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Via email

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

Re: Shareholder Proposal Submitted to Alphabet, Inc. Regarding Public Benefit Corporation on Behalf of James McRitchie and Myra K. Young

Ladies and Gentlemen:

James McRitchie and Myra K. Young (the "Proponents") beneficially own common stock of Alphabet, Inc (the "Company") and have submitted a shareholder proposal (the "Proposal") to the Company. I have been asked by the Proponent to respond to the letter dated February 2, 2020 ("Company Letter") sent to the Securities and Exchange Commission (the "SEC") by Jeffrey D. Karpf ("Company Counsel") and accompanied by a letter to the Company dated February 1, 2021 from Potter, Anderson and Corroon, LLP (the "Delaware Opinion"). In the Company Letter, the Company contends that the Proposal may be excluded from the Company's 2021 proxy statement. A copy of the Proposal is attached to this letter.

We respectfully submit that the Proposal must be included in the Company's 2021 proxy materials and that it is not excludable under Rule 14a-8. A copy of this letter is being emailed concurrently to Company Counsel.

**SUMMARY**

The Proposal requests that the board of directors of the Company (the "Board") take steps necessary to amend the Company's certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC") contingent on shareholders converting certain high-vote Class B shares into either Class A shares (which have one vote) or Class C shares (which have no votes).

The letter cites four different classes of exclusion in its request:

1. The Proposal may be omitted pursuant to Rule 14a-8(i)(6) because it is not within the Company's power or authority to implement the Proposal;

2. The Proposal may be omitted pursuant to Rule 14a-8(i)(3) because the Proposal is impermissibly vague, indefinite, and susceptible to various interpretations so as to be inherently misleading in violation of the proxy rules;

3. The Proposal may be omitted pursuant to Rule 14a-8(i)(2) because the Proposal, if implemented, would cause the Company to violate applicable state law, including the Delaware General Corporation Law ("DGCL"); and

4. The Proposal may be omitted pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations.

The first three of these arguments are all different forms of an anachronistic attempt to argue that proposals to amend a company's certificate of incorporation are excludable, an argument that the Staff rejected long ago; indeed, hundreds of proposals to declassify boards, reduce supermajority votes and provide shareholders with a written consent right have been voted on in the twenty-first century, clearly establishing the right of shareholders to request the initiation of an amendment process.

The fourth argument is that because the Proposal would change the fundamental purpose of the Company, it would have ripple effects throughout the Company's ordinary business operations. But that is not how Rule 14a-8(i)(7) works; the purpose of that exception is to prevent proposals that dictate ordinary business decisions that should be left to management. Nothing in the Proposal dictates specific outcomes of business decisions; in stark contrast, the Proposal addresses the ultimate purpose behind those decisions, which are left completely in the hands of management and the Board. Moreover, the Proposal advances an extraordinary transaction, namely, an amendment of the Company's constitutional documents that would fundamentally alter the arrangement of rights and interests of shareholders and directors in the Company. Even if the Proposal did not involve an extraordinary transaction, the underlying issues regarding PBCs and shareholder primacy represent a significant policy issue that transcends ordinary business: indeed, legislatures around the country and around the world have

passed laws to create benefit corporations in the last decade, and legislation has been introduced in both houses of the U.S. Congress to make all large companies benefit corporations.[1] In addition to this legislative activity, the efficacy of shareholder primacy has been debated for years. All of this demonstrates that the Proposal addresses a significant policy issue that transcends the business of the Company and is thus not excludable as relating to ordinary business.

## BACKGROUND

The request to exclude the Proposal under Rule 14a-8 is based on a series of misunderstandings of the provisions of the Delaware General Corporation Law that authorize PBCs. Accordingly, we begin with an explanation of the purpose and mechanics of Subchapter XV of the DGCL, "Public Benefit Corporations."[2]

### A. Conventional Corporate Law

Prior to 2013, directors of all Delaware stock corporations were required to prioritize shareholder interests. While there has been a fierce ongoing debate as to whether corporations should be managed for the benefit of only shareholders or for a broader group of stakeholders,[3] the concept of shareholder primacy has dominated Delaware corporate law. A series of decisions by the Delaware courts cemented the place of shareholder primacy in the United States.[4]

The most important of these was the famous *Revlon* case decided by the Delaware Supreme Court in 1985.[5] Other Delaware authority has established that corporations exist primarily to generate shareholder value.[6] *eBay Domestic Holdings, Inc. v. Newmark*[7] is a more recent example of the Delaware focus on shareholder wealth maximization, even outside the sale context. The court embraced shareholder primacy, finding that it was a violation of the directors' fiduciary duties to make decisions primarily for the benefit of users of the corporation's platform:

> *Having chosen a for-profit corporate form, the craigslist*

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[1] Several states, including Delaware, use the term "public benefit corporation" to refer to their model of benefit corporations.
[2] 8 Del. C. §361 et seq.
[3] Frederick Alexander, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2018) at 21-26.
[4] Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE UNIV. L. REV. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")
[5] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, the directors' duty is to maximize the cash value to shareholders, regardless of the interests of other constituencies, because there is no long term for the shareholders).
[6] *See Katz v. Oak Indus. Inc*., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [*e.g.*, debtholders] . . . does not . . . constitute a breach of duty."); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1169, 1170 (2002) ("The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.")
[7] 16 A.3d 1 (Del. Ch. 2010).

> *directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.*[8]

The former Chief Justice of the Delaware Supreme Court has explained that the law clearly favors shareholders, stating that, "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[9]

### B. Public Benefit Corporations

The doctrine of shareholder primacy has caused great consternation regarding the harm that it poses to stakeholders and the public.[10] In response, the benefit corporation option was created to provide a corporate form where directors could prioritize interests other than those of shareholders. Beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests; a statute has now been adopted in 39 U.S. jurisdictions, one Canadian province and four other countries.[11]

Delaware's version, the PBC, was adopted in 2013. It allows any stock corporation to be formed as a PBC and any stock corporation that is not a PBC to amend its certificate of incorporation to become one.[12] Any such amendment must identify one or more public benefits, which are defined as "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[13]

PBC directors have modified obligations that do not prioritize shareholder interests over all others. Instead, as a PBC, a corporation is intended to operate in a "responsible and

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[8] *Id*. at 34-35 (referring to corporate justification for a shareholder rights plan meant to forestall a change in control that might threaten platform users' interests).
[9] Leo Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law* 50 WAKE FOREST LAW REVIEW 761 (2015).
[10] *See generally,* Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012).
[11] These totals represent our own hand count based in part on the data available from *The Social Enterprise Tracker,* available at https://socentlawtracker.org/#/map.
[12] 8 Del. C. §362.
[13] Id.

sustainable manner."[14] Specifically, the directors must balance three considerations: (1) the shareholders' financial interests, (2) the best interests of those materially affected by the corporation's conduct, and (3) a specific public benefit identified in the corporation's certificate of incorporation.[15] Thus, a PBC does not only serve shareholders and those named in the public benefit provision—the balancing duty runs to anyone materially affected by the corporation. This balancing obligation distinguishes PBCs from conventional corporations: rather than focusing solely on economic return to shareholders, a PBC must balance the interests of stakeholders other than shareholders as ends in themselves. Its purpose and its obligations are thus broader than financial return to shareholders.

In order for a conventional Delaware corporation to become a PBC, the board of directors must approve an amendment to the certificate of incorporation and then present that amendment to its shareholders for a vote.[16] In other words, the change is considered so fundamental that both director and shareholder approval is required.

Conversion to a PBC reconfigures the rights and duties of the board and shareholders. While the board maintains discretion under the business judgment rule, it is given responsibility to consider a broad range of stakeholder interests as ends in themselves, rather than only as means by which to satisfy shareholder interests.[17] Shareholders also gain new rights to bring lawsuits for relief in the event the board breaches its duties regarding stakeholders or the corporation's public purpose.

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[14] 8 Del. C. §362.
[15] 8 Del. C. §365.
[16] 8 Del. C. §242. At the same time, the statute is quite clear that even an amendment may be abandoned, even if both approvals are obtained, allowing the effectuation of an amendment to be made contingent on further conditions, even if both board and shareholder approval are obtained:

> *The resolution authorizing a proposed amendment to the certificate of incorporation may provide that at any time prior to the effectiveness of the filing of the amendment with the Secretary of State, notwithstanding authorization of the proposed amendment by the stockholders of the corporation or by the members of a nonstock corporation, the board of directors or governing body may abandon such proposed amendment without further action by the stockholders or members.*

*Id.*
[17] 8 Del. C. §365(b). This means that the traditionally broad discretion with respect to decisions remains in the hands of the board and management, with no more shareholder interference than in a conventional corporation. As one author described this element of the statute:

> *[T]he business judgment rule is a doctrine developed by the courts, which prohibits interference with board decisions made by disinterested and fully informed directors acting in good faith. [Chapter XV] states that this rule applies to all balancing decisions made by PBC directors.*

Alexander, *supra* n.3 at 93. In order to ensure that directors' discretion remains unimpeded for PBC's, the statute was amended in 2020 to clarify that ownership of corporate stock would not render a director "interested" and thus ineligible for the protections of the business judgment rule. Richards, Layton & Finger, *2020 Proposed Amendments to the General Corporation Law of the State of Delaware* ("the amendment clarifies that a director's ownership of or other interest in the stock of the public benefit corporation will not, of itself, create a conflict of interest on the part of the director with respect to any decision implicating the director's balancing requirements, except to the extent such ownership or other interest would create a conflict of interest if the corporation were a conventional corporation") available at https://www.rlf.com/2020-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware/.

### C. The Proposal Would Implement a Fundamental Change

The list of core business matters and constituencies in the Company Letter that may be affected by the Proposal does not change a fundamental truth: for a conventional corporation like the Company, those matters and constituencies must be considered through the lens of serving shareholder interests. *The Proposal would eliminate this priority.* As the author of the Delaware opinion has advised in a memorandum to its clients:

> *Unlike directors of a conventional Delaware corporation, directors of a PBC are required to balance the pecuniary interests of stockholders, the best interests of those materially affected by the PBC's conduct and the public benefit identified in the PBC's charter. . . .*
>
> *Delaware case law makes clear that the primary purpose of a conventional corporation is to generate long-term stockholder value, except under certain limited circumstances (e.g., in the context of a sale of the company). As a result, directors of conventional corporations may consider other constituencies but only to the extent the interests of such other constituencies align with the long-term wealth maximization of the corporation's primary stakeholder – its stockholders. See, e.g., eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders").*[18]

Another leading Delaware law firm made exactly this point in a recent memorandum to another issuer: JPMorgan Chase & Co. had received a shareholder proposal asking the board to evaluate the issue of becoming a PBC. JPMorgan immediately implemented the proposal by obtaining a report (the "Richards Report"), which stated:

> *Because the interests of customers, employees, suppliers, and the community in general are often key to the success of the corporation (and therefore are aligned with the interests of the corporation's stockholders), directors of conventional corporations may, consistent with their fiduciary duties, consider such stakeholder interests in making decisions. If the interests of the stockholders and the other constituencies*

[18] *Delaware Makes it Easier for Corporations to Become Public Benefit Corporations,* Potter, Anderson & Corroon, LLP Client Alert (July 20, 2021), available at https://www.potteranderson.com/newsroom-news-Delaware-Makes-it-Easier-for-Corporations-to-Become-Public-Benefit-Corporations.html, last visited February 21, 2021.

> *conflict, however, the board's fiduciary duties require it to act in a manner that furthers the interests of the stockholders.*
>
> *In a public benefit corporation, on the other hand, directors are required to manage the corporation in a manner that balances the pecuniary interest of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or benefits identified in its certificate of incorporation.*[19]

## ANALYSIS

### A. The Proposal Does Not Ask the Company to Take Any Actions That Would Violate Delaware Law, It Is Clear on Its Face and Fully within the Company's Power and Authority to Implement, and Therefore Should Not Be Excluded under Rules 14a-8(i)(2, 3 or 6).

The Company Letter and Delaware Opinion cast a number of interrelated arguments under these different exclusions, and they can best be addressed by treating the arguments together.

1. *The Proposal cannot be excluded simply because it is contingent on shareholder action.*

The Company Letter asserts that because the requested Amendment to certificate of incorporation (the "Amendment") requires shareholder approval after the Board's recommendation, the "Proposal may be excluded under Rule 14a-8(i)(6) because it cannot be implemented without shareholder approval, which is outside of the Company's control to ensure it will occur." Of course, this is not the Staff position; if it were, then all Proposals to amend certificates of incorporation could be excluded, which is far from the case. Instead, the Staff simply requires that proposals make it clear that further steps beyond board approval are necessary: specifically, such proposals must ask the board to take "necessary steps" or a similar formulation.[20] Indeed, from 2000-2018, 699 proposals to declassify boards were submitted to companies, most of which should have been excluded under the logic of the Company Letter, since such a change generally requires shareholder approval.[21]

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[19] Richards, Layton and Finger, *Report to the Board of Directors of JPMorgan Chase & Co. Regarding Public Benefit Corporations.* Available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/harringtonjpmorgan011121-14a8-incoming.pdf, last visited February 21, 2021.

[20] *Frequently Asked Questions about the Shareholder Proposal Process,* Morrison & Forrester ("the Staff has allowed companies to exclude proposals that would require a board to declassify a staggered board, while the Staff has permitted proposals requesting company 'take the steps necessary' to declassify a staggered board"), available at https://media2.mofo.com/documents/frequently-asked-questions-about-shareholder-proposals-and-proxy-access.pdf, last visited February 20, 2021.

[21] *ISS Discusses Role of Shareholder Proposals in Shaping U.S. Governance Practices,* Kosmas Papadopoulos (February 15, 2019) available at https://clsbluesky.law.columbia.edu/2019/02/15/iss-discusses-role-of-shareholder-proposals-in-shaping-u-s-governance-practices/, last visited February 21, 2021.

It is telling that although the Company Letter purports to rely on the Delaware Opinion in reaching its conclusion, the Delaware Opinion is quite careful only to say that "if the Proposal would require the board to unilaterally approve an amendment to the Charter in violation of Delaware law, it is also our opinion that the Company does not have the power and authority to implement the Proposal." (Emphasis added.) Of course, the Proposal does *not* call for *unilateral* approval—it expressly calls for presentation of the Amendment to shareholders, so that Delaware counsel actually declined to join in the contention that the need for shareholder approval put the proposal beyond the Company's power and authority.

Similarly, the fact that the Proposal asks that the Amendment only become effective if the holders of Class B shares convert a certain number of shares to low-vote shares does not put the Proposal outside of the Company's power and authority. As noted above, Delaware law authorizes the approval of amendments that can be abandoned after approval, thus clearly permitting contingencies that must be met beyond shareholder approval.[22] Moreover, the contingency is not only legal and within the Company's authority, but also closely tied to its purpose: namely, redesigning the Company to create shareholder value without relying on externalizing social and environmental costs. That change requires two elements: first, fiduciary duties that permit the prioritization of stakeholder interests and second, control by equity owners whose financial interests are not entirely concentrated at the Company. This requires both the shareholder vote to approve the transaction and the conversion to low-vote shares. While the Company cannot force either to happen, it is completely within the power and authority of the Board to approve the change, contingent on those two events occurring.

The precedent cited in the Company Letter confirms that an event's contingency on shareholder action does not remove it from a company's power and authority for the purposes of Section 14a-8(i)(6), because it shows that proposals "that merely request that a company ask for the cooperation of a third party" are not excludable. In contrast, the examples that the Company cites where the Staff permitted exclusion involved situations where the subject matter of the proposal itself was an act of a third party in which the company was a minority investor. Here, in contrast, the Proposal asks the Company itself to take a specific action that is clearly within its power: conversion to a PBC. The fact that the Proposal asks the Company to voluntarily submit the Amendment to an additional condition does not change the power of the Company to file the Amendment.[23]

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[22] *See supra*, n.16. The Company also seems to argue that the contingency that the Class B shareholders convert enough shares to allow 60% of the vote to be held by other shareholders is insufficient because (1) the Class B shareholders may acquire more shares after the conversion in order to reassert control or (2) the Company may have difficulty determining that the condition is met (although it is not clear why, unless those shareholders are hiding ownership from the Company, as the Company presumably has a list of its shareholders.) 8 Del. C. Section 218. Each of these complaints seems to suggest that the Proposal is flawed and will not fully support its purpose of converting to a PBC without a control group. But the quality of the Proposal is not an argument for exclusion. Proponent is certainly ready and willing to discuss the Proposal, but the Company has not proposed any changes or alternatives that would improve it. And, of course, the Company may recommend against the Proposal and argue these points in its proxy statement. In any event, they are not bases for exclusion.

[23] The Company Letter and Delaware Opinion both note that the certificate of incorporation expressly allows the holders of Class B stock to convert to Class A stock but does not mention conversion to Class C stock. This in no way affects the validity of the

Finally, the Delaware Opinion makes the argument that because the Amendment requires board approval, it is improper under Delaware law, since the directors might violate their fiduciary duties if they determined that the Amendment was not in the best interests of the Company's shareholders, but they nevertheless approved the Amendment. As noted above, the Staff long ago determined that companies could not exclude proposals that asked companies to take the steps necessary to approve amendments to certificates of incorporation. Under this peculiar theory, any proposal to amend a certificate of incorporation, including to declassify a board, permit action by written consent, reduce supermajority votes, or impose any other governance rule requiring an amendment could never be pursued by shareholders under Rule 14a-8. As shown above, such proposals are permissible as long as they are precatory and ask only that "necessary steps" be taken.[24]

2. *The Proposal cannot be excluded merely because it requires the Company to draft the public benefit.*

The Company Letter and Delaware Opinion also claim that the Proposal violates Delaware law because it does not prescribe the public benefit that should be included in the Amendment. Of course, nothing about that violates Delaware law, since the Board is the appropriate body to draft the public benefit in the first instance. Indeed, in order to manufacture a Delaware law violation, the Delaware Law Opinion must mischaracterize the Proposal, stating that "[i]f the Company were to implement the Proposal as drafted, the Company would be omitting from its certificate of incorporation a provision required by Delaware law, in violation of Section 362(a)(1) of the DGCL." But nothing in the Proposal asks the Company to adopt an amendment that fails to identify one or more public benefits; in fact, the Proposal does not include any text of the proposed Amendment; instead, it requests the board to take "<u>all</u> steps" required to convert to a PBC, which necessarily includes drafting a legal version of the Amendment, just as it includes all the other steps to become a PBC that are not expressly identified.[25]

The Company has not asserted any precedent or principle showing why it would be necessary to include the public benefit in the Proposal. Certainly, if the Proposal had advanced an actual amendment for adoption that did not include a public benefit, that would have been unlawful. But that is not what happened. In this instance, leaving the drafting to the Company

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Proposal, since the owners of Class B stock could clearly meet the contingency by converting only to Class A stock, because the certificate of incorporation requires the Company to reserve sufficient Class A shares for such a conversion. Moreover, the owners of the Class B stock and the Company could always agree to a voluntary conversion to Class C. While the term "conversion" may be used in the Delaware corporate statute to refer to an exchange pursuant to a provision in the certificate of incorporation, that does not mean the term is limited to such transactions in normal discourse. *See* "Convert," *Merriam-Webster Dictionary* ("to exchange for an equivalent //*convert* foreign currency into dollars.") available at https://www.merriam-webster.com/dictionary/convert, last visited February 21, 2021.

[24] We note that this argument is not actually included in the Company Letter, demonstrating that even the Company did not believe it was meaningful to the 14a-8 analysis.

[25] In fact, the Supporting Statement expressly refers to the "specified benefit" that must be balanced along with shareholder and stakeholder interests. While that reference is not necessary to make the request legal, it expressly calls attention to the specified benefit that the board would have to exclude from the amendment in order to create an illegal amendment, meaning the board would actually have to contradict the Supporting Statement to make the requested action violate Delaware law. This further illustrates the absurdity of the argument.

represents a reasonable choice to allow the Board to determine the specific terms of the Amendment, based on its knowledge of the Company's business. As discussed (and refuted) below, the Company argues that the Proposal should be excluded because it is related to the Company's ordinary business. In making that argument, the Company Letter argues that conversion to a PBC "necessitates large-scale and long-term changes" to the Company's "functions to ensure compliance with the Company's public benefit purpose(s)." For this very reason, it is more appropriate to allow the Board, with the assistance of management, to draft the precise public benefits that the Company would undertake.

Nor is the absence of a public benefit either vague or misleading under 14a-8(i)(3). Neither the board nor the shareholders would have difficulty comprehending what is requested. The characterization of the public benefit corporation law is not misleading in the Proposal: the supporting statement expressly states that a specified public benefit, along with stakeholder interests, will rise in the balance of considerations once the request is effectuated.

As described above, the Proposal asks the board to take all steps necessary to amend the certificate of incorporation to create a PBC. This would require the board to prepare the Amendment, which must include one or more public benefits. While the Proponent certainly could have included a public benefit, it is perfectly appropriate to allow the board to make that determination in the first instance. By asking the board to take all action necessary to effect a conversion to a PBC, the shareholders are asking the board to use its business judgment, as well as all of the resources available to the directors, including legal counsel, corporate management, and other advisors, to draft the optimal public benefit provision for the Company. The Proponent has confidence that the Board is best positioned to design a public benefit or benefits that address the role of workers, customers, communities, or other stakeholders closely associated with the Company.

Somewhat confusingly, the Company Letter lists a number of efforts the Company has previously made to assist stakeholders and seems to imply that the content of the public benefit included in the Amendment will determine whether those efforts can continue. That is simply a misreading of the law: even if those activities are not covered by the public benefit, the Company will be able to pursue them as part of enhancing the shareholders' pecuniary interest (as they presumably have been doing to date[26]) or as part of the broad mandate of PBCs to account for the "best interests of those materially affected by the corporation's conduct." In other words, the Company Letter implies that that the stakeholder interests that can be balanced by a PBC are limited to those included in the stated public benefit or benefits; in fact, Section 362 requires that all stakeholders' interests be accounted for, regardless of the content of the public benefit provisions. This is why the Company Letter misses the mark when it complains that the examples of stakeholder harm that the Company could remedy as a PBC are not included as public benefits in the Proposal: listing out all those interests is not required.

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[26] Under current law, all of these actions are presumably undertaken with a view towards enhancing shareholder value. *See supra, nn.*18 & 19 and accompanying text.

As discussed in this Section A, the Proposal is clear and not misleading and the subject matter of the Proposal conforms to Delaware law and is fully within the power and authority of the Company, and thus should not be excluded under Rule 14a-8(i)(2,3 and 6).

**B. The Proposal Cannot Be Excluded as Ordinary Business Under Rule 14a-8(i)(7)**

*1. The Proposal Seeks an Extraordinary Transaction, Not Ordinary Business*

Contrary to the Company's assertions, the Proposal does not relate to the Company's ordinary business, because it involves an extraordinary transaction: amending the certificate of incorporation to alter the rights and obligations of the board to account for stakeholder interests and creating new rights of shareholders for relief if the board neglects those interests. The Delaware legislature deemed this change to fiduciary duties so important that it could only be made by an amendment that required board action followed by shareholder approval.

Because of the fundamental nature of a change in fiduciary duties, the Delaware legislature requires a shareholder vote to implement PBC status. The change in governance contemplated by the Proposal is the opposite of ordinary—it is nothing short of extraordinary to change directors' fiduciary duties, as Subchapter XV reflects.

The fact that shareholders have a place in the process also demonstrates the propriety of a request from shareholders for the board to take action. The issue is not a matter reserved to the sole discretion of the board, but one that the Delaware legislature found appropriate for shareholder engagement as well. As a matter of state law, the issue is within the zone of interest of shareholders, and not a matter reserved to the discretion of the board or considered ordinary business.

Staff positions on prior proposals are clear on this: for example, proposals requesting that a company reincorporate in a more investor-friendly state—proposals that would similarly require board approval followed by a shareholder vote in order to change important rights—were found to be non-excludable under Rule 14a-8(i)(7) in *Lowes Companies Inc*. (March 19, 2009) and *American International Group* (March 16, 2009). The registrants argued that the proposal merely related to the determination and implementation of business strategies, and therefore to ordinary business operations. But the Proponent argued that these were not mere business decisions but related to major determinations that would affect the rights and interests of shareholders. The Staff found that the proposals were not excludable under Rule 14a-8(i)(7). Certainly, a change to the very purpose of the Company from shareholder priority to shared priority among shareholders, workers, communities, and others is no less extraordinary than reincorporation to a more investor-friendly jurisdiction. As the Chief Justice of the Supreme Court of Delaware has said:

> *[T]he benefit corporation movement represents a refreshing and substantial step forward for those who believe that corporations—and all business entities—not only can, but should both do well by*

> *their investors, but also their workers and the societies in which they operate.*[27]

*2. The Proposal Transcends Ordinary Business*

In addition to addressing an extraordinary transaction, the Proposal transcends ordinary business because it addresses a significant policy issue, as the prior quote from Chief Justice Strine makes clear. The recent Business Roundtable Statement on the Purpose of a Corporation (the "Statement"),[28] signed by more than 180 of the nation's largest corporations, highlights this issue by acknowledging the critical nature of the relationship between a corporation and its stakeholders. But while it recognized the issue, it also sidestepped it, like the commentators referred to in another passage from the Chief Justice:

> *Rather than fighting to change the corporate law statutes . . ., these good-hearted, but often faint-willed, commentators just urge the directors to "do the right thing."*[29]

The Company Letter follows a similar path: it highlights activities the Company has chosen to pursue that benefit shareholders and stakeholders together, but not its failure to adopt the PBC legal structure, which would permit it to do "do no evil," even if that meant not maximizing shareholder value. Indeed, the Company Letter itself warns that if PBC status were adopted, the resulting requirement to balance shareholder and stakeholder interests might require shareholders to "sacrifice" some portion of the "immense returns" they receive by subordinating any stakeholder interests that conflict with maximizing shareholder value.

The reaction to the Statement's issuance (as well as the number of companies signing on) in August 2019 demonstrated the policy significance of addressing shareholder primacy. One dubious commentator noted that "For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business."[30] Others noted the importance of the change, but also that it was meaningless without ending shareholder primacy:

> *Ensuring that our capitalist system is designed to create a shared and durable prosperity for all requires this culture shift. But it also requires corporations, and the investors who own them, to go beyond words and take action to upend the self-defeating doctrine of shareholder primacy.*[31]

Other commentators were worried not that the Statement failed to go far enough, but

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[27] Leo Strine, *Forward,* in Alexander, *supra,* n.3
[28] https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans, last visited February 21, 2021.
[29] *Id.*
[30] Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).
[31] Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don't believe the Business Roundtable has changed until its CEOs' actions match their words,* FAST COMPANY (August 22, 2019).

rather that it went too far:

> *Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril.*[32]

The author of the articles is referring to Friedman's famous article, which stated that:

> *[T]he doctrine of 'social responsibility' taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book Capitalism and Freedom, I have called it a 'fundamentally subversive doctrine' in a free society, and have said that in such a society, 'there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.*[33]

The outpouring of commentary around the Statement[34] raises two related but distinct significant policy issues: first, should corporations focus more on stakeholders' interests and if so, is a legal change to reject shareholder primacy necessary or desirable? In a conventional corporation, stakeholders' interests are subordinate to the interests of shareholders—the board of directors or management can consider stakeholder interests only to the degree that they serve shareholder interests.[35] Many commentators on the Statement believe it is necessary but insufficient on its own because attaining a fair and durable prosperity will sometimes demand that companies put the interests of stakeholders over those of shareholders.

The clearest signal of the significance of the policy issue is legislative action to address the issue around the nation and the world. Legislatures have acted in 39 U.S. jurisdictions, the Canadian province of British Columbia, and the countries of Italy, Colombia, Rwanda, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in the last U.S. Congress in both houses that would have imposed benefit corporation

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[32] Karl Smith *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).
[33] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (magazine).
[34] One more recent event has unleashed a second rush of commentary around the shareholders v. stakeholders question: the 2020 recognition of the 50th anniversary of Friedman's essay. See, e.g., *Friedman 50 Years later,* PROMARKET (collecting 27 essays about Friedman's article and its legacy) (Stigler Center for the Study of the Economy and the State).
[35] *See supra,* nn.18 & 19 and accompanying text.

duties on the directors of all billion-dollar companies.[36] The issue even surfaced in the most recent U.S. presidential election, as one candidate decried "the era of shareholder capitalism.[37] In response, critics argued that favoring shareholders was the best recipe for a successful economy:

> *In reality, corporations do enormous social good precisely by seeking to generate returns for shareholders.*[38]

Shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives.[39] A Proposal to end shareholder primacy at a corporation meets that test. Shareholder primacy is clearly an issue of great policy significance being addressed in legislatures around the country and the world, and even in the latest race for the U.S. presidency.

Moreover, the Company's decision not to address its legal strictures matters deeply. In a recent study, asset manager Schroders determined that publicly listed companies imposed social and environmental costs on the economy with a value of $2.2 trillion annually—more than 2.5% of global GDP and more than half of the profits those companies earned.[40] These costs have many sources, including pollution, water withdrawal, climate change, and employee stress. The study shows exactly the areas where corporations are likely to ignore stakeholder interests to the detriment of the global economy.

By participating in this common corporate practice of prioritizing the financial return to its shareholders above all stakeholder concerns, corporations harm those very shareholders, the vast majority of whom are diversified.[41] Such shareholders and beneficial owners suffer when companies follow the shareholder primacy model and impose costs on the economy that lower GDP, which reduces overall equity value.[42] Thus, while corporations may increase their isolated return to shareholders under the rule of shareholder primacy by ignoring the costs they externalize to stakeholders, their diversified shareholders will ultimately pay these costs. Such

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[36] Copies of the legislation are available here: https://www.congress.gov/bill/116th-congress/senate-bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1 (Senate) and here: House: https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2 (House), sites last visited February 21, 2021.

[37] *Biden says investors 'don't need me,' calls for end of 'era of shareholder capitalism',* (CNBC) (July 9, 2020), available at https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html, last visited February 21, 2021.

[38] Andy Pudzer, *Biden's Assault on 'Shareholder Capitalism,* (Wall Street Journal) (August 17, 2020), available at https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153.

[39] JD Supra, *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) ("In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.)

[40] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf. Last visited February 21, 2021.

[41] Indeed, as of the September 2020, the top five holders of the Company's shares were mutual fund companies with indexed or otherwise broadly diversified portfolios.

[42] See, e.g., https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet), last visited February 21, 2021.

shareholders would benefit from corporate governance that enabled corporations to prioritize the stakeholders to whom the Statement refers.

Thus, the Proposal addresses a significant policy issue that is not excludable for purposes of Rule 14a-8(i)(7). Consistent with the foregoing analysis, questions around duties to stakeholders have not been excluded under 14a-8(i)(7) in recent staff decisions in Bank of America Corporation (February 12, 2020), Goldman Sachs Inc. (February 25, 2020), and Citigroup Inc. (February 25, 2020).

*3. The Proposal Does Not Micromanage*

Finally, the Proposal does not micromanage the Company but rather requests the Board to initiate an extraordinary action that Delaware law establishes as a matter that requires the approval of the shareholders as well as the board of directors.

Far from constituting micromanagement—focusing on any single activity or operation—PBC status would overlay every decision, allowing the directors to authentically balance the interests of workers, customers, and others without dictating the outcome of any decision, so that all of the matters mentioned in the Company Letter would remain entirely in the hands of the Board and management under the business judgment rule.[43] Indeed, if the Company went forward with the Proposal and became a PBC, directors would have *increased* discretion with respect to matters that implicate stakeholder interests, and granting increased discretion is the precise opposite of micromanaging.

The Company Letter is based on a basic misapprehension of Delaware law, arguing as follows:

> *The Proposal requires that the Company amend its certificate of incorporation, and if necessary, amend its bylaws to convert the Company from a for-profit Delaware corporation to a PBC. Corporate structures are chosen via informed decisions by management, which take into account a variety of factors such as tax and liability implications, effects on talent searches and hiring decisions, requirements of various regulatory regimes and potential impacts of public perception, all of which are impacted by the various jurisdictions in which a company operates. . . [T]his Proposal requests the Company reorganize the Company's corporate structure, an act that is a matter of ordinary business operations and should be left to management, with oversight from the Board of Directors, to consider and make decisions.*

[43] In cases where a higher standard of review applied because of board conflicts or entrenchment concerns, any limitation on board discretion would be the same as the limits that would otherwise apply to a conventional corporation. Alexander, *supra* n.3, Chapter 8.

But as explained above, the decision whether to change its corporate structure in order to extricate itself from shareholder primacy—the sole focus of the Proposal—is decidedly *not* to "be left to management." Conversion to a PBC *requires* shareholder action so that without such action, management would have to violate Delaware law in order to effect the Proposal.

The Company's ordinary business argument asserts that the change in duties will affect decisions that are made in the ordinary course of business, and the Company Letter lists areas of decision-making that such a change might affect. But the length of the list simply demonstrates that the Proposal transcends ordinary business because it provides an overall policy shift that potentially touches every decision the board makes, without dictating any particular outcome.

As the Staff has said, "The purpose of the exception is 'to confine the resolution of ordinary business problems to the management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.'"[44]

Effecting the Proposal will leave problem-solving firmly in the hands of the Board and management. Indeed, the enactment of the suggested Amendment actually would enhance rather than limit the directors' discretion by allowing directors to add other considerations and priorities other than shareholder interests. This concept is written right into the statute: as discussed above, Section 365 fully preserves the discretion of the board with respect to business decisions but expands the purposes that can be addressed. The Proposal would thus give the Company's directors and executives greater leeway on every matter listed in the Company Letter, rather than in any way confining or dictating such decisions.

* * * *

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

**CONCLUSION**

Based on the foregoing, we believe it is clear that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2021 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the company that it is denying the no-action letter request. If you have any questions, please contact me.

Sincerely,

*Frederick Alexander*

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[44] Staff Legal Bulletin No. 14I (2017) (citing Release No. 34-40018 (May 21, 1998).

Frederick Alexander

cc: Jeffrey D. Karpf
James McRitchie
Myra K. Young

PROPOSAL

**RESOLVED: Shareholders request our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC"), contingent on Class B stockholders converting sufficient Class B shares to Class A or Class C to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares.**

SUPPORTING STATEMENT: Estimates state that the Company has more than 4 billion users.[1] It has eight applications with more than one billion users.[2] This reach creates unique power, and power demands accountability. But our governance is structured to produce profits without accountability.

As a conventional corporation, the duties of Company directors emphasize shareholders, not stakeholders (except to the extent they create value for shareholders). In contrast, PBC directors must "balance" interests of shareholders, stakeholders, and specified benefits,[3] allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run.

This distinction is critical. The Company's capacity to link people around the globe provides potential to contribute to religious persecution,[4] put democracy at risk,[5] and undermine vaccination.[6] Threats to freedom, democratic principles, and public health could be prioritized at a PBC, even if it sacrifices return.

These threats matter to the vast majority of our diversified shareholders: as of September 2020, the top five holders of the Company's shares were mutual fund companies with indexed or otherwise broadly diversified portfolios. Diversified shareholders lose when companies harm the economy, because the value of diversified portfolios rises and falls with GDP.[7] While the

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[1] https://review42.com/google-statistics-and-facts/#:~:text=Google's%20search%20engine%20market%20share,over%20one%20billion%20active%20users
[2] https://www.sec.gov/ix?doc=/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.htm#s8845EA78D2E95963AFCF7E636F3B28E0
[3] 8 Del C, §365.
[4] https://www.businessinsider.com/china-likely-laid-out-how-google-can-help-persecute-uighur-minority-2018-10
[5] https://www.thedailybeast.com/cheats/2016/11/16/google-ceo-fake-news-could-ve-swung-election
[6] https://www.thedailybeast.com/you-wont-believe-how-easy-it-is-to-buy-anti-vaxx-ads-on-google-and-twitter
[7] See *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors,* Appendix IV (demonstrating linear relationship between GDP and a diversified portfolio) available at https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; cf. https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).

Company may profit by ignoring costs it inflicts on society, its diversified shareholders ultimately internalize those costs. (They may also be personally at risk from them.)

The shareholders deserve an opportunity to vote on an amendment that will align our governance with shareholder interests and the global community in order to create meaningful accountability.

However, our multiclass structure, which vests control in individuals with wealth concentrated in our stock, could limit the efficacy of PBC status, because their concentrated ownership means they benefit when the company sacrifices social good for its own profit. Thus, the board resolution should provide that the amendment will only be effected if these individuals convert a number of high vote shares to low or no vote shares sufficient to provide meaningful accountability to diversified shareholders.

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February 2, 2021

VIA E-MAIL (shareholderproposals@sec.gov)

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

**Re: Shareholder Proposal Submitted by James McRitchie and Myra K. Young**

Ladies and Gentlemen:

We are writing on behalf of our client, Alphabet Inc., a Delaware corporation ("Alphabet" or the "Company"), pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to notify the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") of the Company's intention to exclude the shareholder proposal (the "Proposal") and supporting statement (the "Supporting Statement") submitted by James McRitchie and Myra K. Young (the "Proponents" and each, the "Proponent"), by a letter dated December 18, 2020, respectively, from the Company's proxy statement for its 2021 annual meeting of shareholders (the "Proxy Statement").

In accordance with Section C of the SEC Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D"), we are emailing this letter and its attachments to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponents as notice of the Company's intent to omit the Proposal from the Proxy Statement. The Company expects to file its definitive Proxy Statement with the Commission on or about April 23, 2021, and this letter is being filed with the Commission no later than 80 calendar days before that date in accordance with Rule 14a-8(j). Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are



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

required to send companies a copy of any correspondence that the shareholder proponent elects to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponents that if the Proponents submit correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company.

## THE PROPOSAL

The Proposal and Supporting Statement are attached hereto as Exhibit A. The Proposal states:

RESOLVED: Shareholders request our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC"), contingent on Class B stockholders converting sufficient Class B shares to Class A or Class C to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares.

## BASES FOR EXCLUSION

In accordance with Rule 14a-8, we hereby respectfully request that the Staff confirm that no enforcement action will be recommended against the Company if the Proposal and the Supporting Statement are omitted from the Proxy Statement for the following reasons:

1. The Proposal may be omitted pursuant to Rule 14a-8(i)(6) because it is not within the Company's power or authority to implement the Proposal;
2. The Proposal may be omitted pursuant to Rule 14a-8(i)(3) because the Proposal is impermissibly vague, indefinite and susceptible to various interpretations so as to be inherently misleading in violation of the proxy rules;
3. The Proposal may be omitted pursuant to Rule 14a-8(i)(2) because the Proposal, if implemented, would cause the Company to violate applicable state law, including the Delaware General Corporation Law ("DGCL"); and
4. The Proposal may be omitted pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations.

## ANALYSIS

### A. Pursuant to Rule 14a-8(i)(6), the Proposal may be omitted because it is not within the Company's power and authority to implement the Proposal.

*1. The Proposal may be omitted because the Proposal requires as a condition precedent that the holders of the Company's Class B stock convert their shares to Class A stock and collectively retain less than 40% voting control of the Company, all of which require intervening actions from independent third parties over which the Company has no control.*

Pursuant to Rule 14a-8(i)(6), the Company may exclude a shareholder proposal from its proxy materials "if the company would lack the power or authority to implement the proposal." The Staff has acknowledged a proposal may be excluded pursuant to Rule 14a-8(i)(6) where "implementing the proposal would require intervening actions by independent third parties." *Exchange Act Release No. 34-40018* (May 21, 1998) at n.20. The Staff has consistently allowed for the exclusion of proposals that require action from a third party over which a company has no control, or where the company is otherwise not in a position to require or induce such third party (even if they otherwise have a relationship with the company) to execute such action. *See, e.g.*, *eBay Inc.* (March 26, 2008), in which the Staff allowed exclusion of a proposal submitted to eBay, which, as a minority member of a joint venture, lacked the power and authority to cause the majority members of the joint venture to adopt a policy to prohibit the sale of dogs and cats on its website; and *Harsco Corp.* (Feb. 16, 1988), in which the Staff allowed exclusion of a proposal that required action by an entity 50% owned by another company that held the deciding vote in the case of any ties. *See also Firestone Tire & Rubber Co.* (Dec. 31, 1987) (allowing exclusion of a proposal that required action of an entity in which the company was a minority investor).

The Proposal requires as a condition precedent to the Company amending its certificate of incorporation and bylaws to convert the Company to a PBC "Class B stockholders converting sufficient Class B shares to Class A or Class C shares to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B [s]hares." The Proposal makes clear that this condition must be satisfied before the Company can convert to a PBC. The Supporting Statement also emphasizes the necessity of the condition that Class B holders "convert a number of high vote shares to low or no vote shares sufficient to provide meaningful accountability to diversified shareholders," because otherwise it would "limit the efficacy of PBC status, because the [Class B holders'] concentrated ownership means they benefit when the company sacrifices social good for its own profit." The Company itself does not hold any Class B shares, and, as further discussed in the opinion of our Delaware counsel Potter Anderson & Corroon LLP, which is attached hereto as Exhibit B (the "Delaware Counsel Opinion"), nor does it have any power or authority to compel any holders of Class B shares to convert their Class B shares to Class A shares (and, pursuant to the Company's amended and restated certificate of incorporation, Class B shares cannot be converted to Class C shares). The Company's Class B shares are privately held by individual shareholders and, aside from the auto-conversion provisions in the Company's amended and restated certificate of incorporation (pursuant to which shares of Class B stock will automatically convert to Class A stock when Class B shares are transferred or sold under certain conditions), the decision to convert or retain any Class B shares is entirely at the discretion of the holders of such Class B shares.

The Staff has distinguished proposals that merely request that a company ask for the cooperation of a third party (*see Exchange Act Release No. 34-40018* (May 21, 1998) at n.20, citing *Northeast Utility System* (November 7, 1996)). However, the condition set forth in the Proposal is unlike the situation in Northeast Utility System, in that the Proposal does *not* request the Company to ask the Class B holders to convert their shares; rather, it assumes the conversion

by Class B holders will occur as a condition precedent to the Company converting to a PBC. Such an action is not one for which the Company can even request cooperation from holders of Class B stock, since, as described in the Delaware Counsel Opinion, the decision to convert Class B stock to Class A stock is an investment decision by an individual stockholder that a company has no power or authority to influence or dictate.

Even if Class B holders independently converted their Class B shares, the conversion alone would not be sufficient to "ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares" in accordance with the Proposal. Depending on the number of Class B and other shares continued to be held by Class B holders, the Class B holders collectively may still hold more than 40% voting control even after conversion of some (or all) of their Class B shares, if they decide not to sell their shares. Even if Class B holders initially go under the threshold upon conversion of their Class B shares, which as discussed would be out of the Company's power and authority to ensure, there is no guarantee that they would not at some point in the future accumulate enough Class A shares to exceed 40% voting control — and the Proposal assumes a sustained lack of concentrated ownership after the initial conversion of Class B shares. Class B holders may decide to purchase more Class A shares and maintain or increase their voting control percentage, and outside of the parameters of the Company's insider trading policy and accompanying trading restrictions, the Company has no power or authority to control, at any time, who owns or purchases voting stock of the Company and in what amounts, such that a balance can be always maintained to ensure a diversified shareholder base and no concentrated ownership, as per the Proposal. Indeed, the Company would not even be able to know or calculate with any certainty how much voting control Class B holders as a "class" would hold in the aggregate at any given time. Millions of the Company's Class A and Class C stock are traded on a daily basis,[1] and while the Company can track the ownership of its directors and officers, there are Class B holders who are not officers and directors, and any such Class B holders who are less than 5% holders may not file Schedule 13D or 13G filings or otherwise notify the Company of their total holdings that would enable the Company to track Class B holder voting control in the aggregate.

Therefore, because the Company has no power or authority to (1) compel the current holders of the Company's Class B stock to convert their Class B shares to Class A shares, and (2) control or dictate who buys and accumulates voting stock of the company to be able to ensure at all times that there is a diversified shareholder base and no concentrated ownership such that current holders of the Company's Class B stock do not and will continue not to beneficially own or control 60% of the Company's voting power, this Proposal may be excluded under Rule 14a-8(i)(6) because its implementation is conditioned on intervening actions by independent third parties that the Company cannot influence or control.

*2. The Proposal may be omitted because the Board of Directors cannot unilaterally amend the Company's certificate of incorporation to implement the Proposal without the*

[1] Alphabet, Inc. Class A Common Stock, Nasdaq, https://www.nasdaq.com/market-activity/stocks/googl; Alphabet, Inc. Class C Capital Stock, Nasdaq, https://www nasdaq.com/market-activity/stocks/goog.

*approval by the Company's shareholders, and the Company cannot control or ensure that its shareholders will give such approval.*

The Staff has also concurred on numerous occasions to exclude proposals where a company cannot ensure that the actions required to implement the proposal would occur, particularly where such actions require approval by shareholders. For example, in *Xerox Corp.* (Feb. 23, 2004), a proposal was submitted requesting that the company's board of directors "amend the certificate of incorporation to reinstate the rights of the shareholders to take action by written consent and to call special meetings." The Staff allowed for the exclusion of a proposal, since "the board of directors of the Company does not have the power or authority to amend the Company's certificate of incorporation, absent the subsequent approval thereof by the Company's shareholders," and Xerox could not ensure that such shareholder approval would occur. The Staff also granted a no-action request to exclude the same proposal in *Burlington Resources Inc.* (Feb. 7, 2003) and other no-action requests to exclude similar proposals requiring shareholder approval (for example, *I-many, Inc.* (Apr. 4, 2003) (excluded on the basis that the company and its board had no power to enforce shareholder election of any particular person as a director), and *Staten Island Bancorp, Inc.* (Mar. 21, 2000) (excluded on the basis that the board had no power to implement a sale or merger without shareholder approval, which it could not control or ensure would happen).

Similar to *Xerox* and the other no-action requests discussed above, the Proposal requests "our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation." As further discussed in the Delaware Counsel Opinion, Section 242(b) of the DGCL requires that any amendment to a company's certificate of incorporation (with very limited exception) must be implemented by (1) the board of directors adopting a resolution setting forth the amendment proposed and declaring its advisability and (2) the stockholders of the company voting to approve the amendment at either a special meeting of stockholders or an annual meeting of stockholders. An amendment to the Company's certificate of incorporation to convert the Company to a PBC would not fall under either of the exceptions set forth in Section 242(b)(1) of the DGCL,[2] and so would require approval by the Company's shareholders. Much like in Xerox, the Company's Board of Directors "does not have the power or authority to amend the Company's certificate of incorporation, absent the subsequent approval thereof by the Company's shareholders." The Proposal itself acknowledges that any amendments to the certificate of incorporation must be made with the approval of the Company's shareholders. However, as is well established under applicable law and further explained in the Delaware Counsel Opinion, a company has no power or authority over its shareholders to direct or otherwise control shareholders' vote on any such

[2] The exceptions named in Section 242 of the DGCL are (1) to change the corporate name of the corporation and (2) to delete (i) such provisions of the original certificate of incorporation which named the incorporator or incorporators, the initial board of directors and the original subscribers for shares, and (ii) such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective.

matters. As such, the Company and its Board of Directors cannot implement this Proposal without the intervening action of its shareholders, over whom the Company and its Board of Directors have no power or authority to dictate or control any voting decisions. Accordingly, this Proposal may be excluded under Rule 14a-8(i)(6) because it cannot be implemented without shareholder approval, which is outside of the Company's control to ensure it will occur.

*3. The Proposal may be omitted because implementation of the Proposal would violate certain provisions of the DGCL, and the Company as a corporation incorporated in Delaware does not have the power or authority to act in a manner that violates applicable state laws.*

The Staff has a well-established history of applying Rule 14a-8(i)(6) to a shareholder proposal that, if adopted by a company's shareholders, would cause the company to violate applicable state law. *See, e.g.*, *RTI Biologics, Inc.* (Feb. 6, 2012); *Abbott Laboratories* (Feb. 2, 2011); *Ball Corp.* (Jan. 25, 2010); *NVR, Inc.* (Feb. 17, 2009); *Schering-Plough Corp.* (Mar. 27, 2008); *The Boeing Co.* (Feb. 19, 2008); *AT&T Inc.* (Feb. 19, 2008); *Noble Corp.* (Jan. 19, 2007); *SBC Communications Inc.* (Jan. 11, 2004). If the Company's Board of Directors unilaterally amended the certificate of incorporation to convert the Company to a PBC and did not seek shareholder approval of such amendment, such act would be a violation of Section 242 of the DGCL. As discussed further in subsection C below, the implementation of this Proposal would also violate other applicable sections of the DGCL and would force directors to act in a way that would constitute a breach of their fiduciary duties and duties of care and loyalty to the Company. Therefore, this Proposal may be properly omitted pursuant to Rule 14a-8(i)(6) because the Company would need to violate numerous sections of the DGCL in order to fully implement the Proposal.

**B. Under Rule 14a-8(i)(3), the Proposal may be omitted because it is impermissibly vague, indefinite and susceptible to various interpretations so as to be inherently misleading in violation of the proxy rules.**

Pursuant to Rule 14a-8(i)(3), the Company may exclude a shareholder proposal from its proxy materials "if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials." The Staff has interpreted Rule 14a-8(i)(3) to include shareholder proposals that are vague and indefinite, and the Staff has consistently concurred with companies excluding shareholder proposals on the basis that "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." *SEC Staff Legal Bulletin No. 14B* (Sept. 15, 2004). A proposal is sufficiently vague and indefinite to justify exclusion where a company and its shareholders might interpret the proposal differently, such that "any action ultimately taken by the company upon implementation of the proposal could be significantly different from the actions envisioned by the shareholders voting on the proposal." *Fuqua Industries, Inc.* (Mar. 12, 1991). Such proposals may be determined to be vague or indefinite because the scope of the work to be done is unclear, making it impossible for a company to determine how to adequately comply with the proposal. For example, a proposal that requested a company's board of directors amend the company's governing

documents "… to set standards of corporate governance" was excluded because the phrase "standards of corporate governance" was too broad in scope for the company to know with certainty how to proceed. *Alaska Air Group, Inc.* (Apr. 11, 2007). Additionally, proposals that do not provide sufficient context or explanation, and "lack[] sufficient description about the changes, actions or ideas for the company and its shareholders to consider" may also be excluded as being too vague and indefinite. *Apple Inc.* (Dec. 6, 2019) (allowing a proposal to be excluded because the request that the company "improve guiding principles of executive compensation" lacked adequate explanation as to what constitutes "guiding principles of executive compensation"); *see also eBay Inc.* (Apr. 10, 2019) (permitting the company to exclude the proposal because there was not sufficient description as to what "reform" its executive compensation committee meant).

Finally, the Staff has allowed proposals to be excluded if a proposal fails to define key terms or otherwise fails to provide guidance on the implementation of the proposal. *See, e.g.*, *Baxter International, Inc.* (Jan. 10, 2013) (allowing exclusion of a proposal requesting no acceleration in vesting of any future equity pay to senior executives in the event of a change of control because the proposal did not adequately define and explain, among other things, "change of control", such that "neither stockholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires"); *General Electric Company* (January 21, 2011) (permitting the company to exclude a proposal to modify the company's incentive compensation program to provide more long-term incentives because the proposal was impermissibly vague in explaining how the program would work in practice, including the financial metrics that would be used in implementing the proposal); *International Paper Co.* (February 3, 2011) (allowing exclusion of a proposal to adopt a policy requiring senior executives to retain a significant percentage of stock acquired through equity compensation programs because it did not sufficiently define "executive pay rights"); *Verizon Communications Inc.* (February 21, 2008) (allowing for the exclusion of a proposal where the proposal failed to define critical terms "Industry Peer Group" and "relevant time period"); *Prudential Financial Inc.* (February 16, 2007) (allowing for the exclusion of a proposal where the proposal was vague on the meaning of critical terms "management controlled programs" and "senior management incentive compensation programs" and where it was unclear how the company would implement the proposal); and *Wendy's International Inc.* (February 24, 2006) (allowing the company to exclude a proposal because the term "accelerating development" was found to be impermissibly vague).

The Proposal states that the Company should convert to a "public benefit corporation" pursuant to Section 362 of the DGCL. Section 362(a) of the DGCL requires a public benefit corporation to "(1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title *one or more specific public benefits* to be promoted by the corporation; and (2) State within its heading that it is a public benefit corporation" (emphasis added) in its certificate of incorporation. As defined under Section 362(b) of the DGCL, "public benefit" means "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." The Supporting Statement notes that "PBC directors must 'balance' interests of shareholders, stakeholders, and

specified benefits, allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run." The Proposal and Supporting Statement do not identify or provide any guidance, description or explanation as to what such specified benefits are that should be included in the Company's certificate of incorporation. They also do not expand on what "protect[ing] communities" means and how the Company could or should do so. Therefore, any action(s) taken by the Company in implementing the Proposal could differ significantly from the intentions and expectations of the shareholders voting on the Proposal. As with the precedent cases above, the term "public benefit" is "sweeping in its scope" (*Alaska Air Group*) and renders it impossible for the Company to ascertain with any accuracy what benefits to include and what initiatives to implement to comply with the Proposal.

As the Proponents, the Company's shareholders and the general public may be well aware, the Company has already undertaken numerous short-term and long-term projects and initiatives that could be considered "public benefits" as defined in the DGCL and may be viewed as "protect[ing] communities." Just to name a few, Alphabet has been carbon neutral since 2007 and is not only the world's largest corporate purchaser of renewable energy, but has also committed nearly $2.5 billion in renewable energy projects with a total combined capacity of 3.7 GW since 2010. In 2016, Google partnered with the humanitarian nonprofit Pact to help eradicate child labor in the Democratic Republic of Congo's tin and cobalt industries and helped to fund the Mines to Markets program, which aims to eliminate child labor in the DRC mines with a comprehensive plan of wide-ranging interventions and outreach programs. In 2019, Alphabet pledged $1 billion and created an investment fund to build affordable housing in the Bay Area, with which it expects to support the construction of around 24,000 new affordable housing units. In 2020, Alphabet issued $5.75 billion worth of sustainability bonds, the largest green/sustainability bond issuance by any company in history, to fund projects in various different areas, including energy efficiency, green buildings, clean transportation, affordable housing, racial equity and COVID-19 response relief. In June 2020, Alphabet announced a $175+ million economic opportunity package to support Black business owners, startup founders, job seekers and developers, in addition to YouTube's $100 million fund to amplify Black creators and artists. However, it is unclear whether any of these initiatives and projects would be in line with what shareholders expect when voting for the Proposal, given the lack of context and information provided in the Proposal and Supporting Statement. Without this information, the Company and its many shareholders could have vastly different ideas about what public benefits to identify and prioritize, which and how many communities should be protected, how such communities should be protected, what protecting communities means, how the Company's progress should be measured, and who would be the best person to measure that progress.

The Supporting Statement further claims that "the Company's capacity to link people around the globe provides potential to contribute to religious persecution, put democracy at risk, and undermine vaccination. Threats to freedom, democratic principles, and public health could be prioritized at a PBC, even if it sacrifices return." However, these are not identified as specific public benefits, and are not accompanied by any explanation or guidance as to how the Company should prioritize and frame any of these concepts as *specified* public benefits. Concepts of "religious persecution," "freedom," "democratic principles," "public health" and "undermining vaccinations" are all extraordinarily vague and broad in scope. It would be impossible for the Company to know with any certainty what shareholders have in mind and

expect from the company upon implementing this Proposal in furtherance of promoting "freedom," "democratic principles" and "public health," what exactly the Company should do to combat these issues, and how to measure success. In fact, it would be a fallacy to even assume as a base premise that every shareholder will have a uniform set of expectations and vision of what each of these broad concepts will look like when manifested upon implementation of the Proposal. The Company has operations all over the world, shareholders of the Company come from many experiences and backgrounds, and the Company's users live in and embrace cultures from every corner of the world. Every one of these stakeholders will have different ideas of what these terms mean and what their implementation should look like. Reasonable minds can, and often do, differ over a plethora of issues under these overarching umbrella terms—how does one promote freedom and in what form does such freedom take; where should one prioritize promoting such freedom; to which groups and from whom should the Company promote freedom; in what way and using what initiatives and efforts should such promotion of freedom manifest—each of the Company's shareholders will have different ideas and priorities about what they want and expect from this, which makes it all the more impossible for the Company to know how to proceed in implementing this Proposal. Even with seemingly more specific items such as "undermining vaccination" are too "sweeping in scope": there is an absolute lack of clarity of what it means to "undermin[e] vaccination" and what and how the Company can mitigate it. Shareholders themselves will disagree on whether the Company even should be promoting vaccination, much less the specifics of how to do it (which could range from putting out some advertisements to changing its business to a pharmaceutical company that develops vaccinations).

Because the Proposal does not adequately define the "specified public benefits" the Company as a PBC should pursue, neither the voting shareholders nor the Company would be able to determine with reasonable certainty what actions or measures the proposal requires. Further, because the Proposal does not provide metrics that the Company should use to measure success, any action taken by the Company should the Proposal be adopted could very well differ significantly from the actions envisioned by the shareholders voting on such Proposal. Thus, the Proposal is impermissibly vague and indefinite and should be excluded.

**C. Under Rule 14a-8(i)(2), the Proposal may be omitted because its implementation would cause the Company to violate state law.**

A Company may omit a shareholder proposal from its proxy materials under Rule 14a-8(i)(2) if the "proposal would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject." The Company is a Delaware corporation, and cannot implement the Proposal without violating certain provisions of the Delaware General Corporation Law (the "DGCL").

The Proposal "request[s] our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC"), contingent on Class B stockholders converting sufficient Class B shares to Class A or Class C to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares." As discussed in subsection B above and as further set forth in the

Delaware Counsel Opinion, Section 362(a) of the DGCL requires a public benefit corporation to "identify within its statement of business or purpose pursuant to §102(a)(3) of this title *one or more specific public benefits* to be promoted by the corporation" (emphasis added) in its certificate of incorporation. Neither the Proposal nor the Supporting Statement reference or identify any specific public benefits, and they also do not otherwise provide any guidance as to what specific public benefits should be identified. As discussed in subsection B above, the Company cannot adequately implement this Proposal because it has no way of determining with any certainty that any specific public benefit that it identifies would be consistent with the intentions and expectations of the shareholders who might vote for this Proposal. However, as explained further in the Delaware Counsel Opinion, the Company cannot lawfully become a PBC without identifying "one or more specific public benefits" in its certificate of incorporation, meaning that implementing the Proposal as it is written (i.e., without identifying any specific public benefits as is consistent with the Proposal) would mean that the Company would be violating the requirements of Section 362(a) of the DGCL.

Furthermore, as discussed at length in the Delaware Counsel Opinion, pursuant to §141(a) of the DGCL, corporations must be "managed by or under the direction of" a board of directors, who must act in the best interest of the corporation and its shareholders. Directors are subject to fiduciary duties, duties of care and loyalty, and are required to "exercise their managerial authority on an informed basis in the good faith pursuit of maximizing the value of the corporation for the benefit of its residual claimants, *viz.*, the stockholders." Virtus Capital L.P. v. Eastman Chem. Co., No. 9808-VCL, 2015 WL 580553, at *16 (Del. Ch. Feb. 11, 2015). To satisfy these duties, directors must take an active role throughout decision-making processes and make careful, informed decisions, including having enough information to make the required decision, devoting sufficient time to review such information, and obtaining the advice of experts, if useful. *See* Guth v. Loft, Inc., 23 Del.Ch. 255 [5 A.2d 503, 510] (1939); Aronson v. Lewis, 473 A.2d 805, 817 (Del. 1984); Krim v. ProNet, Inc*.,* 744 A.2d 523, 527 (Del. Chanc. Ct. 1999) (citing Guth 23 Del.Ch. 255); cited in Reliance Secs. Litig*.,* 91 F.Supp 2d 706, 732 (D. Del. 2000).

The Proposal does not condition the request for the Company to convert to a PBC on first running an analysis or preparing a report detailing the benefits and drawbacks of being a PBC to see if converting to such a structure would be in the best interest of the Company. Instead, the Proposal requests the Company's Board of Directors to amend the certificate of incorporation and bylaws to convert the Company to a PBC, regardless of whether such a decision is in the best interest of the Company and its shareholders. The Company and its Board of Directors has not yet had the opportunity to run any such analysis or retain any independent consultant to prepare any such report. To implement this Proposal without having done such due diligence and without regard to the results of any such diligence that is done—especially if a determination is made that the conversion to a PBC would *not* be in the best interests of the Company and its shareholders—would be a direct violation of our directors' fiduciary duties to the Company and a violation of well-established Delaware law. Thus, as explained further in the Delaware Counsel Opinion, the Company's Board of Directors cannot lawfully approve any

action, including converting the Company to a PBC, if it determines that such action would not be in the best interests of the Company and its shareholders.

Other shareholder proposals submitted to other companies have taken this critical first step to ensure that the board is acting in accordance with the duties it owes to the Company (e.g., Wells Fargo & Company received a shareholder proposal in 2020 requesting that their board "commission an independent study, utilizing outside experts, with a report and recommendations to shareholders by October 2020, to assess the feasibility of taking the necessary actions to become a Delaware Public Benefit Corporation…"). *Wells Fargo & Company* (Feb. 2, 2020). This Proposal does not take this first step to provide the Board of Directors with any flexibility to carry out its fiduciary duty and duty of care in implementing the Proposal, and instead would force the Board of Directors to act in violation of the DGCL and such duties owed to the Company if passed by shareholders. Because the Proposal demands that the directors act without regard to whether such action would actually be in the best interests of the Company and its shareholders, this Proposal, if implemented, would cause the Company and its Board of Directors to violate Delaware state law.

**D. Under Rule 14a-8(i)(7), the Proposal may be omitted because it concerns the Company's ordinary business operations.**

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business operations." The underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholder meeting." *Exchange Act Release No. 40018, Amendments to Rules on Shareholder Proposals*, [1998 Transfer Binder] *Fed. Sec. L. Rep. (CCH) ¶ 86,018, at 80,539* (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission described two "central considerations" for the ordinary business exclusion: 1) 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," and 2) the degree to which the proposal seeks to 'micromanage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *Id.* at 86,017-18 (footnote omitted).

The Staff has agreed in past no-action requests that a company's corporate structure, and making any changes to it, is a matter of ordinary business. In *The Goldman Sachs Group, Inc.* (Jan. 26, 2017), the Staff allowed the company to exclude a shareholder proposal that requested the company prepare and publish a study of the benefits and drawbacks of reorganizing as a bank holding company because the proposal related to the company's ordinary business operations. *See also The Reader's Digest Association Inc.* (Aug. 18, 1998) (allowing a company to exclude a shareholder proposal that requested the board of directors retain an investment bank to evaluate reorganization options, divestment of company assets, and any strategic acquisitions). The Proposal requires that the Company amend its certificate of incorporation, and if necessary, amend its bylaws to convert the Company from a for-profit Delaware corporation to a PBC. Corporate structures are chosen via informed decisions by

management, which take into account a variety of factors such as tax and liability implications, effects on talent searches and hiring decisions, requirements of various regulatory regimes and potential impacts of public perception, all of which are impacted by the various jurisdictions in which a company operates. Similar to Goldman Sachs and The Reader's Digest Association, this Proposal requests the Company reorganize the Company's corporate structure, an act that is a matter of ordinary business operations and should be left to management, with oversight from the Board of Directors, to consider and make decisions.

In the 1998 Release, the Commission determined that, "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. 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." Accordingly, the Staff has taken the view that proposals that affect a company's relationship with certain constituencies are excludable under Rule 14a-8(i)(7). For example:

- Vendors: *See Continental Airlines, Inc.* (Mar. 25, 2009) (permitting exclusion of a proposal requesting a policy on contract repair stations as relating to "decisions relating to vendor relationships"); *Foot Locker, Inc.* (Mar. 3, 2017) (allowing the company to exclude a proposal requesting a report outlining the steps the company was taking, or could take, to monitor the use of subcontractors by the company's overseas apparel suppliers).
- Employees: *See Walmart, Inc.* (Apr. 8, 2019) (allowing the company to exclude a proposal requesting a report evaluating discrimination risk from the company's policies and practices for hourly workers taking medical leave, noting that the proposal "relates generally to the [c]ompany's management of its workforce"); *Exxon Mobile Corporation* (Feb. 16, 2010) (excluding a proposal eliminating remuneration for any one of Management in an amount $500,000 per year, noting "[p]roposals that concern general employee compensation matters are generally excludable under rule 14a-8(i)(7)").
- Customers and Advertisers: *See Wal-Mart Stores, Inc. (Porter)* (Mar. 26, 2010) (agreeing that the Company can exclude a proposal to adopt a policy that all products and services of the company offered for sale by the company be made in the United States of America, with the Staff noting that "[p]roposals concerning the sale of particular products are generally excludable under rule 14a-8(i)(7)"). Here, the Proposal would impermissibly restrict the products and services the Company offers, advertising space and search functions, much like the proposal in Wal-Mart impermissibly restricted the products and services of Wal-Mart. *See also Ford Motor Co.* (Feb. 13. 2013) (allowing the company to exclude a proposal requesting removal of dealers that provided poor customer service, noting that "[p]roposals concerning customer relations are generally excludable under rule 14a-8(i)(7)").

Converting the Company to a PBC requires more than just amending the Company's certificate of incorporation to include some specified public benefit purposes. Such a change in corporate structure of the Company also necessitates large-scale and long-term

changes to the Company's business, finance, human resource and human capital management, research and development ("R&D"), controls and numerous other functions to ensure compliance with the Company's public benefit purpose(s) as a PBC. To name a few examples:

- The Company would be forced to reevaluate and possibly renegotiate the terms of its contracts with vendors, employees, customers, and advertisers. For example, the Company would need to review all of its business relationships, contracts and arrangements with third parties to determine whether any could conflict with the specific public benefit purposes of the Company. If any are found, the Company may need to renegotiate or terminate its relationship with such third party if an alignment with the Company's public benefit purposes cannot be achieved.
- The Company may need to limit Search, Youtube, Maps, Cloud, Gmail and other products and services and restrict certain users' use of such products and services, if such products and services were being used for purposes that conflict with the Company's public benefit purposes. Such restrictions would negatively impact the Company's customers and overall business operations, as well as the Company's short- and long-term profitability.
- Any such restrictions discussed above are also antithetical to the ethos of the Company as it currently stands, and the Company's ethos and culture of information sharing and transparency is one of the draws and competitive advantages for hiring and retaining talent. If this ethos and culture changes into one that employees do not connect with or appreciate, then they may decide to leave and join another Company, which would impact not just our hiring and retention but the quality of our R&D and products and services and the overall growth and development of our Company.
- The Company's shareholders will likely be negatively impacted in regards to their investment in the Company. The Supporting Statement is clear that, as a PBC, the Company's "directors must 'balance' interests of shareholders, stakeholders and specified benefits, allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run." The Company's current shareholders have enjoyed immense returns on the long-term value of our stock: the Company's stock price averaged around $250 per share back in 2010, and is now trading at approximately $1900 per share. The Proposal acknowledges that converting to a PBC will force the Company to act in ways that may "sacrifice return" for the Company's shareholders, which in turn may negatively impact both our current shareholder base and potential new investors.
- The Company would be forced to review and reevaluate its relationship with the Company's many subsidiaries and investment portfolio companies. Currently, because of the Company's for-profit model, the Company has the necessary cash on hand to invest in, acquire and support the growth of businesses that display great innovation and potential for life-changing and life-saving products and services, enabling them to continue to innovate and create even while not making much, if any, profit. If the corporate structure were changed, the Company may be forced to re-evaluate each of its existing

subsidiaries and investment portfolio companies and decide whether to retain, reorganize or dispose of them, which would alter the fundamental nature and identity of the Company as it currently stands.

- The Company currently leads numerous environmental and social projects and initiatives to promote sustainability and support communities and underserved groups around the world. Some of these may not be covered under an identified specific public benefit purpose if the Company converts to a PBC, and the conversion may significantly impact the Company's available surplus capital to fund the amount of these kinds of projects, even if they do fall within the confines of the specified public benefit purposes. The impact on the Company's available surplus capital would also require decisions to be made about how and where to allocate such capital—and such decisions could promote public benefit projects at the cost of the Company's growth and innovation in the R&D and products and services space, or vice versa.

None of these functions of the Company should be subject to shareholder oversight and control, as they are unique and complex in nature and require often confidential or highly sensitive and constantly developing information that shareholders would not know and judgment calls that shareholders are not well-positioned or qualified to make. Management considers many factors when deciding the best corporate structure and all of the related decisions that trickle down from any given corporate structure, and it is neither appropriate nor practicable to involve shareholders in such decision-making of everyday ordinary business operations. These are all areas that would directly and indirectly impact the Company's relationships with its vendors, business partners, employees, customers and other parties, and are reminiscent of those that the Staff has explicitly allowed for exclusion, as outlined above.

**E. The Proponents should not be given the opportunity to cure these defects by revising the Proposal, because any revisions required to cure these defects would not be minor, insubstantial changes.**

In addition to the reasons discussed in subsections A through D above in regards to why the Proposal should be excluded, the Proponents should not be given an opportunity to revise the Proposal, as any revisions needed to resolve these bases for exclusion would be substantial and material changes. The Company recognizes that the Staff has a "long-standing practice of issuing no-action responses that permit stockholders to make revisions that are minor in nature and do not alter the substance of the proposal." *Staff Legal Bulletin No. 14* (CF) (July 13, 2001) ("SLB No. 14"). However, this guidance in SLB No. 14 is meant for proposals that "generally comply with the substantive requirements of the rule, but contain some relatively minor defects that are easily corrected." That is not the case here. As discussed in this letter, the defects described in each basis for exclusion in subsections A through D above are neither minor in nature nor easily corrected with minor revisions.

Short of wholesale deleting the condition that the Company's Class B holders convert their shares and relinquish sufficient control of the Company such that at least 60% of voting control rests in non-Class B stock holders, there is no way to revise this condition such that the Company would have power and authority to control the investment decisions of its

shareholders without violating securities laws, as discussed in subsection A above. The Proposal is premised on this condition and treats it as a critical and necessary step for the PBC conversion to be effective, and removing this condition would require significant rewriting of both the Proposal and the Supporting Statement. Furthermore, the shareholder approval requirement is dictated by law under the DGCL but is also something that is not within the Company's power or authority to ensure it occurs. Any revision that could cure this defect would not be a minor change to the Proposal, given the nature of the requirement and the independent parties whose actions are required to implement it.

As outlined in subsection B above, the vagueness and "sweeping scope" of the definition of "public benefit" cannot be corrected by minor revisions that "do not alter the substance of the proposal." As discussed in subsection B above, the Proposal does not identify any specified public benefits and does not provide any relevant explanation or guidance on pinpointing public benefits. Any revisions addressing the vagueness and the lack of an essential element required by the DGCL would essentially create a new proposal that changes the nature of the requested change in corporate structure, and would also run the risk of further constituting "micromanaging" the Company.

Any revisions that could cure the violation of state law defect discussed in subsection C above would require submitting essentially a second proposal (e.g., one requesting an analysis or independent report to be done regarding the feasibility of converting the Company into a PBC and whether it would be in the Company's and its shareholders' best interests to do so). Any such or similar revisions would not only be impermissible under Rule 14a-8(c), which allows only one proposal to be submitted by each shareholder, but also constitute substantial and material rewriting of the Proposal.

As discussed in subsection D, the proposal requests for a change to the corporate structure, which is a fundamental decision that should be left to management, with oversight by the Board of Directors, as an ordinary business decision. Furthermore, such a change to the corporate structure necessitates broad-sweeping decisions and consequential actions at both Alphabet and at each of its subsidiaries, impacting the Company's business operations, financial performance, employees and other human capital resources, advertising and other business relationships, and current environmental, social and sustainability projects and initiatives, all of which is considered micromanagement of the Company. To revise the Proposal such that the ordinary business defect is cured would essentially require a rewriting of the entire Proposal into a new Proposal, which would not be a minor change contemplated by SLB No. 14 as permissible.

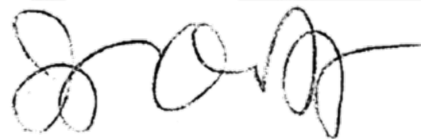
Any revision to the Proposal that would effectively correct any of the defects discussed herein would not constitute a "relatively minor" revision as contemplated by SLB No. 14. Therefore, corrective revisions are impermissible under the terms of SLB No. 14 and the Proposal should not be given the opportunity to be so revised.

* * * * * *

**Conclusion**

By copy of this letter, the Proponents are being notified that for the reasons set forth herein, the Company intends to omit the Proposal and Supporting Statement from its Proxy Statement. We respectfully request that the Staff confirm that it will not recommend any enforcement action if the Company omits the Proposal and Supporting Statement from its Proxy Statement. If we can be of assistance in this matter, please do not hesitate to call me.

Sincerely,



Jeffrey D. Karpf

Cc: John Chevedden, James McRitchie and Myra K. Young

Enclosures:

Exhibit A – Proponents' Proposal and Supporting Statement

Exhibit B – Delaware Counsel Opinion

**Exhibit A**

# Proponents' Proposal and Supporting Statement

9295 Yorkship Court
Elk Grove, CA 95758


REVISED 18 DEC 2020

Corporate Secretary
Alphabet Inc. (GOOGL)
1600 Amphitheatre Parkway
Mountain View CA 94043
PH: 650-253-0000
FX: 650-253-0001
Corporate Secretary <corporatesecretary@google.com>
<corporatesecretary@abc.xyz>

Dear Corporate Secretary,

We are submitting a shareholder proposal for a vote at the next annual shareholder meeting to request to **Increase Diversity of Director Nominees.**

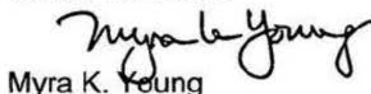
The proposal meets all Rule 14a-8 requirements, including the continuous ownership of the required stock value for over a year. We pledge to continue to hold stock until after the date of the next shareholder meeting. Our submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

This letter confirms that we are delegating John Chevedden to act as our agent regarding this Rule 14a-8 proposal, including its submission, negotiations and/or modification, and presentation at the forthcoming shareholder meeting. Please direct all future communications regarding our rule 14a-8 proposal to John Chevedden *** to facilitate prompt communication. Please identify me as the proponent of the proposal exclusively.

Your consideration and the consideration of the Board of Directors is appreciated in responding to this proposal. *We are open to negotiating possible changes to the proposal. We expect to forward a broker letter soon. Therefore, if you simply acknowledge my proposal in an email message to* *** *it may not be necessary for you to request such evidence of ownership.*

Sincerely,

James McRitchie — December 15, 2020
Date



Myra K. Young — December 15, 2020
Date

cc: Thu-An Pham <tapham@google.com>
PH: 650-253-1035
FX: 650-887-2552
Nancy Walker <nwalker@google.com>
Valentina Margulis <valya@google.com>

James McRitchie and Myra K. Young, CorpGov.net

[GOOGL: Rule 14a-8 Proposal December 18, 2020]
[This line and any line above it – *Not* for publication.]
Proposal 4* - Transition to Public Benefit Corporation

**RESOLVED: Shareholders request our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC"), contingent on Class B stockholders converting sufficient Class B shares to Class A or Class C to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares.**

SUPPORTING STATEMENT: Estimates state the Company has more than 4 billion users.[1] It has eight applications with more than one billion users.[2] This reach creates unique power, and power demands accountability. But our governance is structured to produce profits without accountability.

As a conventional corporation, the duties of Company directors emphasize shareholders, not stakeholders (except to the extent they create value for shareholders). In contrast, PBC directors must "balance" interests of shareholders, stakeholders, and specified benefits,[3] allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run.

This distinction is critical. The Company's capacity to link people around the globe provides potential to contribute to religious persecution,[4] put democracy at risk,[5] and undermine vaccination.[6] Threats to freedom, democratic principles, and public health could be prioritized at a PBC, even if it sacrifices return.

These threats matter to the vast majority of our diversified shareholders: as of September 2020, the top five holders of the Company's shares were mutual fund companies with indexed or otherwise broadly diversified portfolios. Diversified shareholders lose when companies harm the economy, because the value of diversified portfolios rises and falls with GDP.[7] While the Company may profit by ignoring costs it inflicts on society, its diversified shareholders ultimately internalize those costs. (They may also be personally at risk from them.)

Shareholders deserve an opportunity to vote on an amendment that will align our governance with shareholder interests and the global community in order to create meaningful accountability.

However, our multiclass structure, which vests control in individuals with wealth concentrated in our stock, could limit the efficacy of PBC status, because their concentrated ownership means they benefit when the company sacrifices social good for its own profit. Thus, the board resolution should provide that the

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[3] 8 Del C, §365.
[4] https://www.businessinsider.com/china-likely-laid-out-how-google-can-help-persecute-uighur-minority-2018-10
[5] https://www.thedailybeast.com/cheats/2016/11/16/google-ceo-fake-news-could-ve-swung-election
[6] https://www.thedailybeast.com/you-wont-believe-how-easy-it-is-to-buy-anti-vaxx-ads-on-google-and-twitter
[7] See *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors,* Appendix IV (demonstrating linear relationship between GDP and a diversified portfolio) available at https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; cf. https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).

amendment will only be effected if these individuals convert a number of high vote shares to low or no vote shares sufficient to provide meaningful accountability to diversified shareholders.

Vote to Transition to Public Benefit Corporation– Proposal [4*]

[This line and any below, *except for possible footnotes in the proposal*, are *not* for publication]
Number 4* to be assigned by Company

The graphic above is intended to be published with the rule 14a-8 proposal.
The graphic would be the same size as the largest management graphic (and accompanying bold or highlighted management text with a graphic) or any highlighted management executive summary used in conjunction with a management proposal or a rule 14a-8 shareholder proposal in the 2021 proxy.

The proponent is willing to discuss the in unison elimination of both shareholder graphic and management graphic in the proxy in regard to specific proposals.

Reference: SEC Staff Legal Bulletin No. 14I (CF)
[16] Companies should not minimize or otherwise diminish the appearance of a shareholder's graphic. For example, if the company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics. If a company's proxy statement appears in black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.

Notes: This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

> Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:
>
> - the company objects to factual assertions because they are not supported;
> - the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
> - the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
> - the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.
>
> **We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.**

See also Sun Microsystems, Inc. (July 21, 2005)

The stock supporting this proposal will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email ***

**Exhibit B**

# Delaware Counsel Opinion

Potter
Anderson
Corroon LLP

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P.O. Box 951
Wilmington, DE 19801- 0951
302 984 6000
www.potteranderson.com

February 1, 2021

Alphabet Inc.
1600 Amphitheatre Parkway
Mountain View, California 94043

Re: Stockholder Proposal Submitted by James McRitchie and Myra K. Young

Ladies and Gentlemen:

You have requested our opinion as to certain matters of Delaware law in connection with your request that the staff of the Securities and Exchange Commission (the "Commission") grant no-action relief to Alphabet Inc., a Delaware corporation ("Alphabet" or the "Company"), with respect to a stockholder proposal and a statement in support thereof (the "Proposal") submitted by James McRitchie and Myra K. Young on or about December 18, 2020. The proposal, if adopted would require the Board of Directors of Alphabet to takes steps necessary to amend the Amended and Restated Certificate of Incorporation of Alphabet (the "Charter") and, if necessary, the Amended and Restated Bylaws of Alphabet (the "Bylaws"), to convert Alphabet into a public benefit corporation (a "PBC"), contingent on the holders of Class B Common Stock (as defined in the Charter) converting sufficient shares of Class B Common Stock to shares of Class A Common Stock or Class C Capital Stock (as such terms are defined in the Charter) to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Common Stock. The Proposal is more fully set forth in the attached Exhibit A.

In connection with your request for our opinion, we have reviewed the following documents, all of which were supplied by the Company or were obtained from publicly available records: (i) the Amended and Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware on October 2, 2015; (ii) the Amended and Restated Bylaws of Alphabet, publicly filed by the Company on October 27, 2020; and (iii) the Proposal.

With respect to the foregoing documents, we have assumed (i) the authenticity of all documents submitted to us as originals and the conformity with authentic originals of all documents submitted to us as copies or forms, and (ii) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinions as expressed herein. For the purposes of rendering this opinion, we have conducted no independent factual investigation of our own, but have relied exclusively upon the documents listed above, the statements and information set forth therein and the additional matters related or assumed therein, all of which we have assumed to be true, complete and accurate in all material respects.

Based upon and subject to the foregoing, and upon such legal authorities as we have deemed relevant, and limited in all respects to matters of Delaware corporate law, for the reasons set forth below, it is our opinion that the Proposal, if adopted and implemented, would violate Delaware law.

**The Proposal**

The Proposal reads as follows:

> RESOLVED: Shareholders request our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC"), contingent on Class B stockholders converting sufficient Class B shares to Class A or Class C to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares.

**Discussion**

The Proposal requests that the Board of Directors of the Company (the "Board") take action to amend the Charter and, if necessary, the Bylaws, to convert Alphabet into a PBC. Pursuant a Subchapter XV of the General Corporation Law of the State of Delaware (the "DGCL"), a corporation may be organized as a "public benefit corporation," which is defined to mean a "for-profit corporation organized under and subject to the requirements of [the DGCL] that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner." 8 *Del. C.* § 362(a). Section 362(b) of the DGCL defines "public benefit" to mean "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." 8 *Del. C.* § 362(b).

To form a Delaware PBC or convert an existing Delaware corporation to a PBC through an amendment to the corporation's certificate of incorporation, the PBC's certificate of incorporation must, among other things, "identify within its statement of business or purpose … one or more specific public benefits to be promoted by the corporation[.]" 8 *Del. C.* § 362(a)(1). Thus, Section 362(a) of the DGCL requires a PBC to identify in its certificate of incorporation the *specific* public benefit or public benefits the corporation will promote. Critically, the specific public benefit or public benefits so identified in a PBC's certificate of incorporation informs the duties of a PBC's directors. Pursuant to Section 365(a) of the DGCL, a PBC's board of directors is required to manage or direct the business and affairs of the PBC in a manner that "balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and *the specific public benefit or public benefits identified in its certificate of incorporation.*" 8 *Del. C.* § 365(a) (emphasis added). Likewise, the public benefit or public benefits so identified in the PBC's certificate of incorporation is directly related to the PBC's obligation to provide to its stockholders certain periodic statements. Pursuant to Section 366 of the DGCL, a PBC is required to provide to its stockholders, no less than biennially, a statement "as to the corporation's promotion of the public benefit or public benefits *identified in the certificate of incorporation* and of the best interests of those materially affected by the corporation's conduct." 8 *Del. C.* § 366(b) (emphasis added).

The Proposal requests that the Board take steps necessary to, among other things, amend the Charter to "become a public benefit corporation." However, neither the Proposal nor the

supporting statement identify a *specific public benefit or public benefits* to be promoted by the Corporation – a critical requirement of the DGCL. As noted above, in order for a Delaware corporation to be organized as a PBC under Subchapter XV of the DGCL, the corporation's certificate of incorporation *must* identify one or more *specific* public benefits to be promoted by the corporation. The specific public benefit so identified therein will, in turn, inform the directors' duties in managing the PBC in a manner that complies with the balancing requirements set forth in Section 365(a) of the DGCL, as well as the PBC's obligation to provide periodic statements to its stockholders regarding the PBC's promotion of the identified public benefits in accordance with the requirements of Section 366 of the DGCL. If the Company were to implement the Proposal as drafted, the Company would be omitting from its certificate of incorporation a provision required by Delaware law, in violation of Section 362(a)(1) of the DGCL.

In addition to the foregoing, the Proposal is an improper attempt by stockholders to exercise management authority that is expressly reserved to the Board by the DGCL and the Charter and interferes with the discharge of the Board's fiduciary obligations. By requiring the Board to take steps to amend the Charter without giving the Board the discretion to evaluate whether it would be in the best interests of the Company and its stockholders to convert the Company to a PBC, the Proposal represents an improper attempt by stockholders to exercise management authority that is expressly reserved to the Board. Section 141(a) of the DGCL provides the board of directors of a Delaware corporation, and not the stockholders, with the express statutory authority to manage the business and affairs of the corporation. Absent an express provision in a corporation's certificate of incorporation to the contrary, "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors…" 8 *Del. C.* § 141(a). Consistent with this statutory delegation of authority, the Charter provides that "the business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors." Charter at Article VI, Section 1. Thus, the Board possesses the full power and authority to manage the business and affairs of the Company under Section 141(a) of the DGCL.

The principle that the directors, rather than the stockholders, manage the business and affairs of a Delaware corporation is a long-standing principle of Delaware law. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation."). As a result, the stockholders of a Delaware corporation cannot require the directors to make decisions on matters with respect to which authority is specifically conferred on the directors by statute or the certificate of incorporation, including adopting, amending or repealing certain provisions of the corporation's certificate of incorporation.

Likewise, stockholders cannot substantially limit a board's freedom to make decisions on matters of management policy. *See, e.g. Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957) (holding that a stockholders' agreement was invalid because it had the effect of restricting the ability of the directors to exercise their best judgment in making decisions on matters of management policy). Although stockholders may

agree to a course of action, they may not commit directors to proceed with such course of action as it may force the directors to vote contrary to their own best judgment and/or in a manner that would be inconsistent with the exercise of the directors' fiduciary duties. *Id.* at 900; *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 231 (Del. 2008) (finding a stockholder-proposed bylaw invalid because it would "violate the prohibition, which our decisions have derived from Section 141(a), against contractual arrangements that commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties").

If implemented, the Proposal could require the Board to take actions that violated their fiduciary duties of care and loyalty. In carrying out their obligation to manage a corporation's business and affairs, the directors of a Delaware corporation have an unyielding fiduciary duty to act in the best interests of the corporation and its stockholders. *See Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). That unyielding fiduciary duty includes a fiduciary duty of care and a fiduciary duty of loyalty. The duty of care obligates directors to inform themselves of all material information reasonably available to them before making a business decision and, having so informed themselves, to act with the requisite care in making such decision. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1075 (Del. Ch. 1985). The fiduciary duty of loyalty (including the obligation to act in good faith) requires, among other things, that corporate directors act in a manner they believe in good faith to be in the best interests of the corporation and its stockholders. *See Aronson*, 473 A.2d at 812; *Van Gorkom*, 488 A.2d at 872. In carrying out their fiduciary duties of care and loyalty, directors must determine in the exercise of their good faith business judgment whether a proposed course of action would or would not be in the best interests of the corporation. *See ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 103 (Del. Ch. 1999). *See also McAllister v. Kallop*, 1995 WL 462210, at *24 (Del. Ch. July 28, 1995) (holding that contract restricting exercise of fiduciary duties by limiting director's ability to make independent, good faith determination regarding appropriate corporate action is invalid), *aff'd*, 678 A.2d 526 (Del. 1996); *Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205 (Del. Ch. 1979) (holding that agreement by which board committed years in advance to fill particular board vacancy with certain named person, irrespective of circumstances that existed at time vacancy occurred, and thus effectively relinquishing duty of directors to exercise their best judgment on management matters, was unenforceable), *aff'd sub nom.*, *Harrison v. Chapin*, 415 A.2d 1068 (Del. 1980).

More recently, the Delaware Supreme Court found that a proposed bylaw committing a board of directors to a course of action that would preclude them from fully discharging their fiduciary obligations is a violation of Delaware law. *CA, Inc.*, 953 A.2d 227. In that case, a proposed bylaw would have required the board of directors to reimburse stockholders' expenses in connection with nominating candidates in a contested election of directors. The Supreme Court found that the bylaw would "prevent directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate." *Id.* at 239. Moreover, the Supreme Court emphasized, "the Bylaw mandate[d] reimbursement of election expenses in circumstances that a proper application of fiduciary principles *could* preclude." *Id.* at 240 (emphasis added). In reaching its conclusion, the Supreme Court noted that "the Bylaw contain[ed] no language or provision that would reserve to [the corporation's] directors their full power to exercise their fiduciary duty to decide whether or not it would be appropriate, in a specific case, to award reimbursement at all." *Id.* (citing *Malone v.*

*Brincat*, 772 A.2d 5, 10 (Del. 1998) ("Although the fiduciary duty of a Delaware director is unremitting, the exact course of conduct that must be charted to properly discharge that responsibility will change in the specific context of the action the director is taking with regard to either the corporation or its stockholders.")).

The Proposal would require the Board to act in an area committed to the business judgment of the Board by statute and case law – the decision whether to adopt and recommend an amendment to the Company's Charter. The conversion of the Company from a traditional corporation to a PBC would represent a radical transformation of the nature of the Company. The Proposal, if implemented, would improperly infringe upon the right and obligation of the Board to manage the business and affairs of the Company, and to act to propose the conversion of the Company to a PBC *only if* the directors believe that course of action to be in the best interests of the Company and its stockholders. Such a result, without affording the Board the opportunity to conduct an analysis of the costs and benefits of such a change or retain counsel to opine as to advantages and disadvantages of such a conversion would run afoul of the Board's fiduciary obligations and Delaware law.

Finally, we note that, to the extent that the Proposal seeks to require the Board to approve an amendment to the Charter to convert the Company to a PBC, the Proposal, if implemented, would violate Section 242(b) of the DGCL. Section 242(b) of the DGCL sets forth a two-step process to effect an amendment to a corporation's certificate of incorporation: first the Board must adopt a resolution setting forth the amendment proposed, declaring its advisability, and providing for its submission to stockholders. Second, after the Board acts, the stockholders entitled to vote thereon must approve the amendment by the vote of a majority of the outstanding stock. 8 *Del. C.* § 242(b)(1). Delaware case law emphasizes the importance that the courts attach to the strict two-part process: "it is significant that two discrete corporate events must occur, in precise sequence, to amend the certificate of incorporation under 8 *Del. C.* § 242.… The stockholders may not act without prior board action. Likewise, the board may not act unilaterally without stockholder approval." *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996). Moreover, and as noted above, Section 242(b) of the DGCL expressly requires that the board of directors declare the advisability of any amendment to a corporation's certificate of incorporation prior to submission thereof to its stockholders for approval. 8 *Del. C.* § 242(b)(1). If a board of directors does not, in the good faith exercise its business judgment, determine that an amendment is advisable, the amendment cannot be submitted to stockholders for approval. Consistent with the foregoing discussion regarding the infringement on the Alphabet directors' exercise of their fiduciary obligations, the Proposal seeks to require that the Board make a specific determination as to the advisability of the proposed amendment to the Charter, which determination is reserved by statute and applicable Delaware common law to the discretion of the Board.

Likewise, if the Proposal would require the Board to unilaterally approve an amendment to the Charter in violation of Delaware law, it is also our opinion that the Company does not have the power and authority to implement the Proposal. As noted above, the Board, acting alone, may not approve an amendment to the Charter "to become a public benefit corporation." Any such amendment first must be adopted and declared advisable by the Board and then submitted to the stockholders for their approval, which the Company cannot guarantee. This second step would effectively require intervening action on the part of independent third parties – a requisite number

of the Company's stockholders – over which the Company has no control. Under Delaware law, "[s]tockholders in Delaware corporations have a right to control and vote their shares in their own interest. They are limited only by any fiduciary duty owed to other stockholders. It is not objectionable that their motives may be for personal profit, or determined by whim or caprice, so long as they violate no duty owed other shareholders." *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987); *see also Williams*, 671 A.2d at 1380–81.

Further, to the extent that the Proposal seeks to require the Board to cause the conversion of outstanding shares of Class B Common Stock to shares of Class A Common Stock or Class C Capital Stock, the Proposal, if implemented, would violate Delaware law and the Company lacks the power and authority to implement the same. Section 151(e) of the DGCL provides as follows:

> Any stock of any class or of any series thereof may be made convertible into, or exchangeable for, at the option of either the holder or the corporation or upon the happening of a specified event, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation, at such price or prices or at such rate or rates of exchange and with such adjustments *as shall be stated in the certificate of incorporation* or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided.

8 *Del. C.* § 151(e) (emphasis added). Article IV, Section 2(f) of the Charter sets forth, among other things, the terms pursuant to which shares of Class B Common Stock may be converted into shares of Class A Common Stock. Subject to the terms of the Charter, shares of Class B Common Stock shall be converted into Class A Common Stock (i) at the option of the holder thereof, (ii) automatically upon the consummation of certain Transfers (as such term is defined in the Charter), and (iii) automatically upon the death of the applicable holder of Class B Common Stock. Charter at Article IV, Section 2(f)(ii-iv). The Charter does not permit the Company or the Board to unilaterally cause the holders of Class B Common Stock to convert such shares to Class A Common Stock or Class C Capital Stock.

This opinion is rendered solely for your benefit in connection with the foregoing and may not be relied upon by any other person or entity or be furnished or quoted to any person or entity for any purpose, without our prior written consent; provided that this opinion may be furnished to or filed with the Commission in connection with your no-action request relating to the Proposal.

Sincerely yours,

POTTER ANDERSON & CORROON LLP

# <u>Exhibit A</u>
## Proposal

# Corporate Governance

CorpGov.net: improving accountability through democratic corporate governance since 1995

9295 Yorkship Court
Elk Grove, CA 95758

Corporate Secretary
Alphabet Inc. (GOOGL)
1600 Amphitheatre Parkway
Mountain View CA 94043
PH: 650-253-0000
FX: 650-253-0001
Corporate Secretary <corporatesecretary@google.com>
<corporatesecretary@abc.xyz>

RECEIVED 18 DEC 2020

Dear Corporate Secretary,

We are submitting a shareholder proposal for a vote at the next annual shareholder meeting to request to **Increase Diversity of Director Nominees**.

The proposal meets all Rule 14a-8 requirements, including the continuous ownership of the required stock value for over a year. We pledge to continue to hold stock until after the date of the next shareholder meeting. Our submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

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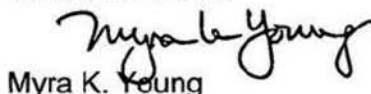
Sincerely,

James McRitchie

December 15, 2020
Date



Myra K. Young

December 15, 2020
Date

cc: Thu-An Pham <tapham@google.com>
PH: 650-253-1035
FX: 650-887-2552
Nancy Walker <nwalker@google.com>
Valentina Margulis <valya@google.com>

James McRitchie and Myra K. Young, CorpGov.net

[GOOGL: Rule 14a-8 Proposal December 18, 2020]
[This line and any line above it – *Not* for publication.]
Proposal 4* - Transition to Public Benefit Corporation

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SUPPORTING STATEMENT: Estimates state the Company has more than 4 billion users.[1] It has eight applications with more than one billion users.[2] This reach creates unique power, and power demands accountability. But our governance is structured to produce profits without accountability.

As a conventional corporation, the duties of Company directors emphasize shareholders, not stakeholders (except to the extent they create value for shareholders). In contrast, PBC directors must "balance" interests of shareholders, stakeholders, and specified benefits,[3] allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run.

This distinction is critical. The Company's capacity to link people around the globe provides potential to contribute to religious persecution,[4] put democracy at risk,[5] and undermine vaccination.[6] Threats to freedom, democratic principles, and public health could be prioritized at a PBC, even if it sacrifices return.

These threats matter to the vast majority of our diversified shareholders: as of September 2020, the top five holders of the Company's shares were mutual fund companies with indexed or otherwise broadly diversified portfolios. Diversified shareholders lose when companies harm the economy, because the value of diversified portfolios rises and falls with GDP.[7] While the Company may profit by ignoring costs it inflicts on society, its diversified shareholders ultimately internalize those costs. (They may also be personally at risk from them.)

Shareholders deserve an opportunity to vote on an amendment that will align our governance with shareholder interests and the global community in order to create meaningful accountability.

However, our multiclass structure, which vests control in individuals with wealth concentrated in our stock, could limit the efficacy of PBC status, because their concentrated ownership means they benefit when the company sacrifices social good for its own profit. Thus, the board resolution should provide that the

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[4] https://www.businessinsider.com/china-likely-laid-out-how-google-can-help-persecute-uighur-minority-2018-10
[5] https://www.thedailybeast.com/cheats/2016/11/16/google-ceo-fake-news-could-ve-swung-election
[6] https://www.thedailybeast.com/you-wont-believe-how-easy-it-is-to-buy-anti-vaxx-ads-on-google-and-twitter
[7] See *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors*, Appendix IV (demonstrating linear relationship between GDP and a diversified portfolio) available at https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; cf. https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).

amendment will only be effected if these individuals convert a number of high vote shares to low or no vote shares sufficient to provide meaningful accountability to diversified shareholders.

Vote to Transition to Public Benefit Corporation– Proposal [4*]

[This line and any below, *except for possible footnotes in the proposal*, are *not* for publication]
Number 4* to be assigned by Company

The graphic above is intended to be published with the rule 14a-8 proposal.
The graphic would be the same size as the largest management graphic (and accompanying bold or highlighted management text with a graphic) or any highlighted management executive summary used in conjunction with a management proposal or a rule 14a-8 shareholder proposal in the 2021 proxy.

The proponent is willing to discuss the in unison elimination of both shareholder graphic and management graphic in the proxy in regard to specific proposals.

Reference: SEC Staff Legal Bulletin No. 14I (CF)
[16] Companies should not minimize or otherwise diminish the appearance of a shareholder's graphic. For example, if the company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics. If a company's proxy statement appears in black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.

Notes: This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

> Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:
>
> - the company objects to factual assertions because they are not supported;
> - the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
> - the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
> - the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.
>
> **We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.**

See also Sun Microsystems, Inc. (July 21, 2005)

The stock supporting this proposal will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email ***