April 15, 2020

Via email: shareholderproposals@sec.gov

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

RE: Request for Reconsideration of April 9, 2020 Decision Permitting Alphabet, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Dear Sir or Madam,

We at the National Center for Public Policy Research respectfully request review and reconsideration by the staff of the Division of Corporation Finance ("the Staff") and the U.S. Securities and Exchange Commission (the "Commission") of the Staff's April 9, 2020 response approving the no-action request of Alphabet, Inc. ("the Company") dated February 4, 2020 (the "Request Letter") regarding our Proposal that the Company study the risks associated with its ongoing failure to add viewpoint non-discrimination to its Equal Employment Opportunity ("EEO") policy.

The Staff provided no explanation of its decision beyond a statement that it "[c]oncur[red] that Rule 14a-8(i)(7) provides a basis to exclude."[1]

We think that the Staff's decision is in error in this specific instance. We based our Proposal on a proposal that was proffered in the *CorVel Corp.* (avail. June 5, 2019) proceedings. As we stated in our response to the Company's no-action request letter, our proposal differed from the proposal in *CorVel* only in that our proposal sought protection from discrimination on the basis of viewpoint, while the proposal in *CorVel* sought that same protection from discrimination on

[1] SEC Staff, *2019-2020 Shareholder Proposal No-Action Responses* (last updated April 9, 2020) ("*No-Action Responses*"), *available at* https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf (last accessed April 13, 2020).

the basis of sexual orientation.[2] Otherwise, the proposals were identical.[3] Some states bar discrimination on the basis of viewpoint in employment, while others – and the federal government – do not.[4] This situates viewpoint discrimination in the same manner as discrimination on the basis of sexual orientation in employment, which is barred by some states, but not by others nor explicitly by the federal government.[5]

Meanwhile, the proponents in *CorVel* provided no evidence that discrimination on the basis of sexual orientation was actually occurring at CorVel Corporation, while we provided the Staff replete evidence that such discrimination has occurred and is occurring at Alphabet.[6]

The Staff is not supposed to distinguish between similarly situated proposals on the basis of the Staff's exogenous opinions about the subject matter of the proposals.[7] It is impossible, though, to eliminate the supposition that this is the ground on which the SEC Staff made its decision in this instance, because the only material distinctions to be made between the *CorVel* proceeding and this one other than the subject matter weigh in favor of denying the request to exclude in this case, and because neither the Company nor the Staff even raised the *CorVel* proceeding, much less substantively distinguished it.[8] Because it therefore appears that the Staff plainly erred in permitting our Proposal to be excluded, we ask the Commission to reconsider and to reverse that decision, on the grounds that we offered in detail in our February 24, 2020 Response to the Company's No-Action Request, and which we incorporate into this request for reconsideration. (The Response Letter is included at Attachment A.)

Additionally, we ask that both the Commission and the Staff take this opportunity to reconsider recent changes in both the basis upon which the Staff makes no-action determinations and the

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[2] *See* discussion in National Center for Public Policy Research Response to Division of Corporation Finance, Response to Alphabet Inc. No-Action Request Letter (Feb. 24, 2020), at 5 ("Response Letter"). The Response Letter appears at Attachment A.

[3] *See id.*

[4] *See, e.g.*, Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. LAW. & POL'Y 295 (2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174776 (last accessed April 13, 2020).

[5] *See e.g., Can LGBT People Be Legally Fired*, MOVEMENT ADVANCEMENT PROJECT (July 2019), *available at* https://www.lgbtmap.org/file/2019SCOTUSTitle%20VIICasesBrief.pdf (last accessed April 13, 2020); *Federal Civil Rights Law Protects Gay Workers, U.S. Appeals Court Rules* (Feb. 26, 2018), *available at* https://www.nbcnews.com/feature/nbc-out/federal-civil-rights-law-protects-gay-works-u-s-appeals-n851231 (last accessed April 13, 2020).

[6] *See* Response Letter, *supra* note 2, at 7-9.

[7] *See Staff Legal Bulletin No. 14* at B. 6-7 (July 13, 2001), *available at* https://www.sec.gov/interps/legal/cfslb14.htm (last accessed April 13, 2020).

[8] The Staff has mentioned *CorVel* neither in this proceeding or in the *Apple, Inc.* proceeding, the request for reconsideration for which appears at Attachment B.

manner in which it reports its decisions. Until recently, Rule 14a-8(i)(7) has been invoked only when the issue raised by a proposal has effectively been addressed or rendered insignificant by the ordinary business operations of the Company. Now, however, the Rule is being used – under the guise of determining the substantiality of the issue raised by the proposal – as a multi-factor test that allows the Staff to aggregate grounds, none of which themselves justify exclusion, into a "lump-sum" exclusion decision. Multi-factor tests are often used in the law, but where they are used, they are carefully explained. These explanations allow parties to understand how the various factors have been weighed, and what contrary considerations have been taken into account and why they have been found wanting, so that parties know how to fashion their behavior in the future. But this change in the treatment of Rule 14a-8(i)(7) has come exactly as the Staff has shifted to providing no explanation of any kind for many of its decisions. It provided no explanation in this proceeding.

The result of these changes together, as this proceeding so clearly illustrates, is to eliminate any insight into the Staff's decision-making, which now under Rule 14a-8(i)(7) can rely on the potentially intricate and subtle interplay of a variety of factors which may have nothing to do with the ostensible purpose of Rule 14a-8(i)(7), but which might also rely, as it might in this instance, on inappropriate or impermissible factors. We ask the Staff and the Commission to consider the potential for misunderstanding and injury that arises from this pair of changes, taken together.

Because we did not fully address our concerns about these Staff policy changes in our Response Letter, we make our argument in favor of reversing these changes below. We also incorporate into this request the arguments we made in a request for reconsideration in the related proceeding (which inculpated the same proposal, and the same concerns, that are raised in this proceeding) of *Apple, Inc.* (avail. Dec. 20, 2019, *reconsid. denied* (as untimely) Jan, 17, 2020). (It is included in this letter as Attachment B.) The substance of those arguments was not considered in that proceeding because the request for reconsideration was rejected as untimely, even though an untimely submission from Apple had been accepted by the Staff earlier in that proceeding.[9] The arguments made there will throw additional light on the request for reconsideration in this instance because in that proceeding the Staff at least provided a few lines of explanation for its decision, which allowed for at least some review and critique of the basis of that decision. Here it has provided none.

We believe the Staff's decision in this proceeding was substantively wrong on its face and is indicative of the significant possibility that personal policy preferences are dictating the results of proceedings. We also think that the decision and others like it in recent months are both novel and potentially deeply procedurally problematic as precedent. We therefore believe this to be one of the "certain instances" in which "an informal statement of the views of the Commission may be obtained."[10] And so we seek reconsideration by the Commission.

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[9] *See id.* at 2.

[10] 17 CFR § 202.1(d) ("The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly

DISCUSSION

The Commission Should Reconsider its Recent Changes to its Interpretive Standard Under Rule 14a-8(i)(7) and its Decision-Rendering Procedure.

A. Rule 14a-8(i)(7) as until recently applied concerned itself only with issues genuinely related to "ordinary businesses operations," and included a clear exception from exclusion for significant discrimination matters.

The ordinary-business exception appears at Rule at 14a-8(i)(7). It, in its entirety, permits exclusion of a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[11]

The initial Rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Bulletin in 2002. There the Staff explained that

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. ...[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues ... would not be considered to be excludable because the proposals would transcend the day-to-day business matters.'[12]

As the amendment itself explained, in detail particularly relevant to our considerations here,

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. **However, proposals relating to such matters but focusing on sufficiently significant social policy issues *(e.g., significant discrimination matters)* generally would not be considered to be**

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complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.").

[11] 17 C.F.R. § 240.14a-8(i)(7).

[12] *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998)) (emphasis added), *available at* https://www.sec.gov/rules/final/34-40018.htm) (last accessed April 13, 2020).

> **excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.**[13]

There matters stood until 2017.

B. Rule 14a-8(i)(7) has recently been transformed into a multi-factor test, under which staff is permitted to aggregate as sufficient grounds for exclusion factors not directly relevant to the issue of ordinary business operations.

In a bulletin issued in November 2017, the Staff recognized that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[14] It therefore invited corporations, in arguing for an ordinary-business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of the proposals.[15]

The Staff expanded this guidance further in October of 2018.[16] It suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff. In particular, the Staff would welcome details about:

- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.

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[13] *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added), *available at* https://www.sec.gov/rules/final/34-40018.htm (last accessed April 13, 2020).

[14] *See Staff Legal Bulletin* No. 14I (Nov. 17, 2017), *available at* https://www.sec.gov/interps/legal/cfslb14i.htm (last accessed April 13, 2020) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

[15] *See id.* ("Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

[16] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed April 13, 2020).

- Whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.[17]

The Staff expressly noted that in seeking this information as part of its review, it was turning its analysis into a very fine-grained, multi-factor test that would likely result in very different results at different companies despite the proposals being very similar in form or content. "[A] proposal that the Staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another."[18]

Additional Staff guidance appeared this past fall.[19] In that bulletin, the Staff relevantly underscored the value of "delta analysis," which is to say the difference between what the shareholder has proposed and what the company currently does; and of "prior voting results," or a discussion of the results of previous related shareholder votes. With regard to the latter, the Staff explained that "the board's analysis may be more helpful if it includes, for example, a robust discussion that explains how the company's subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company."[20]

C. The SEC Staff has also recently stopped requiring that letters be issued providing at least some explanation of its decisions, so that in proceedings such as the present one, parties have no idea what factors raised by the parties swayed the Staff's decision.

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[17] *Id.* at B.2. (internal citation deleted).

[18] *Id.*

[19] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals (last accessed April 13, 2020).

[20] *Id.* at B.3.b.

The SEC Staff announced in the fall of 2019 that after November 19, 2019, the staff would no longer respond with a decision letter to every no-action request received.[21] And in fact it produced no decision letter in this proceeding.[22] The failure to issue a decision letter in this proceeding demonstrates that the Staff will sometimes fail to issue a decision letter even in instances in which it uses Rule 14a-8(i)(7) not in its traditional manner as a genuine conclusion that the proposal implicates ordinary business operations without presenting an issue of substantial importance, but instead in the novel manner as a conclusion that the proposal in some way failed the Staff's multi-factor analysis, some factors of which are only tangentially – if at all – related to ordinary business operations.

D. The combination of these two innovations works to ensure that parties will often (as here) have no idea, when cases are decided on the grounds of Rule 14a-8(i)(7), what factors the Staff considered dispositive or relevant to its determination, or how those factors were weighed, opening the door to both the perception of and the opportunity for decisions impermissibly based on the personal policy preferences of the Staff.

Neither of these changes – the change in providing decision letters and the changes to the interpretation of Rule 14a-8(i)(7) – need necessarily have raised any concern. With regard to the first change: not all decisions do require written explanations, as courts have long recognized. Rote decisions that cannot possibly have any precedential value need not necessarily be written (though it is unclear that refusing to write what have historically been very short letter decisions really saves all that much staff time).

Written – and detailed – decisions are vital, however, when a decision-maker undertakes very fact- and entity-specific determinations that can vary significantly from case to case depending upon the details of each case. When such very case-specific decisions are made, but no explanations are provided, parties are left with no idea at all what factors were decisive and which were less or not relevant, and how all of the various factors fit together. This leaves parties with no information about how to proceed in future cases. And while it might seem as though this confusion could lead to fewer filings in the future, the odds are that it will increase filings as shareholder proponents – left without meaningful guidance – try, in essence, everything. This will increase staff workloads. At the same time, it will increase party frustration, as shareholder proponents find it impossible to know how to craft their efforts to increase their chances of success. It will also lead to suspicions of bias if the SEC staff seems regularly to reject some shareholder proposal efforts while waving through technically similar proposals by parties with different ideological dispositions. If the results in similar circumstances are consistently different, while no meaningful explanations are forthcoming, concerns about bias will be not only understandable, but fully warranted.

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[21] *See* SEC Staff, Shareholder Proposal No-Action Responses Issued Under Exchange Act Rule 14a-8 (last modified April 9, 2020), *available at* https://www.sec.gov/corpfin/shareholder-proposals-no-action (last accessed April 13, 2020).

[22] *See No-Action Responses, supra* note 1.

Meanwhile, the staff's revisions to the way it analyzes the ordinary-business exception have introduced exactly the sort of case-specific, multi-factor analysis that renders detailed written explanations so vital. As the review above illustrates, the staff has explicitly invited wide-ranging discussion by companies of their boards' analyses, and has essentially invited them to include any information that they consider relevant – the very epitome of a multi-factored (or even "all-the-factors") test.[23] It has further explicitly declared that this multi-factored analysis will result in conclusions that will differ, potentially significantly, by case.[24] These are just the circumstances in which the credibility of a decision-maker requires that it provide detailed, written explanations and analyses of the bases for its decisions.

The problem is compounded here because some of the factors that the staff has explicitly agreed to consider in determining the case-specific substantiality of proposals under the ordinary-business exception are factors that more truly go – and heretofore have gone – to the analysis of some of the 12 grounds under the Rule other than the ordinary-business exception. For instance, "[t]he extent to which the proposal relates to the company's core business activities"[25] is already addressed by another of the Rule's provisions. Notably, though, that ground has *specific* triggers, permitting withholding of the proposal only if it relates to operations that account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business.[26]

Similarly, "[w]hether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken"[27] is already addressed, but again more specifically, in a different ground that "[t]he company has "already *substantially implemented the proposal.*"[28] Note that this is a much sterner standard than what the staff is now considering relevant under the ordinary-business exception, namely that the company has addressed somewhat related issues to some degree. Likewise, "[t]he extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement"[29] goes directly to this ground: "The proposal deals with *substantially the same* subject matter as another proposal or proposals that previously has or have been included in the company's proxy materials within a specified time

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[23] *See Staff Legal Bulletin* No. 14J, at B.2.

[24] *See id.*

[25] *See id.*

[26] Rule 14a-8(i)(5), available at https://www.sec.gov/interps/legal/cfslb14.htm (last accessed April 13, 2020).

[27] *See Staff Legal Bulletin* No. 14J, at B.2.

[28] Rule 14a-8(i)(10) (emphasis added).

[29] *See Staff Legal Bulletin* No. 14J, at B.2.

frame and did not receive a specified percentage of the vote."[30] But once again, the stand-alone ground's standard is much more structured, and much harder to reach, than the newly articulated, purportedly ordinary-business-related standard.

All of this means that the staff has effectively turned the ordinary-business exception into a mélange ground under which companies can make arguments that really go to, but would be insufficient to justify exclusion under, other grounds. It then weighs that otherwise-insufficient evidence to determine whether it feels that a company can exclude a proposal, and issues a yes-or-no decision, without any meaningful explanation of its thinking at all.

This leaves tremendous room for confusion, for the perception of bias, and for actual bias. Because now, facts that on their own would be insufficient to trigger any other ground to permit exclusion can be amalgamated together to somehow result in exclusion under the ordinary-business exception – and the staff will, at its sole determination, refuse to explain just how that alchemy occurred. This will leave room for the inference that the staff is merely excluding proposals with which it disagrees on the basis of substantive policy, even though such subject-matter considerations are, by regulation, supposed to play no part in its analysis.[31] Where the information submitted by a company appears not to have any particular relevance to the questions rightly at issue under the ordinary-business exception – *i.e.*, the importance of the issue and the interference of the details of the proposal with the fundamental operations of the business – this inference will be warranted. Where the information submitted does nothing to distinguish the circumstances at issue from separate circumstances in which a substantially similar proposal – different only in the substantive content (i.e., the ideological import) of the proposal – was treated differently, the inference is effectively required.

E. The potential for confusion and for the perception and possibility of bias, so patent in these recent changes, has been fully realized in this proceeding.

The Company in this proceeding invoked Rule 14a-8(i)(7), and relied heavily on the fact that a proposal had been raised last year on the issue of ideological diversity on its board of directors as a reason for arguing that our Proposal was insufficiently significant to require that our Proposal be submitted to its shareholders. In staking out this position, the Company merely asserted, without evidence or argument, that the previous proposal inculpated the "same substantive concern" as our Proposal.[32]

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[30] Rule 14-a(8)(i)(12).

[31] *See Staff Legal Bulletin No. 14* at B. 6-7.

[32] Alphabet, Inc. to Division of Corporation Finance, No-Action Request Letter (Feb. 4, 2020), at 3, *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/ncppralphabet020420-14a8-incoming.pdf (last accessed April 13, 2020).

We noted in response that under the Staff's own recent statements, such a bare assertion of relatedness, without more, should carry no weight in the Staff's determinations.[33] We then demonstrated in significant detail how the previous proposal differed from our Proposal in focus, subject, result and purpose, and really only shared linguistic similarities to the prior proposal.[34]

As a result, then: we have submitted a proposal that was exactly the same as a previous proposal for which a no-action request was denied, except that ours sought to prohibit discrimination on the basis of political viewpoint instead of sexuality. We have provided significant evidence of ongoing viewpoint discrimination at the Company, while the previous proponent had shown no evidence of ongoing sexual-orientation discrimination. We have made significant and detailed arguments about why a prior proposal is substantially different than our current proposal, and should thus provide no grounds for diminishing the significance of our anti-discrimination proposal. The Staff's rules provide that matters of significant discrimination are to be treated as substantial under Rule 14a-8(i)(7), while bare assertions of a relationship between a current and previous proposal, without more, are not to weigh on the Staff.

Yet, with all of that, the Staff decided that our Proposal could be excluded. And it provided absolutely no explanation of its decision.

This procedure has left us with no idea how to proceed in the future. It also leaves us with a strong basis for concluding that the Staff has acted in contravention of its own published guidance and on the impermissible basis of its own policy preferences. The Staff has given us no basis on which to reject that conclusion.

Conclusion

The Staff's conclusion, affirming the Company's no-action request in this case, is plain error that the Commission should reverse, resulting in a denial of the Company's no-action request. Moreover, in making its determination, the Staff employed a very recently developed method of analysis that so significantly shifts the meaning and effect of Rule 14a-8(i)(7) that it may well have violated long-standing Staff-issued rules, and cannot legitimately be applied here and in the future without detailed explanation of its decisions by the Staff. We ask the Staff and the Commission to reconsider the Staff's recent innovations to Rule 14a-8a(i)(7) and its determination no longer to issue decision letters in some instances, at least with regard to decisions made on the basis of this new, multi-factor application of Rule 14a-8(i)(7).

Thanks to the Staff and the Commission for its time and consideration.

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[33] *See Staff Legal Bulletin* No. 14J, at B.2.

[34] *See Response Letter, supra* note 2, at 11.

A copy of this correspondence has been timely provided to the Company. If I can provide additional materials to address any queries the Staff may have with respect to this letter, please do not hesitate to call me at 202-507-6398 or email me at sshepard@nationalcenter.org.

Sincerely,

Scott Shepard

cc: Jeffrey D. Karpf, Cleary Gottlieb Steen & Hamilton LLP (jkarpf@cgsh.com)
Justin Danhof

Attachment A

February 24, 2020

Via email: shareholderproposals@sec.gov

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Dear Sir or Madam,

This correspondence is in response to the letter of Jeffrey D. Karpf on behalf of Alphabet Inc. (the "Company") dated February 4, 2020, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our Shareholder Proposal (the "Proposal") from its 2020 proxy materials for its 2020 annual shareholder meeting.

RESPONSE TO ALPHABET'S CLAIMS

Our Proposal asks the Board of Directors to issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity ("EEO") policy. We indicated that the report should be available within a reasonable timeframe, be prepared at reasonable expense, and omit any proprietary information.

Alphabet objected. It sought from the SEC Staff a no-action declaration, on the basis of Rule 14a-8(i)(7), claiming that our Proposal falls within the Company's ordinary business operations. Specifically, the Company relies on a recent decision by the SEC Staff in *Apple, Inc.* (issued Dec. 20, 2019), which, it claims, effectively controls in this case. Moreover, it argues that our Proposal seeks to affect the day-to-day management of the Company and seeks to micromanage the company without presenting a sufficiently significant policy issue to justify our Proposal's avoiding a no-action determination. We of course demur.

As an initial matter, we agree with Alphabet that this matter presents issues essentially the same as those raised in *Apple, Inc.*, though we think that the evidence of actual viewpoint discrimination at Google is much stronger even than the very significant evidence of discrimination and the perception of discrimination at Apple. We believe that *Apple, Inc.* was wrongly decided, as we explained at length in our request for reconsideration in that matter. *See Apple, Inc.* (reconsid. denied, issued Jan. 17, 2020), and have further addressed in this report.[1] The Staff denied our request for reconsideration in that case not on substantive grounds, but on the grounds that Apple had asserted that it had begun printing its proxy materials two days before we filed our request, and began mailing those materials *the day after* we submitted our request. We now put all parties on notice that should this matter proceed as *Apple, Inc.* did, and ***should the Staff grant the Company's no-action request on grounds similar to and as little explained as those in Apple, Inc., we intend to file a request for consideration by the SEC Commission.*** It would therefore be unwarranted for the Company to rely on such a Staff decision in this case as a basis on which to design, print or mail proxy materials or otherwise expend resources in the expectation that the SEC has conclusively agreed to its no-action request. Rather, the Company must await full resolution of that reconsideration request, should it prove necessary, and cannot be permitted to foreclose the reconsideration process by ignoring this warning and proceeding before the reconsideration process is properly concluded.

I. Background

The ordinary-business exception appears in the Rule at 14a-8(i)(7). It, in its entirety, permits exclusion of a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[2]

The initial Rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Bulletin in 2002. There the Staff explained that

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. ...[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues ... would not be considered to be

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[1] *See* Scott Shepard, *SEC Decisions Raise Specter of Bias, McCarthyism*, NATIONAL POLICY ANALYSIS #681, NATIONAL CENTER FOR PUBLIC POLICY RESEARCH (Feb. 21, 2020), *available at* https://nationalcenter.org/ncppr/2020/02/21/sec-decisions-raise-specter-of-bias-mccarthyism (last accessed Feb. 24, 2020).

[2] 17 C.F.R. § 240.14a-8(i)(7).

> excludable because the proposals would transcend the day-to-day business matters.'[3]

As the amendment itself explained, in detail particularly relevant to our considerations here,

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. **However, proposals relating to such matters but focusing on sufficiently significant social policy issues *(e.g., significant discrimination matters)* generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.**[4]

There matters stood until 2017. In a bulletin issued that November, the Staff recognized that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[5] It therefore invited corporations, in arguing for an ordinary-business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of that proposals.[6]

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[3] *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added), *available at* https://www.sec.gov/rules/final/34-40018.htm) (last accessed Feb. 13, 2020).

[4] *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998), *available at* https://www.sec.gov/rules/final/34-40018.htm (last accessed Feb. 20, 2020).

[5] *See Staff Legal Bulletin* No. 14I (Nov. 17, 2017), *available at* https://www.sec.gov/interps/legal/cfslb14i.htm (Feb. 20, 2020) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

[6] *See id.* ("Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

The Staff expanded this guidance further in October of 2018.[7] It suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff. In particular, the Staff would welcome details about:

- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.
- Whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.[8]

The Staff expressly noted that in seeking this information as part of its review, it was turning its analysis into a very fine-grained, multi-factor test that would likely result in very different results at different companies despite the proposals being very similar in form or content. "[A] proposal that the Staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another."[9]

Additional Staff guidance appeared this past fall.[10] In that bulletin, the Staff relevantly underscored the value of "delta analysis," which is to say the difference between what the shareholder has proposed and what the company currently does; and of "prior voting results," or a discussion of the results of previous related shareholder votes. With regard to the latter, the Staff explained that "the board's analysis may be more helpful if it includes, for example, a robust discussion that explains how the company's subsequent

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[7] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed February 13, 2020).

[8] *Id.* at B.2. (internal citation deleted).

[9] *Id.*

[10] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals (last accessed Feb. 20, 2020).

actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company."[11]

II. *Our Proposal is Indistinguishable from CorVel, Inc. – in which the SEC Staff determined that the Proposal Could Not be Excluded – Except with Regard to the Type of Discrimination to be Studied, Which is not an Appropriate Ground for SEC Staff Differentiation.*

Our Proposal is substantially similar to the proposal that the Staff allowed in *CorVel Corp.* (avail. June 5, 2019). The "resolved" section of the proposal at issue in that no-action determination contest stated:

> RESOLVED Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting "sexual orientation" and "gender identity" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.

Likewise, our Proposal to the Company states:

> RESOLVED Shareholders request that Apple Inc. ("Apple") issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omit proprietary information.

Just as the Company does now, CorVel argued that it should be able to omit the proposal on grounds that it contravened its ordinary business operations under Rule 14a-8(i)(7). As the operative language of our Proposal is nearly identical to that in *CorVel*, consistency dictates that the Staff reject Alphabet's no-action request on these grounds. In its no-action request, the Company does not even address the Staff's *CorVel* decision.

The only difference between our Proposal and the one in *CorVel* is that ours seeks a report on the effect of failing to bar discrimination on the grounds of *viewpoint* rather than sexual orientation or gender identity. This is, for the present analysis, a distinction without a difference.[12]

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[11] *Id.* at B.3.b.

[12] The precedent cited by the Company cannot overcome the determinative effect of the clear, recent, and directly relevant *CorVel* decision. Both *CVS Health Corporation* (avail. Feb. 27, 2015) and *The Walt Disney Co.* (avail. Nov. 24, 2014) involved proposals that would have required the relevant organizations to amend their non-discrimination policies in specified ways. Our Proposal, exactly like the successful *CorVel* proposal but in contrast to the unsuccessful *CVS* and *Disney* proposals, seeks merely a *report* about

There is no doubt that questions of discrimination, *vel non*, on the grounds of sexual orientation or gender identity have occupied substantial public-policy attention in recent years, an interest perhaps most obviously illustrated at the national level by the arc of Supreme and inferior Court cases beginning with *Bowers v. Hardwick*, 478 U.S. 186 (1986) and culminating at present with *Obergefell v. Hodges*, 576 U.S. ___ (2015). Yet there can similarly be no question that the issue of discrimination on the grounds of viewpoint, particularly political or ideological viewpoint, has represented at least as compelling a national public-policy interest for a significantly longer period.

The debate about whether American government and business may properly discriminate in hiring or retention on the grounds of political viewpoint or philosophy stretches back at least as far as the initial "Red Scare" following World War I.[13] The argument reached its apogee during the House Unamerican Activities Committee hearings and related events in the 1950s.[14] During what is most commonly known as "the McCarthy Era," government and private industry "blacklisted" those with minority political viewpoints, costing them their jobs and their livelihoods.[15] Major political, media and literary figures rallied against McCarthyism, with the result that the American people reached a broad consensus that discrimination in employment on the grounds of political viewpoint was beyond the pale. Recently, though, that consensus has weakened, especially in the Company's own Silicon Valley, where instances of viewpoint discrimination in employment have begun to appear again, along with an increasing sense of the pervasiveness, invasiveness, and deleteriousness of such discrimination.[16]

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the effects of the continuing failure to forbid discrimination on certain specified grounds. Similarly, the other precedent on which the Company has relied presents instances in which the proponent asked the relevant companies to "consider" changing their policies. *See* Alphabet's No-Action Request Letter at 4 (citing *Bristol-Myers Squibb Co.* (Jan. 7, 2015) and *Yum! Brands, Inc.* (Jan. 7, 2015)). Again, like the directly apposite *CorVel* case, our Proposal seeks only a report into the effects of non-inclusion; we do not seek to interfere with the response to be taken by the Company as a result of its report. As a result, our Proposal does not improperly interfere with the ordinary course of Company's business nor attempt to micro-manage the Company, and so is not excludable.

[13] *See, e.g.*, Matthew F. Simmons, *Red Scare*, INTERNATIONAL ENCYCLOPEDIA OF THE FIRST WORLD WAR (last updated May 26, 2016), *available at* https://encyclopedia.1914-1918-online.net/article/red_scare (last accessed Feb. 20, 2020).

[14] *See, e.g., HUAC*, HISTORY.COM (last updated June 7, 2019), *available at* https://www.history.com/topics/cold-war/huac (last accessed Feb. 20, 2020).

[15] *See id.*

[16] *See, e.g.*, Nitasha Tiku, *Survey Finds Conservatives Feel Out of Place in Silicon Valley: Online poll adds to concerns that political divisions are affecting tech workplaces*, WIRED (Feb. 2, 2018), *available at* https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/ (last accessed Feb. 20, 2020); Olivia Solon, *'There was a witch-hunt': Silicon Valley conservatives decry Google groupthink*, THE GUARDIAN (Aug. 9, 2017), *available at* https://www.theguardian.com/technology/2017/aug/09/google-diversity-memo-conservatives-react (last accessed Feb. 20, 2020); Mark Bergen & Ellen Huet, *Google Fires Author of Divisive Memo on Gender Differences*, BLOOMBERG (Aug. 7, 2017), *available at* https://www.bloomberg.com/news/articles/2017-08-08/google-fires-employee-behind-controversial-

CorVel stands for the proposition that a proponent may request that a company's board of directors undertake a study to determine the effect of failing to expand anti-discrimination policies to include categories of longstanding public-policy interest. That analysis wholly applies here, and determines this question. As we noted in Section I, the SEC Staff has long held and never abandoned the proposition that while most employment decisions constitute ordinary business matters, significant discrimination matters are sufficiently important to transcend that category and deny a no-action request on Rule 14a-8(i)(7) grounds.[17] The SEC itself, meanwhile, has directed the Staff that its personal policy preferences are not to determine its decisions: The Commission has instructed the Staff not to discriminate against similarly situated – far less otherwise identical – proposals on the basis of the subject matter or merits.[18] As we have just established, discrimination on the basis of viewpoint has been just as substantial a problem throughout American history as discrimination on the basis of sexual orientation – with a much longer consensus about its impropriety and the danger it presents to the American polity, thus creating at least as much legitimate concern about its raising its ugly head once again at this late date.

The only conceivable grounds on which the Staff could reasonably divert from its *CorVel* precedent in this case, then, would be if the Company here has demonstrated that it does not have any problem with discrimination on the basis of viewpoint, so that the problem is simply insubstantial as to it. But as will be considered in detail below, this is certainly not the case. A class-action suit charging rampant viewpoint discrimination against the company currently proceeds. That suit is in the discovery process, but has already produced significant evidence suggesting just such discrimination. Meanwhile, the nominal rhetorical efforts that the Company has undertaken to "combat" such discrimination are demonstrably pretextual and can do nothing to insulate the Company from its obligation to present our Proposal to its shareholders.

III. *Significant Evidence Suggests that the Company has a Serious Viewpoint Discrimination Problem.*

An ongoing viewpoint-discrimination lawsuit has revealed a significant number of instances of viewpoint discrimination at the Company by directors and managers, and suggests a general workplace hostility toward those on the center and right of the American political spectrum. The Company's rote and formalistic denial of the charges levied in the complaint in that legal action does nothing to refute this evidence of discrimination. By comparison, the proposal-

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diversity-memo (last accessed Feb. 20, 2020); *Mozilla CEO Resignation Raises Free Speech Issues*, USA TODAY (April 5 2014), *available at* https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/ (last accessed Feb. 20, 2020).

[17] *See supra* at p. 3.

[18] *See Staff Legal Bulletin No. 14* at B.6-7 (July 13, 2001), *available at* https://www.sec.gov/interps/legal/cfslb14.htm (last accessed Feb. 20, 2020).

proponents in *CorVel* made no demonstration of active discrimination on the basis of sexual orientation in that Company, and yet the Staff still held that discrimination presented a significant matter for the company and so denied a no-action request on the basis of Rule 14a-8(i)(7). It must reach the same conclusion here.

James Damore, an employee of the Company, was fired in August of 2017 for sharing reviewed scientific scholarship about potential differences between men and women that could lead to disparate hiring patterns.[19] In early 2018, he sued.[20] That suit has become a class-action suit.[21] It has survived a motion for judgment on the pleadings and has proceeded to discovery.[22]

In the complaint, Damore (and fellow, similarly situated, plaintiffs) raised a litany of specific objections to their treatment at the Company and to the behavior of many employees there, especially those in positions of power and influence. *Inter alia*, the plaintiffs claimed that they and others were openly threatened, harassed and retaliated against because of their political viewpoints.[23] They claimed that directors called their opinions repulsive, called for human-resource investigations against them, and circulated calls for physical violence against them because of those positions.[24] They charged that Google employees were awarded bonuses for arguing against Damore's views.[25] They claimed that directors and managers maintained blacklists – facilitated and supported by Company management – of those who expressed conservative viewpoints, harassed them, and denied them work opportunities.[26] They claimed that the Company failed to protect employees from workplace harassment on the basis of their political viewpoints.[27]

The Company's answer to the complaint included a rote and blanket denial,[28] but Damore's complaint included not only assertions, but reproductions of documents and other transmissions that affirmed the assertions.[29] In fact, it contains more than 100 pages of examples of viewpoint bias at the company, much of it from authority figures.[30] The Company has not asserted that they are forgeries. They, then, establish a basis on which to think that

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[19] *See* First Amended Complaint at ¶¶ 50-53, p. 10, *Damore v. Google, LLC.*, No.: 18CV321529 (Cal. Sup. Ct. April 17, 2018) (available as Attachment to this letter).

[20] *See* Complaint, *Damore v. Google, LLC.*, No. 18CV321529 (Cal. Sup. Ct. Jan. 8, 2018).

[21] *See* First Amended Complaint, *supra* note 19.

[22] *See* Order After Hearing on June 7, 2019, *Damore v. Google, LLC.*, No.: 18CV321529 (Cal. Sup. Ct. June 7, 2019).

[23] *See* First Amended Complaint, at ¶ 7, p. 3, *supra* note 19.

[24] *See id.* at ¶ 75, p. 14.

[25] *See id.* at ¶¶ 83-85, pp. 16-17.

[26] *See id.* at ¶¶ 118, p.24; ¶ 120, p. 25; ¶¶ 148-175, pp. 34-44.

[27] *See id.* at ¶¶ 124-137; pp. 26-29.

[28] *See* Answer, *Damore v. Google, LLC.*, No.: 18CV321529 (Cal. Sup. Ct. Aug. 30, 2019).

[29] *See* First Amended Complaint, *supra* note 19, *passim* and particularly Exhibits A-C, *supra* note 19.

[30] *See id.*

there is a *comprehensive* level of viewpoint discrimination at the Company. Additional evidence flows in from sources other than the Damore-helmed class-action lawsuit.[31] This discrimination issue is significant, and very much Google-specific.

The problem of viewpoint discrimination at the Company is very real, and constitutes the sort of substantial discrimination matter that lifts a proposal's subject matter out of Rule 14a-8(i)(7). The study our Proposal seeks is not only warranted, but vital.

IV. *The Company's Reliance on Generalized Assertions of Equity, Along with its Refusal Even to Study the Need to Add Viewpoint to its Non-Discrimination Policy, while Including So Many Other Categories, Further Highlights the Need for Such Protections.*

The Company's non-discrimination policy states that

> Google is an equal opportunity employer. Employment at Google is based solely on a person's merit and qualifications directly related to professional competence. Google does not discriminate against any employee or applicant because of race, creed, color, religion, gender, sexual orientation, gender identity/expression, national origin, disability, age, genetic information, veteran status, marital status, pregnancy or related condition (including breastfeeding), or any other basis protected by law.[32]

The Company asserts that the second sentence, that "[e]mployment at Google is based solely on a person's merit and qualifications directly related to professional competence," is sufficient to guard against viewpoint discrimination, so that there is virtually no distance between what we seek and what Google has already performed. But this argument is belied in two profound ways. First, Google itself does not believe that that single sentence is enough to bar discrete discrimination on specific grounds; if it did, it would simply stick with that single sentence. Instead, it goes on to list a bevy of specific grounds on which it will not discriminate.

It could include "viewpoint" in that discrete list. It adamantly refuses. In fact, it in this proceeding seeks fervently even to keep from having to ask its shareholders whether it should

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[31] For just some very recently published additional evidence of pervasive viewpoint discrimination and bias at Google, *see, e.g.*, Justin Danhof, *When The Bully Controls The Search Engine*, ISSUES & INSIGHTS (Feb. 4, 2020), *available at* https://issuesinsights.com/2020/02/04/when-the-bully-controls-the-search/ (last accessed Feb. 20, 2020); Peter Hasson, *Google Employees Used Company Resources To Organize Anti-Trump Resistance Events*, DAILY CALLER (Feb. 2, 2020), *available at* https://dailycaller.com/2020/02/02/exclusive-google-employees-used-company-resources-to-organize-anti-trump-resistance-events/ (last accessed February 20, 2020); Tyler O'Neill, *YouTube Defends Removing Livestreams of Richmond Gun-Rights Rally*, PJ MEDIA (Jan. 20, 2020), *available at* https://pjmedia.com/trending/youtube-removes-livestreams-of-richmond-gun-rights-rally/ (last accessed February 20, 2020).

[32] Alphabet No-Action Request Letter, at p. 6.

conduct a study to look into the risks that arise from failing to include viewpoint in this enumerated list.

The second refutation of the Company's claim that its blanket, general abjuration of discrimination is sufficient to stop viewpoint discrimination is reality at the Company itself. As we indicated above, evidence of real, ongoing discrimination on the basis of viewpoint at the Company is weighty. That blanket sentence is demonstrably insufficient to the cause because it has failed to stop this panoply of discriminatory behavior.

The "delta" between what the Company has done – nothing at all to stop viewpoint discrimination, which appears to be rife there – and what we seek could hardly be starker.

V. *The Prior Proposal Raised by the Company is Not Sufficiently Similar to our Proposal to Permit the Company to Exclude our Proposal because of that Proposal's Failure.*

The Company claims that it should be excused from presenting our Proposal because a previous proposal raised the same general subject matter in ways that it asserts – without any analysis – inculpated "the same substantive concern." Such a bald assertion, without more, should by the SEC Staff's own recent statements not carry weight in its decision-making process.[33] Nevertheless, in contrast to the Company, we here explain in significant detail the fundamental differences between the two proposals.

While there is a superficial resemblance between our Proposal and the prior proposal cited by the Company, in that they both broadly implicate issues of political or ideological viewpoint, they are in every substantial and material way different – in their focus, their purpose, their application, and their effect. The Company has here done no more than to assert that the proposals are similar enough to permit exclusion of our Proposal because they both deal in some way with the broad subject matter of ideological viewpoints and because the previous proposal was defeated. On that logic, though, the Staff would be obliged to issue no-action decisions against all future proposals that deal in some way with the environment once a single environment-related proposal had been defeated. Surely this is not the standard.

The previous proposal sought to have the Company reveal the ideological dispositions of its Board member nominees in chart form before shareholders voted on those nominees. Our Proposal seeks a report detailing the potential risks associated with failing to protect employees from discrimination on the basis of political or philosophical viewpoint. Thus, the Company is correct in noting that the proposals both – as most proposals will, to one extent or other – traffic in the realm of ideas held by some groups of people. In every material and effective way, however, the proposals are substantially different.

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[33] *See supra* at pp. 3-5.

The *focus* and *subject* of each proposal is different. The previous proposal focused on Board nominees, while our Proposal is concerned with employees – but not even employees directly: rather, with the overall risks to the Company of failing to provide long-taken-for-granted protections against blacklisting and career ruination as a result of viewpoint discrimination.

The prospective *result* of each proposal is different. The former proposal would have resulted in nominee disclosure of their public viewpoints, while the latter will result in a report about risks to the Company of failure to protect workers from long-discredited (but now potentially reviving) McCarthyite discrimination. This is more than just a nominal distinction. Our Proposal seeks no personal information from any party, no mandatory reporting from any party. It is not an *active* request for disclosure from anyone. Rather, it is simply an attempt to gauge the dangers that obtain should the Company continue to fail to prohibit viewpoint discrimination.

This difference in requested result underscores the fundamental difference in *purpose* between the two proposals. The previous proposal sought to provide shareholders with additional information about Company board candidates. This information might well have proven useful to shareholders in maximizing Company value and growth opportunity by ensuring that, at the highest levels, the Company did not make grave errors in corporate governance because it was fundamentally unaware of the purchasing and loyalty dispositions of large swathes of its customers. The purpose here is entirely different, except in that it (as it must) attends to the maximization of Company value. The purpose of our Proposal is to place before the Company board a consideration of the potential costs that lay in a continuing failure to offer basic civic protections to its employees – the potential costs associated with making the workplace uncomfortable, unsafe, and potentially unavailable to potentially huge numbers of employees.

These are fundamentally, profoundly different proposals. The former proposal was aimed at maximizing shareholder knowledge, so as to in turn potentially maximize the value to the Company of its board. Our Proposal seeks to inform the Company of the potential costs of keeping open a door to debilitating discrimination.

This fundamental difference is perhaps best illustrated by adapting a well-established Rule 14 test from a slightly different context. When trying to decide whether a shareholder-initiated proposal is properly trumped by a company-initiated proposal under Rule 14a-8(i)(9), the Commission has explained that both proposals should be permitted when a shareholder might vote for both of them without logical contradiction.[34] Conversely, in a case like this one, in which a Company has claimed that a proposal is too similar to a previous recent proposal to merit submission to shareholders, the test should perhaps be this: could a shareholder logically and without caprice vote for one of the propositions and against the other? If the proposals are so genuinely similar that it would be incoherent for a reasonably, and reasonably

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[34] *See Staff Legal Bulletin* No. 14H (Oct. 22, 2015), available at https://www.sec.gov/interps/legal/cfslb14h.htm (last accessed Feb. 20, 2020).

representative, shareholder to vote for one of the propositions while voting against the other, then it is proper to exclude the latter proposition.

That is certainly the case here. Shareholders who rejected a proposal to require disclosure of personal information from board of director nominees might very well vote in favor of requiring a report on the effect of Company's continuing – and conspicuous, given the length and breadth of other categories to which its non-discrimination policy applies – refusal to prohibit viewpoint discrimination at the Company. The two proposals are, at heart, so tangentially related that such a position – against required disclosures but also against discrimination – is self-evidently not only consistent but quite pedestrian.

Or, instead, the Staff could just stick to its stated position that in the face of a fulsome argument demonstrating the fundamental difference between two proposals, it will not act on a bare assertion by a company that the proposals are "close enough."

For all of the foregoing reasons, we urge the Staff to find that our Proposal may not be omitted under Rule 14a-8(i)(7).

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

A copy of this correspondence has been timely provided to the Company. If I can provide additional materials to address any queries the Staff may have with respect to this letter, please do not hesitate to call me at 202-507-6398 or email me at sshepard@nationalcenter.org.

Sincerely,

Scott Shepard

cc: Jeffrey D. Karpf, Cleary Gottlieb Steen & Hamilton LLP (jkarpf@cgsh.com)
Justin Danhof

Attachment B

January 8, 2020

Via email: shareholderproposals@sec.gov

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

RE: Request for Reconsideration of December 20, 2019 Decision Permitting Apple, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Dear Sir or Madam,

We at the National Center for Public Policy Research respectfully request review and reconsideration by the staff of the Division of Corporation Finance ("the Staff") and the U.S. Securities and Exchange Commission (the "Commission") of the Staff's December 20, 2019 response ("the Staff Response Letter") to the no-action request of Apple, Inc. ("the Company") dated October 22, 2019 (the "Request Letter") regarding our Proposal that the Company study the risks associated with its ongoing failure to add viewpoint non-discrimination to its Equal Employment Opportunity ("EEO") policy.

In its Response Letter, the Staff agreed with the Company that our Proposal could be excluded from its 2020 proxy materials for its 2020 annual shareholder meeting. In reaching this decision, the staff concluded that the Proposal "does not transcend the Company's ordinary business operations." Staff Response Letter. In so concluding, it relied on the Company's assertion that the difference between the Company's current practices and the proposal is relatively small, while nevertheless failing to accept the Company's claim that it has already substantially implemented the proposal, thus justifying exclusion under Rule 14a-8(i)(10). *Id.* It further relied on the fact that "a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote," while nevertheless declining to endorse the Company's assertion that our Proposal is excludable under Rule 14a-8(i)(12)(i) as being substantially similar to that earlier proposal. *Id.*

We think that the Staff's decision is in error in this specific instance, because it diverges from exactly relevant precedent that sought to study the risks of discrimination against other potentially at-risk groups on irrelevant or unsubstantiated grounds.

Moreover, and perhaps more importantly, we believe that this decision, if permitted to stand, will significantly undermine the proposal-review process in the future. The Staff made its determination here ostensibly under Rule 14a-8(i)(7), but on grounds that neither the Staff nor the Company connected to the issue properly under consideration under Rule 14a-8(i)(7) – whether or not the issue raised by our Proposal has effectively been addressed or rendered insignificant by the ordinary business operations of the Company. Allowing this decision to stand on the aggregated, indistinct, and unexplicated mélange of grounds stipulated by the Staff would effectively convert a system of unique grounds for exclusion (as Rule 14a-8 has until now provided) into a multi-factor test that would allow the Staff to aggregate grounds, none of which themselves justify exclusion, into a "lump-sum" exclusion decision. This *sub silentio* shift to a multi-factor test, if unaccompanied by a concomitant new commitment to providing additional detail about how the various factors apply and the role they play in supporting the aggregate decision, would undermine the objectivity and interpretive value of the Rule 14a-8 review process while potentially creating significantly more work for the Staff to no good purpose. We therefore request that the Commission and the Staff reconsider and reverse the December 20 decision of the Staff.

Because we think the Staff's decision is both novel and potentially deeply procedurally problematic as precedent, we think it to be one of the "certain instances" in which "an informal statement of the views of the Commission may be obtained."[1] We therefore seek reconsideration by the Commission.

Summary of Proceedings

Our Proposal asks the Board of Directors to issue a public report detailing the potential risks arising from omitting "viewpoint" and "ideology" from its written EEO policy. We indicated that the report should be available within a reasonable timeframe, be prepared at reasonable expense, and omit any proprietary information.

The Company sought to exclude this proposal on three broad grounds. First, it claimed that the Proposal's subject matter concerned only the Company's ordinary business operations, while failing to implicate any significant policy issues, thus permitting exclusion under Rule 14a-8(i)(7). Next, the Company asserted that the Proposal relates to substantially the same subject

[1] 17 CFR § 202.1(d) ("The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.").

matter as a recently submitted proposal that failed of shareholder support, allowing exclusion under Rule 14a-8(i)(12)(i). Finally, it averred that it has already substantially implemented this Proposal, invoking Rule 14a-8(i)(10).

We objected to each of these claims. In our response to the Company we pointed out that the Staff, in *CorVel Corp.* (avail. June 5, 2019), had ruled that a proposal that was *exactly the same* as the one we had submitted – except that the category of discrimination it wished to avoid was *sexuality* instead of *viewpoint* – did not fall within the ordinary business exception, and thus that ours could not reasonably and objectively so fall either, especially given the similarity of the long history and modern urgency of the two types of discrimination in American life. We further argued that our Proposal differed in focus, subject, result and purpose from the earlier proposal, particularly in that the earlier proposal sought private information about Board of Director candidates, while our Proposal seeks to protect the civil liberties of all of the Company's employees. Finally, we explained that while the Company had prohibited discrimination on a wide variety of bases, it had made no demonstration whatever that it has done *anything at all* to prohibit discrimination on the basis of viewpoint, and thus could not be considered to have "substantially implemented" the proposal.

The Staff issued its Response Letter on December 20. In that letter, it asserted that our Proposal fell within the ambit of the Company's ordinary business activities, and was thus excludable under 14a-8(i)(7). As is its normal procedure, the Staff failed to explain how our Proposal fell within the ordinary business exception while the proposal implicated in *CorVel Corp.*, which, again, was exactly the same as our Proposal except that it sought to review and deter discrimination on the basis of sexual orientation rather than viewpoint, did not qualify as an ordinary business decision.

The Staff did assert that its decision was based in part on its conclusions that "we considered the board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company's current policies and practices." Staff Response Letter. It failed, however, to explain *how* it had taken this analysis and conclusion into account, or how providing *no* protection against discrimination on the basis of viewpoint is not very different from actually providing protection against discrimination on the basis of viewpoint – far less how whatever the Company had done went to the question. It also failed to concur with the Company's position that the Company had established that its current practices justified exclusion of our Proposal under the relevant Rule 14a-8(i)(10). Finally, it failed to explain how any prior performance by the Company could place our Proposal more completely in the ambit of "ordinary business operations" than the proposal implicated in *CorVel Corp.*

Similarly, the Staff Response Letter stated that it had, in reaching its Rule 14a-8(i)(7) conclusion, considered "the committee's analysis," which "noted that a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote." Staff Response Letter. Again, though, the Staff failed to describe how it considered the proposals related. It failed to endorse the Company's claim that the proposals were sufficiently related to

allow for exclusion of our Proposal under 14a-8(i)(12). And it failed to explain how the relationship, however it might arise or however strong it might be, might render our Proposal to be more within the ambit of ordinary business activity than the *CorVel Corp.* proposal and thus excludable under Rule 14-8(i)(7).

Analysis

As we argued in our response to the Company's No-Action Request Letter, and as summarized above, we believe that our Proposal is essentially the same – except for the grounds on which protection against discrimination is sought – as the proposal in *CorVel Corp.*, and that no Rule 14(a) provision permits its exclusion. We seek reconsideration not on those grounds *per se*, but specifically because of the means by which the Staff reached its no-action determination.

It appears from the Staff's decision that it did not understand the Company to have demonstrated that it could exclude our Proposal on any single ground alone. If it had so concurred, it would simply have made such a declaration, as is its wont, and settled the issue. Instead, it issued a conclusion based in the "ordinary business operations" exception of Rule 14a-8(i)(7), and indicated that the decision was bolstered by the additional observations of the Company – observations related by the Company as part of its board's analysis of our Proposal – that it noted. Upon review, though, it becomes clear that the additional board analysis relied upon is related in no way to the appropriate Rule 14a-8(i)(7) question.

We think that this mode of analysis wholly changes the character of staff no-action determinations in ways that simply do not suit the staff's method of expressing those determinations, and in ways that undermine this decision specifically, all future decisions decided this way, and the integrity of the no-action decision process generally.

The key problem arises because the actual additional assertions made by the Company have nothing to do with whether the proposal is addressed or rendered insignificant by the Company's ordinary business operations or not. This need not have been so. The Company might – in theory – have provided evidence, but did not, that in its ordinary business operations it had considered and protected against the problems of viewpoint discrimination in ways that had made our Proposal superfluous. It could have shown that despite evidence to the contrary, viewpoint discrimination and perceptions among employees of viewpoint discrimination were demonstrably not occurring. But it did not provide that evidence. Similarly, it could theoretically have shown that our Proposal was linked to the previous proposal referenced in some manner not simply rhetorical, but genuinely relevant to ordinary business operation analysis.

That the Company provided no evidence that the content of the board's analysis and conclusions related in any way to the question of whether our Proposal implicated issues treated effectively by the company in its normal course of business suggests that there was no such evidence to provide. But it also renders the Staff's reliance on the board's analysis here incoherent and potentially deeply disruptive. The Company board's analysis does not go to the question of ordinary business operations at all. By allowing that analysis, without explanation

or obvious connection, to bolster an otherwise insufficient claim under Rule 14a-8(i)(7), the Staff has effectively turned the Rule 14a-8 grounds as aggregated under Rule 14a-8(i)(7) from a list of unique grounds – any one of which must be independently satisfied for exclusion to be justified – into a list of *factors*, which may be aggregated to justify exclusion even if no specific ground is itself satisfied.

This latter move may constitute plain error under the Commission's own published guidance,[2] as discussed further below. Even if it is not plain error to treat the Rule 14a-8 grounds as factors rather than unique rules, though, it is a mistake to do so given the Staff's standard method of replying to no-action requests, as modified in the instant case. While courts of law often employ multi-factor tests in a variety of settings, they are careful when they do so to explain how each factor was relevant, how it weighed into the determination, and related considerations. In short, multi-factor tests require detailed and extensive analysis. But the Staff provides no such detailed analysis – rather, it offers just a series of unsupported assertions that that board analysis, which on its face has nothing in particular to do with the coverage that our Proposal already receives under the Company's ordinary business operations, nevertheless substantiates an otherwise insufficient Rule 14a-8(i)(7) claim.

To use the Rule 14a-8 grounds as factors in this way without also providing detailed and precedent-based analysis of those factors' application would result in the no-action guidance process losing all coherence, predictive value, and perception of objectivity. This will result not in a decrease in work for the Staff, but an increase as the precedential value of its decisions effectively disappears and proponents thus lose any meaningful way to judge whether a new proposal to a new company may survive review – and so submit them all. It is therefore an innovation that would hurt all parties, and that should be rejected by the Commission.

Each of these arguments is elaborated below.

Part I. Our Proposal is functionally indistinguishable – except with regard to the* type *of discrimination to be studied – from a proposal approved by the Staff just last year, making exclusion of our Proposal inappropriate absent additional relevant considerations.

As an initial matter, our Proposal is effectively the same as a proposal for which the Staff refused a no-action request just last year in *CorVel Corp.* (avail. June 5, 2019) – except for the category of employee the discrimination against whom we sought study. The "resolved" section of the proposal at issue in that no-action determination contest stated:

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[2] *See Staff Legal Bulletin* No. 14: Shareholder Proposals (July 13, 2001) at B.1. ("The rule generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within *one* of the 13 substantive bases for exclusion described in the table below." (emphasis added)).

> RESOLVED Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting "sexual orientation" and "gender identity" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.

Likewise, our Proposal to the Company states:

> RESOLVED Shareholders request that Apple Inc. ("Apple") issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omit proprietary information.

The only distinction to be made between these two proposals is the category of employee discrimination to be studied. As we discussed in our November 25, 2019 Response to the Request Letter ("Proponent Response"), at 3-4, and as had gone uncontradicted throughout these proceedings, discrimination on the basis of viewpoint has – like discrimination on the basis of sexual orientation – presented a grave and serious threat for at least a century, one that had lain dormant for many decades but which is growing again in recent years.

No effective distinction exists between the *CorVel, Corp.* proposal and our Proposal except the type of employees the discrimination against whom (along with its effects) is sought to be studied. The Commission and its Staff have long and clearly expressed their intention not to discriminate against similarly situated – far less effectively identical – proposals on the basis of the subject matter or merits of otherwise indistinguishable propositions alone. *See Staff Legal Bulletin No. 14* at B.6-7. As a baseline proposition, therefore, the Staff should have rejected the Company's no-action request.

Part II. The "board's Nominating and Corporate Governance Committee's analysis" of our Proposal upon which the Staff relies speaks in no way to the issue raised by our Proposal.

In order to defeat this baseline proposition, the Staff cited two other factors that entered into its decision-making process. The first of these was the Company's "board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company." Staff Response Letter. That analysis not only failed to demonstrate any way in which discrimination *vel non* by the Company *on the basis of viewpoint* was being actively studied. It went even further, by its demonstration of other ways in which discrimination has been prohibited, to demonstrate that nothing whatever was being done to study – far less to prohibit – discrimination on the basis of viewpoint. In fact, the Company's asserted confusion between discrimination on the basis of viewpoint and discrimination on the basis of totally unrelated characteristics underscored the complete failure of the Company to grapple with viewpoint discrimination – the issue raised by our Proposal – in any way at all.

The Commission has made significant efforts recently to explain how companies may usefully provide details of their boards' analysis in helping the Staff to determine whether a particular proposal falls within or beyond the ambit of ordinary business operations. *See Staff Legal Bulletin* 14K (October 16, 2019); *Staff Legal Bulletin* 14J (October 23, 2018). Most recently, it advised that companies that sought to exclude proposals would be well advised to demonstrate "that the policy issue raised by the proposal is not significant to the company." *Staff Legal Bulletin* 14K. In particular, it indicates that

> [w]hen a proposal raises a policy issue that appears to be significant, a company's no-action request should focus on the significance of the issue to that company. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7).

Id. We understand that this guidance is very new, and as yet little applied. We respectfully submit, however, that in reaching its conclusion in this instance, the Staff misapplied this guidance in ways that will, if followed here and in future, significantly undermine – if not essentially hollow out – the shareholder-proposal review process.

Our concern arises because the Company's report on its board's analysis simply failed to provide the information required by *Staff Legal Bulletin* 14K, and failed in ways that should have been dispositive. The Company reported on activities that it undertakes that are irrelevant to our Proposal (*i.e.*, how it prohibits discrimination against groups and on grounds *other* than those implicated by our Proposal), but failed even to make an effort to suggest that these other sorts of discrimination prohibition effectively achieved the sort of anti-discrimination analysis we sought. With regard to prohibition of discrimination on the basis of viewpoint, in fact, the Company's only relevant statement was that "the Company's Equal Employment Opportunity Policy … does not explicitly include 'ideology' or 'viewpoint' discrimination." Request Letter, at 5. It then indicated that on one page of its extensive website, it has included the sentence "We welcome all voices and all beliefs." *Id.* at 6.

The distance between an extensive non-discrimination policy that nevertheless fails to include a prohibition against viewpoint discrimination and a stand-alone, generalized sentence on the website is itself a very significant one. And the distance is made greater by the very fact of Apple's fierce fight against even studying whether it should include viewpoint discrimination in its otherwise fulsome protections. Additionally, the Company carefully fails in any way in its Response Letter, a public document, to suggest that its current policy plus the cited sentence *already does* prohibit against viewpoint discrimination, as such an admission might conceivably provide a basis on which an employee might in future stand.

The Company is eager to imply that viewpoint discrimination is really protected against while being careful to say no such thing. Neither does it suggest, as it easily could, that it intends to rectify the oversight in its non-discrimination policy by adding viewpoint discrimination, to

bring the actual policy in line with what it suggests to be the import of the single sentence from its website.

Likewise, the Company does not indicate that it has any plans to study the problem of potential viewpoint discrimination on its own, despite direct and public communication of a problem of viewpoint discrimination at the Company from employees to the CEO himself.[3] Nor did it, despite this direct evidence about problems at the Company as well as increasing problems with and perceptions of viewpoint discrimination in Silicon Valley and nationally,[4] provide any contradictory evidence that viewpoint discrimination presented no real, legitimate problem at the Company.

The second consideration that the Staff relied on was that "a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote." Staff Response Letter. But the Company provided nothing about the board's analysis of the comparison between the previous proposal and our Proposal except the bare, unsupported assertion that the board had concluded that the prior proposal had a "substantially identical policy focus," Request Letter, at 6, while our response letter explained the differences between the two proposals in great detail. *See* Proponent Response, at 5-7. Because the Company board's analysis was no more than conclusory, and could have added nothing to the Staff's analysis under Rule 14a-8(i)(7), it should have played no role whatever in the Staff's analysis.[5]

All of these failures render the Staff's decision in the instant matter erroneous. As importantly, however, they create a precedent that, if followed, would open Rule 14a-8(i)(7) analysis open to serious abuse. Here the Company provided no evidence that it does, or plans to do, or plans even to study, anything related to the subject matter of the proposal. Nor did it provide evidence that the issue raised is not – despite evidence to the contrary – a real, living issue at the

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[3] *See, e.g.*, Troy Wolverton, *Tim Cook says conservative Apple employees who feel shunned should 'come talk to me,'* BUSINESS INSIDER (Mar. 1, 2019), *available at* https://www.businessinsider.com/apple-supports-employees-range-politics-tim-cook-2019-3.

[4] *See, e.g.*, Nitasha Tiku, *Survey Finds Conservatives Feel Out of Place in Silicon Valley: Online poll adds to concerns that political divisions are affecting tech workplaces*, WIRED (Feb. 2, 2018), *available at* https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/; Olivia Solon, *'There was a witch-hunt': Silicon Valley conservatives decry Google groupthink*, THE GUARDIAN (Aug. 9, 2017), *available at* https://www.theguardian.com/technology/2017/aug/09/google-diversity-memo-conservatives-react; Mark Bergen & Ellen Huet, *Google Fires Author of Divisive Memo on Gender Differences*, BLOOMBERG (Aug. 7, 2017), *available at* https://www.bloomberg.com/news/articles/2017-08-08/google-fires-employee-behind-controversial-diversity-memo; *Mozilla CEO Resignation Raises Free Speech Issues*, USA TODAY (April 5 2014), *available at* https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/.

[5] See *Staff Legal Bulletin* 14K (October 16, 2019); *Staff Legal Bulletin* 14J (October 23, 2018) ("The discussions we found most helpful focused on the board's analysis and the specific substantive factors the board considered in arriving at its conclusion. Less helpful were those that described the board's conclusions or process without discussing the specific factors considered.").

Company. Rather, it simply showed that it does *other* things tangentially related to the subject matter of the proposal, while straightforwardly admitting that it does not do – and implicitly admitted that it does not intend to do – anything like what the proposal seeks.

By this standard, every company that provides analysis of its board's thinking will be entitled to a no-action determination so long as that analysis can point to something rhetorically similar – even if wholly functionally irrelevant – to the subject matter of the proposal. Further, as will be discussed more fully below, because of the summary nature of Staff no-action letters, decisions under this precedent will be liable to both the possibility and the perception of unappealable subject-matter bias.

Because this decision misunderstands and misapplies the Commission's own guidance with regard to company board analysis in ways that result in both reaching the wrong conclusion in this instance and setting up incoherent and dangerous precedent for future cases, we urge the Commission to reverse it.

Part III. Because the Staff's Use of the Board Analysis Supplied in This Case Effectively Turns Rule 14a-8(i)(7) into a* Sub Silentio *and Unexplicated Multi-Factor Test, it Must be Rejected Absent a Wholesale Change in the Staff's Method of Analyzing and Explaining its No-Action Decisions.

As we established in Part I, the decision in *CorVel, Corp.* should – unless other relevant factors intervened – have dictated the result in this case on the grounds of Rule 14a-8(i)(7), a result in favor of our Proposal, and against the Company's no-action request. On its face, there is nothing that renders significantly different a report on the potential risks and ill effects arising from discrimination on the grounds of sexual orientation, the result requested in the *CorVel, Corp.* decision, from a report on the potential risks and ill effects arising from discrimination on the grounds of viewpoint, the result requested in our Proposal. The Company, having failed to address *CorVel, Corp.* at all, certainly failed to develop any such distinction.

As the Staff's analysis illustrates, it found those other relevant factors in the Company board's analysis. But as we have discussed above, there is nothing in the board's analysis that connects it to the specific question at issue under Rule 14a-8(i)(7) – the question of whether the board is already addressing the issue raised by the Proposal in the course of its ordinary business operations.

The staff's analysis also illustrates that it did not think that the Company had shown, via its retailing of its board's analysis or otherwise, that the Company had shown that our Proposal was excludable under Rule 14a-8(i)(10) or Rule 14a-8(i)(12)(i), the Rules to which the information (or bare assertions) in the board's analysis *were* arguably relevant. We know this because the board did *not* conclude that the our Proposal was independently excludable under these Rules, despite the Company's explicit requests that the Staff so conclude.

Finally, then, we were left, after the Staff's decision, with this knowledge:

(1) The staff agreed that our Proposal would *not* have been excludable under Rule 14a-8(i)(7) absent the Company's discussion of the Company board's analysis.
(2) That analysis did not demonstrate anything additional about the Company's having dealt with our Proposal in the ordinary course of its business.
(3) Rule 14a-8(i)(7) has therefore in effect been turned into a sort of catch-all provision under which factors unrelated to the question of ordinary business operations can nevertheless be aggregated together to allow a generalized decision of exclusion.
(4) The Company board's analysis did not demonstrate that our Proposal was substantially similar to a previous proposal (else the Staff would have excluded the proposal under Rule 14a-8(i)(12)(i)), but did demonstrate that our Proposal is to some completely indeterminate amount related to that previous proposal in such a way so that the indeterminate resemblance contributes in some unspecified degree to reaching a general determination of excludability under the new catch-all version of Rule 14a-8(i)(7).
(5) The Company board's analysis did not demonstrate that our Proposal had already been substantially implemented by the Company, but did demonstrate that matters factually irrelevant to our Proposal but linguistically connected to it had been addressed in detail by the Company, so that the Company is for some undefined reason excused in some degree from addressing the *actual* subject matter of our Proposal in any way.

This is an incoherent mode of decision that leads to an incoherent result, one that will if allowed to stand result in significant problems well beyond the instant matter. Under the framework of decision that has existed heretofore, each Rule was addressed individually, as a unique ground for inclusion or exclusion of a proposal. Matters irrelevant to a specific ground could not change the Staff's decision on that ground. And the Staff could – and, we suggest, should – continue to proceed on that basis in future in complete consistency with *Staff Legal Bulletins* No. 14J and 14K. Under this mode of analysis, the Staff could consider Company discussions of board analysis under Rule 14a-8(i)(7), but only with regard to how those analyses reflect the Company's demonstration that it, in its ordinary business operations, has rendered the proposal nugatory – as by showing that the Proposal is being addressed by other means in the ordinary course, has been shown not to be a problem at the company, or otherwise.

Where the board's analysis has revealed such information *directly relevant to Rule 14(a)-8(i)(7)*, the Staff's cursory summary of that analysis as part of its Rule 14(a)-8(i)(7) would provide the Proponent with coherent information about how to proceed.

Where the board's analysis has, as here, provided no information about the relationship between the Company's ordinary business operations and the Proposal in question, the Staff's reliance on this information, which is relevant to other grounds on which the Staff did not make a no-action determination but not to Rule 14(a)-8(i)(7), converts the process into a multi-factor analysis.

There are two problems with this *sub silentio* conversion. The first is that it appears to be prohibited by the Staff's own previous interpretations of Rule 14a-8. As Staff Legal Bulletin No.

14 explains, "rule [14a-8] generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within *one* of the 13 substantive bases for exclusion described in the table below."[6] Turning Rule 14a-8(i)(7) into a catch-all aggregation of factors, none of which would satisfy *one* of the 13 substantive Rule 14a-8 grounds, appears straightforwardly to violate this stipulation.

The second problem, as we have seen just above, is that the conversion – executed as it has been in this instance, and presumably would be in the future – leaves proponents in a blind fog as to how to proceed. There is nothing wrong with multi-factor analyses *per se*; they are often applied in a variety of settings in federal and state courts. Where they are adopted, however, the courts are careful to provide detailed descriptions of which factors were relevant, why, how each factor weighed into the decision, and so on.

To adopt a multi-factor test, as the Staff has effectively done by its use of the Company's report of its board's analysis in this case, without also adopting the detailed analysis and exposition that the courts undertake when employing such rubrics, drains the Staff review process of any informational or precedential content. If the Commission allows the decision in this case to stand, we will – as we have demonstrated – have no idea what to make of the decision, and no idea how to proceed. We won't know how to craft better proposals in the future, or otherwise how to chart a path more likely to result in success. Neither will any other proponents faced with such opaque decisions.

Confusion will reign. The result will be not less work, fewer decisions and more efficiency for the Staff in this proposal-review process, but significantly more, as proponents fumble increasingly blindly in their efforts to achieve their policy purposes. The confusion and indeterminacy will additionally result in increasing perceptions of bias and other forms of unfairness, as proponents find it more and more difficult to figure out how the Staff makes its decisions, and easier and easier to conclude that untoward motivations play a role.

The Commission should instruct the Staff to allow company boards' analysis to influence Rule 14a-8(i)(7) exclusion decisions only if that analysis provides direct evidence that the proposal under consideration is rendered unnecessary *by ongoing ordinary business activities.* This will avoid the problem of converting a list of independent grounds into an ill-defined and unexplained set of indeterminately weighted factors. In the alternative, though, if the Commission disagrees and wishes to allow the Staff to turn Rule 14a-8(i)(7) into an effective catch-all aggregate provision, it should at least instruct the Staff, both in this instance and in future cases, to provide significant details about the Board-provided facts it found relevant, and its method of weighing the implicated factors to reach its decision, so that proponents will still find instructive and precedential value in its determinations.

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[6] *Staff Legal Bulletin* No. 14: Shareholder Proposals (July 13, 2001) at B.1. ("The rule generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within *one* of the 13 substantive bases for exclusion described in the table below." (emphasis added)).

Conclusion

The Staff, in affirming the Company's no-action request in this case, undertook a novel method of analysis that so significantly shifts the meaning and effect of Rule 14a-8 that may well have violated long-standing Staff-issued rules, and that cannot legitimately be applied here and in the future without the development of an entirely different, and much more detailed, form of review and decision by the Staff. We therefore ask the Commission to reverse the decision of the Staff, and to deny the Company's no-action request. In the alternative, we ask that the current Staff decision be withdrawn, and the matter returned to the Staff with the options of either denying the no-action request or fully explaining its reinterpretation of the Rule 14a-8 grounds and the implications of that reinterpretation, its detailed analysis in this case, and the means by which proponents who would wish to follow the *CorVel Corp.* precedent about the non-ordinary nature of discrimination-prohibition studies in the future might reliably do so.

Thanks to the Staff and the Commission for its time and consideration.

A copy of this correspondence has been timely provided to the Company. If I can provide additional materials to address any queries the Staff may have with respect to this letter, please do not hesitate to call me at 202-507-6398 or email me at sshepard@nationalcenter.org.

Sincerely,

Scott Shepard

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