the fiduciary duties of directors of Delaware corporations cannot be modified or extended.[5] While "[i]t is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize profits currently[,] [t]hey may do so. . . because such activities are rationalized as producing greater profits over the long-term for stockholders."[6] Thus, "Delaware case law is clear that the board of directors of a for-profit corporation . . . must,

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[2] *See Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. Ch. 1952); *Jones Apparel Group, Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 846 (Del. Ch. 2004) (finding that a provision will be invalidated if it "vitiates or contravenes a mandatory rule of our corporate code or common law").

[3] *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985).

[4] *Frederick Hsu Living Trust v. ODN Hldg. Corp.*, 2017 WL 1437308, at *18 (Del. Ch. Apr. 14, 2017); *accord TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) ("[B]roadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders.").

[5] *Auriga Capital Corp. v. Gatz Props.*, 40 A.3d 839, 849 (Del. Ch. 2012) (noting that the Delaware Limited Liability Company Act "lets contracting parties modify or even eliminate any equitable fiduciary duties, a more expansive constriction than is allowed in the case of corporations"), *aff'd*, 59 A.3d 1206 (Del. 2012); *In re Inergy L.P. Unitholder Litig.*, 2010 WL 4273197, at *12 (Del. Ch. Oct. 29, 2010) ("While the DGCL generally forbids a corporate board of directors from contractually modifying or restricting their fiduciary duties (except the duty of care), § 1101(d) [of the Delaware Revised Uniform Limited Partnership Act] allows MLPs to eliminate completely a general partner's fiduciary duties to common unitholders, subject only to the limited protections of the covenant of good faith and fair dealing."); *Dieckman v. Regency GP LP*, 2016 WL 1223348, at *8 (Del. Ch. Mar. 29, 2016) (noting that in "corporate context . . . fiduciary duties cannot be waived"), *rev'd on other grounds*, 155 A.3d 358 (Del. 2017).

[6] *ODN*, 2017 WL 1437308, at *17 (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012)); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013).

within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare."[7]

Directors' fiduciary duties to maximize long-term stockholder welfare under Delaware law arise as a matter of public policy.[8] The same public policy dictates that "[t]he fiduciary nature of a corporate office is immutable" and "'inveterate and uncompromising in its rigidity.'"[9] Accordingly, the fiduciary duties of the Board already extend as far as permitted under Delaware law. As a result, the Proposal, if implemented as requested, would violate Delaware law in that it would mandate the adoption of a bylaw which would purports to extend the Boards' fiduciary duties whereas such duties are only established via the Delaware common law, and thus would violate Section 109(b) of the General Corporation Law, which prohibits bylaws that contravene Delaware law.

Moreover, to the extent that the Supporting Statement suggests that implementation of the Proposal would result in the Company's fiduciaries placing the interests of others ahead of the interests of the Company's stockholders, the Proposal also would violate Delaware law. While the Delaware Revised Uniform Limited Partnership Act and Delaware Limited Liability Company Act expressly allow a Delaware limited partnership or limited liability company to expand, restrict or eliminate common law fiduciary duties,[10] the General Corporation Law contains no such authorization. The sole provisions of the General Corporation

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[7] *ODN*, 2017 WL 1437308, at *17 (quoting Leo E. Strine, Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and its Problematic Implications*, 41 J. CORP. L. 71, 107 (2015)); *accord Trados*, 73 A.3d at 37 ("[S]tockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end.") (quoting Strine, *Our Continuing Struggle*, 47 WAKE FOREST L. REV. at 147 n.34); *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); *TW Servs.*, 1989 WL 20290, at *7 ("[D]irectors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected, and thus directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other "'corporate constituencies.'"); *see also eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 32–33 (Del. Ch. 2010) (holding that "craigslist's values, culture and business model, including [its] public-service mission," did not "sufficiently promote[] stockholder value to support the indefinite implementation of a poison pill").

[8] *Guth v. Loft, Inc.*, 5 A.2d 504 503, 510 (Del. 1939).

[9] *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) (quoting *Guth*, 5 A.2d at 510); *accord Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003) ("The stockholders of a Delaware corporation are entitled to rely upon the board to discharge its fiduciary duties at all times. The fiduciary duties of a director are unremitting."); *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) ("[T]he fiduciary duty of a Delaware director is unremitting."); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) ("In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders.").

[10] 6 *Del. C.* §§ 17-1101(d), 18-1101(c).

Law contemplating the extension of common law fiduciary duties to communities other than stockholders apply only to public benefit corporations.[11] Thus, outside of the public benefit corporation context, the fiduciary duties of directors cannot be modified or extended.[12] This is supported not only by public policy, but the entirety of the General Corporation Law, which weighs against the extension of fiduciary duties to any other constituents.[13]

### B. The Proposal, if Implemented, Would Violate Delaware Law in Impermissibly Directing the Board's Exercise of its Fiduciary Duties and Management Authority

Because the bylaw contemplated by the Proposal purports to direct the Board's oversight responsibilities to include the Company's human and indigenous peoples' rights policy, the bylaw would impermissibly direct the Board in the exercise of its fiduciary duties by requiring the Board to oversee the policy and include it in its decision-making process even in circumstances where a proper application of fiduciary principles would preclude doing so. Under the Proposal, there is no "fiduciary out" that would allow the Board to eliminate or cease its oversight of the human and indigenous peoples' rights policy if the Board determined that that was in the best interests of the Company and its stockholders.

Under Delaware law, stockholders cannot "commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders."[14] The Delaware courts have consistently applied this principle which is derived from Section 141(a), to prevent attempts to dictate future conduct or decisions

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[11] *See* 8 *Del. C.* §§ 361–68; Strine, *A Job is Not a Hobby*, 41 J. CORP. L. at 73 ("Benefit Corporations were created by statute precisely to enable corporations to consider other constituencies without running afoul of the law.").

[12] *See, e.g. Auriga Capital Corp.*, 40 A.3d at 849 (noting that the Delaware Limited Liability Company Act "lets contracting parties modify or even eliminate any equitable fiduciary duties, a more expansive constriction than is allowed in the case of corporations"), *aff'd*, 59 A.3d 1206 (Del. 2012); *In re Inergy L.P. Unitholder Litig.*, 2010 WL 4273197, at *12.

[13] *See* Leo E. Jr. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 765–66 (2015) ("Even if § 101(b) of the Delaware General Corporation Law ("DGCL"), which allows a corporation to pursue any lawful purpose, represented an expression of Delaware's commitment to a constituency-based approach, the provision does not exist in a vacuum. The contention that it proves directors are free to promote interests other than those of stockholders ignores the many ways in which the DGCL focuses corporate managers on stockholder welfare by allocating power only to a single constituency, the stockholders. Under the DGCL, only stockholders have the right to vote for directors; approve certificate amendments; amend the bylaws; approve certain other transactions, such as mergers, and certain asset sales and leases; and enforce the DGCL's terms and hold directors accountable for honoring their fiduciary duties. In the corporate republic, no constituency other than stockholders is given any power.").

[14] 953 A.2d 227, 238 (Del. 2008).

by directors, whether by contract, bylaw, stockholder resolution or otherwise.[15] Indeed, in *CA, Inc. v. AFSCME Emps. Pension Plan*, the Delaware Supreme Court held that neither the board nor stockholders could adopt a bylaw amendment requiring future boards to reimburse the reasonable expenses of stockholders incurred in connection with a proxy contest since it would impermissibly "prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate." Likewise, in *Abercrombie v. Davis*, the Delaware Court of Chancery applied this principle to invalidate an agreement vesting stockholders with the power to initiate, maintain or discontinue corporate policies because "it tend[ed] to limit in a substantial way the freedom of director decisions on matters of management policy [and] violate[d] the duty of each director to exercise his own best judgment on matters coming before the board."[16]

As such, the bylaw, if implemented, would impermissibly direct the Board in managing the business and affairs of the Company in contravention of Section 141(a) of the General Corporation Law. As noted above, Section 141(a) provides that the management of the business and affairs of a corporation shall be managed by or under the direction of its board of directors except as otherwise provide by the General Corporation Law or its certificate of incorporation. Because any variation from Section 141(a)'s mandate must be "otherwise provided in [the General Corporation Law] or in its certificate of incorporation,"[17] and the Certificate of Incorporation does not provide for management of the Company by persons other than the Board, the Board possesses the full power and authority to manage the business and affairs of the Company.[18]

The Board's power and authority to manage the business and affairs of the Company includes the establishment and maintenance of corporate policies and initiatives.[19] In

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[15] *See, e.g., Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) (invalidating a provision of a stockholder rights plan preventing any newly elected board from redeeming the rights plan for six months because the provision would "impermissibly deprive any newly elected board of both its statutory authority to manage the corporation [under the General Corporation Law] and its concomitant fiduciary duty pursuant to that statutory mandate").

[16] 123 A.2d at 899–900.

[17] *See, e.g., Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966).

[18] *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147, at *10 (Del. Ch. July 5, 2010) (noting that "the premise of board-centrism animates the General Corporation Law"); *Quickturn Design Sys., Inc.*, 721 A.2d at 1291 ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.").

[19] *Grimes v. Donald*, 1995 WL 54441, at *1 (Del. Ch. Jan. 11, 1995) (noting that the board's responsibility under Section 141(a) ordinarily "entails the duty to establish or approve the long-term strategic, financial and organizational goals of the corporation; to approve formal or informal plans for the achievement of these goals; to monitor corporate performance; and to act, when in the good faith, informed judgment of the board it is appropriate to act"), *aff'd*, 673 A.2d 1207 (Del. 1996); *Abercrombie*, 123 A.2d at 898 (holding that, under Section 141(a), "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the

this connection, the Delaware Court of Chancery has stated that:

> Absent specific restriction in the certificate of incorporation, the board of directors certainly has very broad discretion in fashioning a managerial structure appropriate, in its judgment, to moving the corporation towards the achievement of corporate goals and purposes. In designing and implementing such a structure, the board of course may delegate such powers to the officers of the company as in the board's good faith, informed judgment are appropriate.[20]

In addition, Delaware case law is clear that directors have "the duty to establish or approve the long-term strategic, financial and organizational goals of the corporation; to approve formal or informal plans for the achievement of these goals; to monitor corporate performance; and to act, when in the good faith, informed judgment of the board it is appropriate to act."[21] Thus decisions directing the Board to implement and oversee a policy, such as a human and indigenous peoples' rights policy, are reserved by statute to the discretion of the Board, not the stockholders.[22]

Thus, the Proposal, if implemented, would violate Delaware law in that it would mandate the adoption of a bylaw that would contravene Delaware common law (related to directors' fiduciary duties) and Section 141(a) of the General Corporation Law (related to the directors' authority to manage the business and affairs of the Company) and would therefore violate Section 109(b) of the General Corporation Law.

## II. The Proposal is Beyond the Power and Authority of the Company to Implement

As set forth in Section I above, the Proposal, if implemented, would violate Delaware law. Therefore, in our opinion, the Company lacks the power and authority to implement the Proposal.

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state to deal with questions of management policy"); *Cahall v. Lofland*, 114 A. 224, 229 (Del. Ch. 1921) ("The duties of directors are administrative, and relate to supervision, direction and control."), *aff'd* 118 A.1 (Del. 1922).

[20] *Grimes*, 1995 WL 54441, at *9; *see also* 8 *Del. C.* § 141(a) (providing that a corporation's business and affairs is "managed *by or under the direction of* a board of directors") (emphasis added); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 943 (Del. 1985) (observing that Section 141(a)'s reference to the corporation being managed "under the direction" of the board reflects that "[t]he realities of modern corporate life are such that directors cannot be expected to manage the day-to-day activities of a company"); *Canal Capital Corp. v. French*, 1992 WL 159008, at *3 (Del. Ch. July 2, 1992) ("[T]he details of the business may be delegated to inferior officers, agents and employees.") (quoting *Cahall*, 114 A. at 229).

[21] *See Grimes*, 1995 WL 54441, at *1.

[22] *Abercrombie*, 123 A.2d at 898.

## CONCLUSION

Based upon and subject to the foregoing and subject to the limitations stated herein, it is our opinion that the Proposal, if implemented, would violate Delaware law and that the Company lacks the power and authority to implement the Proposal.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

CSB/RBG