



February 19, 2021

Via email: shareholderproposals@sec.gov

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 1

Ladies and Gentlemen,

This correspondence is in response to the letter of Michael Kaplan on behalf of Facebook, Inc. (the “Company”) dated February 12, 2021 (the “supplemental no-action request”), supplementing its request that your office (the “Commission” or “Staff”) take no action if the Company omits our Shareholder Proposal (the “Proposal”) from its 2021 proxy materials for its 2021 annual shareholder meeting.

RESPONSE TO FACEBOOK’S SUPPLEMENTAL CLAIMS

The Company’s supplemental no-action request merely supplements the fatal weaknesses of its arguments for exclusion.

I. *The Company Has Tortured Its “Secret Referendum” Argument Into Incoherent Absurdity.*

The Company first labels *The Walt Disney Company* (Dec. 23, 2020) and *Starbucks Corp.* (Dec. 23, 2020) the “Precedent Proposals,” as though ascription could make it so. But then it immediately must acknowledge the germane point: that in every particular relevant to the current inquiry – the text of our Proposal, and, the Company specially insists, the web-address-

only footnotes – our Proposal is materially different than the proposals in *Walt Disney* and *Starbucks*, and is different because we made changes to our Proposal in specific response to the objections raised in the *Walt Disney* and *Starbucks* proceedings. So yes, those decisions are precedent, but only as negative precedent – to illustrate objections that could be raised in those proceedings but that are unavailable to the Company in this one.

The Company's follow-up argument implicitly recognizes this by what information it provides, and excludes, and the assertions that it quietly abandons. Once again, the Company directs the Staff's attention to the footnotes of our Proposal, focusing on the titles of some of the stories to which those footnotes link, but failing to consider the content of those stories. It now appears, then, that the Company's theory of shareholder-voter textual exegesis runs like this: shareholders, when reviewing our Proposal, will click on the links in the footnotes so far as to read the headlines of the linked stories (or some of them, anyway, but not all), but they will resolutely refuse to read the stories themselves. And the Company's theory of shareholder-voter divination is that from those polyglot headlines, the shareholder-voters will divine an attitude of ours toward certain specific charities or a delimited and coherent category of charities so nuanced and pronounced as to render an otherwise neutral and evenhanded text instead a referendum on the specific giving that we have covertly identified for shareholder-voters through our intricate headline-semaphore system.

These Company theories are of course ludicrous. Even if we accept and the Staff accepts, *arguendo*, that shareholder-voters attend carefully to the stories linked in the footnotes rather than just remembering that there were, in fact, disturbances in the summer of 2020, we must posit that the shareholder-voters then read the stories, rather than intently analyzing (some of) the headlines alone in search of deep and runic messages while eschewing any engagement with the stories' texts. But whether our suppositional shareholder-voters read only the headlines or the whole stories, what they will find is that there is deep and widespread disagreement about what those disturbances were about and what various groups involved in those disturbances sought and seek. The majority of the American people disagree that the disturbances simply sought "justice," the category to which the Company pretends we're opposed, and so do the groups involved in the disturbances themselves. There is no way to read the stories linked to in our footnotes and conclude that (1) our Proposal is "really" about one charity or one coherently definable subset of charities, and that (2) our Proposal means to set up a referendum about funding that single charity or one coherently definable subset of charities.

In fact, the whole root and core of our Proposal are that shareholders need specific information, to be provided in the report sought by our Proposal, about the charities to which the Company provides support – *all* of the charities, without focus or limit – and any oversight that attends such support, if any, explicitly *because* there is such confusion and disagreement about what some charities, of all sorts, do and whether those things are good or bad. This confusion and disagreement – especially if the confusion lies with the Company, and the disagreement with shareholders and other stakeholders, or *between* the Company's management and its owners (the shareholders) and other stakeholders – carries significant financial and reputational risk, rendering our Proposal not only appropriate, but vital.

The incoherence of the Company's theories, and of its assertions that *Walt Disney* and *Starbucks* are still relevant precedents in its favor, is illustrated by the claims that it has necessarily abandoned in this proceeding. As we pointed out in our reply to the Company's No-Action Request, the claims made by the companies in *Walt Disney* and *Starbucks* were that that we had specifically, through our footnote selection, targeted the Black Lives Matter organization. We explained that we had not, but we also changed both the text of our Proposal to Facebook here *and* the footnotes we had included to make that absence of secret focus indisputable. This left the Company to argue in its No-Action Request that our Proposal to it was secretly a referendum (secret referenda being a baffling but necessary concomitant of the Company's position in this proceeding) on giving to a subset of organizations sometimes identified by the Company as racial justice organizations and sometimes as social justice organizations but, at all events, definitely interested in justice. We pointed out that all charities believe – or at least assert – that their work is for justice, and so accusing us of establishing a secret referendum on the propriety of the Company supporting a coherent subset of charities, the subset being those that assert that their work is in the advancement of justice, is incoherent. It is, in fact, incoherence on stilts of gibberish.

The Company's final retrenchment in its Supplemental No-Action Request implicitly recognizes this analysis. All that the Company can manage in this latest letter is an assertion that “there is no question that the Proposal is intended to create a referendum on charitable donations to particular types of causes as the Proposal addresses specific forms of ‘controversies.’”¹ But that doesn't mean anything at all. The Company can't even come up with any label for the subset of charities about which we are supposedly secretly but definitively setting up a referendum. This is because we're not, even if such a thing were possible.

II. *By the Company's Own Insistent Standards, and Because It Made No Arguments on Micromanagement Grounds, AT&T, Inc. Is Irrelevant in Three Different Ways.*

The Company makes fleeting reference to *AT&T, Inc.* (Jan. 15, 2021), claiming that in that proceeding the Staff permitted exclusion of the “same shareholder proposal” which is “identical

¹ Letter from Michael Kaplan to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission 2 (Feb. 12, 2021). The Company follows up this empty sentence with intentional misdirection. It states that “the footnotes do not make reference to a ‘variety’ or a ‘wide array’ of organizations or causes that the Company supports.” *Id.* This is persiflage. The articles linked to in the footnotes do, in aggregate, make specific and explicit reference to very many charities indeed, of all different sorts. These references shatter the notion that our Proposal is somehow a secret referendum on a specific charity (the claim made in *Walt Disney* and *Starbucks*), and – as the Company itself belatedly realized – even the weaker claim that we are targeting any specific, coherently definable subset of charities. The Company crafts its assertion – that there are not references in the footnotes to “organizations or causes *that the Company supports*,” a claim we never made – in order to permit it to pretend that an irrelevant assertion in response to nothing is in fact a relevant contradiction of an assertion that we had made, and on which we had placed weight.

to [our] Proposal” in this proceeding. But this assertion utterly belies the immediately preceding assertion by the Company about the centrality of footnotes to the integrated text of a proposal and the very specific and deep-but-highly-limited way in which shareholder-voters interrogate those footnotes (or, rather, the headlines of some stories linked to in footnotes, but under no circumstances the stories themselves). The footnotes in our proposal to AT&T are very different than those in our Proposal at issue here, in exactly the ways we’ve repeatedly explained in this proceeding. Under the Company’s own theory, then, the result in *AT&T, Inc.* is irrelevant. What we’re left with is a Company that’s playing an *Alice in Wonderland* meets Calvinball game in which text and footnotes are to be used, when they wish, in exactly the way necessary for them to make out even the phantom of an argument, but no other; and in other circumstances used in entirely different ways in aid of the same goal.

Meanwhile, the Company fails to note another vital difference between the *AT&T, Inc.* proposal and our Proposal here. We changed the parameters of the report sought by our Proposal to make it even clearer that we sought in no way to micromanage Facebook with our Proposal, thus aligning our Proposal even more indisputably with the proposals found non-excludable in *Wells Fargo & Co.* (avail. Feb. 19, 2010) and *McDonald’s Corporation* (avail. Feb. 28, 2017). But, at all events, the Company in this proceeding has made no argument that our Proposal here might constitute micromanagement, no doubt recognizing that that argument would be even weaker than is its “secret-but-certain-and-definite-even-though-not-definable referendum” argument. So if *AT&T, Inc.* was decided on micromanagement rather than “referendum” grounds – which neither we nor the Company can know, because the Staff didn’t specify – its precedent is doubly irrelevant to this proceeding.

Conclusion

For the above reasons, as well as the reasons supplied in our no-action reply, we urge the Staff to find that our Proposal may not be omitted under Rule 14a-8(i)(7).

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

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

Office of the Chief Counsel
Division of Corporation Finance
February 19, 2021
Page 5

Staff does not concur with our position, we would appreciate an opportunity to confer with the Staff concerning this matter prior to the determination of the Staff's final position.

Sincerely,

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

Scott Andrew Shepard

cc: Michael Kaplan (michael.kaplan@davispolk.com)
Justin Danhof, National Center for Public Policy Research



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February 12, 2021

Re: Response Letter on the stockholder proposal of National Center for Public Policy Research Pursuant to Rule 14a-8 of the Securities Exchange Act of 1934

U.S. Securities and Exchange Commission
Office of Chief Counsel
Division of Corporation Finance
100 F. Street, N.E.
Washington, D.C. 20549
Via email: shareholderproposals@sec.gov

Dear Sir or Madam:

On behalf of Facebook, Inc., a Delaware corporation (the “**Company**” or “**Facebook**”), we are writing in response to the letter from the National Center for Public Policy Research dated February 4, 2021 (the “**Proponent Letter**”), regarding Facebook’s no-action letter dated January 11, 2021 (the “**No-Action Letter**”) with respect to the Proposal submitted by the Proponent for inclusion in the 2021 Proxy Statement. Terms used herein and not defined are used as defined in the No-Action Letter.

As the Proponent Letter makes clear, the Proposal is only different from the shareholder proposals submitted to *The Walt Disney Company* (Dec. 23, 2020) and *Starbucks Corp.* (Dec. 23, 2020) (the “**Precedent Proposals**”) in the elimination of a specific reference in the Precedent Proposals to specific charitable contributions made by those companies to causes to support social justice or organizations that promote equity. Instead of making a similar explicit reference in the supporting statement of the Proposal, the Proposal contains links to the following articles to evidence that the “political and social events which triggered [Facebook’s charitable] commitments are potentially highly divisive,” and have the “significant potential for misapplication of well-intentioned contributions to activities fraught with risk”:

- “Portland’s anarchists say they support racial justice. Black activists want nothing to do with them.” *Los Angeles Times*, 26 November 2020.
- “F***Thanksgiving!': Antifa Topples Statues of George Washington Veterans to Flight 'Colonization'.” *PJ Media*, 28 November 2020.

- “AP-NORC poll: Support for racial injustice protests declines.” *AP News*, 24 September 2020.
- “NFL’s Social Justice Experiment is No Touchdown.” *Real Clear Politics*, 22 September 2020.
- “Silent Majority: Poll Shows American Voters Support Use of Military, National Guard in Riots.” *BrietBart*, 2 June 2020.

The Staff has made clear that the information contained on websites that are referenced in shareholder proposals are part of the proposal (*Staff Legal Bulletin 14G* (October 2012)). As a result, the above-referenced articles should be read as included in the supporting statement of the Proposal. Given the nature of the articles, there is no question that the Proposal is intended to create a referendum on charitable donations to particular types of causes as the Proposal addresses specific forms of “controversies.” The Proposal is not “neutral,” “reserved” or in fact “understated” as the Proponent Letter claims, and the footnotes do not make reference to a “variety” or a “wide array” of organizations or causes that the Company supports.

In addition, the Proponent Letter fails to mention that the Staff recently permitted the exclusion of the same shareholder proposal to *AT&T Inc.* (January 15, 2021). The proposal in AT&T is identical to the Proposal, also without an explicit reference to a specific form of corporate support but with the intent of the proposal targeting specific forms of corporate contributions unambiguous from the website references in the footnotes to the supporting statement that contain articles with similar subject matters as the Proposal.

The Company respectfully requests the Staff’s concurrence with its decision to omit the Proposal from the 2021 Proxy Materials and further requests confirmation that the Staff will not recommend any enforcement action if it so omits the Proposal. Please call the undersigned at (212) 450-4111 if you should have any questions or need additional information or as soon as a Staff response is available.

Respectfully yours,



Michael Kaplan

cc: Justin Danhof, Esq., General Counsel, National Center for Public Policy Research
David Kling, Vice President, Deputy General Counsel and Secretary,
Facebook, Inc.



February 4, 2021

Via email: shareholderproposals@sec.gov

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 1

Ladies and Gentlemen,

This correspondence is in response to the letter of Michael Kaplan on behalf of Facebook, Inc. (the “Company”) dated January 11, 2021, requesting that your office (the “Commission” or “Staff”) take no action if the Company omits our Shareholder Proposal (the “Proposal”) from its 2021 proxy materials for its 2021 annual shareholder meeting.

RESPONSE TO FACEBOOK’S CLAIMS

Our Proposal asks the Board of Directors to prepare a report “at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions made or committed during the prior year.”¹ The Proposal was both facially and materially neutral, applying to all charitable contributions without distinction as to subject matter or anything else.

The Company seeks to exclude this proposal pursuant to Rule 14a-8(i)(7), under which “a shareholder proposal may be excluded from a company’s proxy materials if the proposal ‘deals with matters relating to the company’s ordinary business operations.’ The purpose of the ordinary business exclusion is ‘to confine the resolution of ordinary business problems to

¹ Attachment A (Free Enterprise Project – Proposal, CHARITABLE GIVING REPORT (2020)).

management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.”² The Company noted that “[t]he ordinary business exclusion is based on two central considerations.”³ It is to exclude proposals that apply to “[c]ertain tasks [that] are so fundamental to management’s ability to run a company on a day-to-day basis’ that they are not proper subjects for shareholder proposals,” and “proposal[s that] seek[] to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders ... would not be in a position to make an informed judgment.”⁴

The Company failed, in its response, to address the precedent on which we explicitly relied in fashioning our Proposal, precedent that we were generous enough to provide in our Proposal itself.⁵ That precedent establishes that when proposals to require charitable-contribution reporting are neutrally drawn and not intended to create a “referendum on donations to particular charities or types of charities,” *McDonald’s Corporation* (avail. Feb. 28, 2017), they are non-excludable. Our proposal is wholly neutral in application and, as the text demonstrates, mentions current controversies solely for the purpose of establishing the importance and saliency of charitable-giving concerns this year. As we explained in our Proposal, our concerns were triggered by the significant increases in charitable giving made by the Company and others over the course of the summer. We recognized that the events that occasioned the giving raised contentious and disputed issues. This in turn raised in us a concern about the risks that the Company runs in making charitable contributions that might redound to the ultimate injury of the firm’s reputation, standing, and financial prospects unless carefully made and overseen. We thought that shareholders would agree with us that instructing the Board to report on its giving and monitoring efforts would ensure all parties that due care was being taken, while simultaneously also spurring relevant actors in the Company to take that due care. Our explanation of the triggers that led us to make the Proposal was not grandiose or overblown – not designed to make the proposal a referendum on anything – but instead reserved and understated, the least necessary to justify and explain our Proposal. All of this renders our Proposal easily within the bounds of acceptable proposals established by precedent.

Instead, the Company relies on the Staff’s decisions in *The Walt Disney Company* (Dec. 23, 2020) and in *Starbucks Corp.* (Dec. 23, 2020).⁶ But this reliance is misplaced. Contrary to the Company’s claims, our Proposal in this proceeding is not “nearly identical” to the proposals we submitted in those two proceedings. Rather, having received the decisions in those proceedings, we revised the language of our Proposal here to completely eliminate any references that could even be construed as relating to any specific charities or causes, while including a set of

² Letter from Michael Kaplan to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission 3 (Jan. 11, 2020) (*quoting* Release No. 34-40018 (May 21, 1998)) (“No-Action Request”).

³ *Id.*

⁴ *Id.*

⁵ See Attachment A (Free Enterprise Project – Proposal, CHARITABLE GIVING REPORT (2020)).

⁶ See No-Action Request, *supra* note 2, at 4.

footnotes that makes references to a variety of organizations, to concerns arising from charitable-giving triggers in 2020, and to conflicting interpretations and understandings of those events and the motivations of those involved to make it even clearer that we are in no way focusing on any single organization or type of organization. Our Proposal here is materially different than the two previous proposals in *exactly the way* objected to by the companies in those proceedings – which is the functional opposite of being “nearly identical” to them.

The material changes that we made to our Proposal for submission in this proceeding make it even clearer that we have demonstrated at least as much neutrality as was evinced in *McDonald’s*, and render *Disney* and *Starbucks* inapposite here. We therefore trust that the Staff will find our Proposal non-excludable.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden. Our Proposal is neutral in application and modest in its establishment of the context in which it is proposed. Clear Staff precedent establishes that our Proposal is non-excludable.

Analysis

Part I. Rule 14-8(i)(7) & Relevant Precedent.

Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal if the proposal “deals with a matter relating 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 shareholders meeting.” SEC Release No. 34-40018 (May 21, 1998) (the “1998 Release”).

As set out in the 1998 Release, there are two “central considerations” underlying the ordinary business exclusion. One consideration is that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.” The other consideration is that a proposal should not “seek[] to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”

In its decision letter in *Wells Fargo & Co.* (avail. Feb. 19, 2010), the Staff explained that “we note that the proposal[s that] relate[] to charitable contributions ... involve a matter of corporate policy which is extraordinary in nature and beyond the company’s ordinary business operations. Moreover, in our view, the proposal does not pertain to specific types of organizations,” and so was not excludable under Rule 14a-8(i)(7). That decision also, *sub silentio*, necessarily established the proposition, contested by Wells Fargo in that proceeding, that merely requiring

reporting about charitable contributions does not constitute micromanagement of the company by shareholders.

Part II. Our Proposal Is Materially Different than the Proposals We Submitted in Starbucks and Disney in Direct Response to the Objections Raised in Those Proceedings.

Our Proposal is neutral in its application. Full stop. It would require reporting about all charitable contributions, without distinction.

In order to elide and obscure this basic fact, the Company asserts that the unquestionable neutrality of the proposal is eviscerated because

[t]he Proposal, read together with the Supporting Statement and the Supporting Statement's footnotes, does not have a general and neutral objective with regard to the specific recipients of the Company's charitable contributions. Instead, it is seemingly directed at contributions to specific organizations that support particular racial justice movements, most prominently, the Black Lives Matter movement ("BLM").⁷

This assertion is covertly cribbed from the company no-action request letter submitted in the *Starbucks* proceeding. But it is also materially different from the *Starbucks* assertion in revealing and dispositive ways. In *Starbucks*, the company argued that

The Proposal, read together with the Supporting Statement and the Supporting Statement's footnotes, does not have a general objective. Instead, it clearly seeks to prevent the Company from contributing to organizations that support a particular movement to which the Proponent is opposed: BLM.⁸

The Company was obliged to revise the *Starbucks* claim rather than lifting it *in toto* because our Proposal here is materially different than the one we submitted in *Starbucks*. The Staff's recently enacted refusal to explain, in the overwhelming majority of proceedings, anything about the grounds on which it permits or excludes proposals of course made it impossible to know for sure what caused the Staff to find our proposal in the *Starbucks* proceeding excludable. But in response to the possibility that – despite having made our proposal there completely neutral in application, and despite making no reference anywhere in the proposal to any charitable organization or type of organizations – the Staff had excluded our proposal because it still viewed the proposal as somehow evocative, we revised our Proposal, as submitted to the Company in this proceeding, to make it wholly immune from any such imputations.

⁷ No-Action Request, *supra* note 2, at 3-4.

⁸ Letter from David Lopez to Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission 8 (Nov. 3, 2020) (*quoting* Release No. 34-40018 (May 21, 1998)) ("*Starbucks* No-Action Request").

In *Starbucks*, the supporting statement of our proposal read:

The need for reporting has grown acute in this shareholder season. Many contributions seem unlikely to raise material concerns. In recent months, however, the Company has made significant charitable commitments in response to political and social events, commitments that are highly divisive, not apparently successful in quelling rioter hate, and carry with them significant potential for misapplication to activities very risky to the Company's reputation. The Company's commitment to potentially problematic contributions remains vague: it has, for example, pledged \$1 million in contributions to unspecified organizations to promote "equity," an opaque term often suggesting radical and divisive commitments, in unspecified ways. It is therefore vital that the Company monitor carefully, and report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.⁹

In *Disney*, the supporting statement of our proposal read:

The need for such reporting has grown acute in this shareholder season. Many contributions seem unlikely to raise any material concerns. In recent months, however, the Company has made significant charitable commitments in response to political and social events, commitments that have proven highly divisive and carry with them significant potential for misapplication to activities fraught with risk to the Company's reputation. The Company's commitment to potentially problematic contributions remains vague: while it has pledged \$2 million to the NAACP, for example, it has pledged \$3 million more in matching funds to unspecified organizations to support "social justice," an opaque term, in unspecified ways. It is therefore vital that the Company monitor carefully, and report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.¹⁰

By contrast, in this proceeding, the supporting statement of our Proposal reads:

The need for such reporting has grown particularly acute in this shareholder season. Many corporations, including the Company, have committed to making significant charitable contributions in recent months. The political and social events which triggered these commitments are potentially highly divisive, and carry with them significant potential for misapplication of well-intentioned contributions to activities fraught with risk to the Company's reputation. It has therefore become

⁹ Attachment B (Free Enterprise Project – Proposal, CHARITABLE GIVING REPORT (2020) as submitted in the *Starbucks* proceeding) (citations omitted but discussed in detail *infra*).

¹⁰ Attachment C (Free Enterprise Project – Proposal, CHARITABLE GIVING REPORT (2020) as submitted in the *Disney* proceeding) (citations omitted but discussed in detail *infra*).

more important than ever for corporations, and for Company specifically, to monitor carefully, and to report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.¹¹

The Company, then, is quite incorrect to assert that our Proposal in this proceeding is “nearly identical” to those submitted in *Starbucks* and *Disney*. Rather, in the text of our Proposal to the Company we stripped out every stray reference to anything other than the events that caused us to seek the report raised by our Proposal, and we alluded to those events and to the concerns about potential risks from incautious charitable contributions that arose in the wake of those events in the most diffuse and circuitous manner possible. As will be discussed below, precedent unquestionably establishes that shareholder petitioners may ask companies to account for their charitable contribution spending and may in their proposals explain briefly the causes that impelled them to submit their proposals. We could hardly have done so in a way more completely calculated *not* to set up a “referendum” on charitable giving of a certain type, which is the ground upon which such proposals are omissible (as discussed in Part III).

Meanwhile, because in *Starbucks* and *Disney* the companies argued stridently that the footnotes we included in our proposals to them were vital in “giving away the game” about our supposed secret, unexpressed and yet somehow entirely manifest “real” intentions in submitting our proposals,¹² we materially and substantially changed our footnotes as well. Of course, we argued then, and continue to argue here, that there is no evidence – certainly neither the Company here nor *Starbucks* nor *Disney* provided any – or other independent reason to believe that shareholders voting on shareholder-submitted proposals ransack the footnotes of those proposals to conduct textual exegeses of the sort that would be necessary to glean secret-but-vital meanings from them. But even if they do act that way, they cannot possibly, in this proceeding, come to the conclusion that the Company assigns as the “real” import of our footnotes.

The Company’s assertion that our Proposal is “nearly identical” to the one submitted in *Starbucks* includes the footnotes in that assertion.¹³ In that proceeding, the company claimed that

the footnotes in the Supporting Statement all lead to webpages with articles or releases describing recent protests in connection with BLM, the damage done to certain of the Company’s physical locations in such protests and the Company’s charitable contributions to “promote racial equity and create more inclusive and just communities.” The Proposal, when read in conjunction with the accompanying Supporting Statement and its footnotes ... plainly seeks to limit the Company’s

¹¹ Attachment A (Free Enterprise Project – Proposal, CHARITABLE GIVING REPORT (2020)) (citations omitted but discussed in detail *infra*).

¹² See, e.g., *Starbucks* No-Action Request, *supra* note 8, at 4-5 (“[t]he Proposal is distinguishable from the Wells Fargo 2010 Proposal and the McDonalds Proposal in that the Supporting Statement and its footnotes are very pointedly negative about one specific cause, BLM, for no apparent reason other than the Proponent being opposed to such cause.”).

¹³ See No-Action Request, *supra* note 2, at 4.

charitable contributions only with respect to BLM, a movement that is not supported by the Proponent.¹⁴

Nothing similar can be claimed about the footnotes included in our Proposal in this proceeding. Rather, the news articles cited in those stories do mention BLM, but they mention a wide array of different organizations as well. The Company attempts to paper over this difference by asserting that our Proposal targets “BLM and other racial justice movements.”¹⁵ But this assertion is not supported, and it is belied, in a story cited in our footnotes, *by BLM itself*, whose members note that not all of the organizations and those involved in the summer’s events are seeking social and racial justice as BLM defines it.

The stories cited in the footnotes also underscore the divergence of opinions within the American public about what constitutes “racial and social justice,” and who is demonstrating it. This renders inherently problematic and unstable the Company’s highly contested and contestable claim that all of the organizations mentioned in the stories cited in the footnotes are in some objectively determinable way supporting social-justice movements of a unique and discernable type. We certainly never made such a claim. And at bottom the claim is both empty and defeated by well-established Staff precedent. *All* charities are doing – or at least are claiming to be doing – social justice as they see it. “The Unified Charity to Achieve Injustice and Evil” has seldom been encountered. So if just saying “the proponent can be excluded because the charitable donations which it asks us to report are to charities that claim to involve themselves in achieving justice, so that the proponent’s proposal targets that class of organizations self-reportedly interested in doing justice,” then no charitable-giving proposals would ever have been permitted. But precedent makes clear that the Staff has rightly rejected this absurd reinterpretation of “all charities” to be “a specific class or type of charities.”

We stripped out of our Proposal in this proceeding any language other than the barest and most opaque necessary to provide any explanation at all of what raised our concerns. We then included a series of footnotes that established our claims that there were events in the summer of 2020 that resulted in significant giving. We made sure not even accidentally to select sources that could be construed as focusing on BLM. We included sources that pointed to significant disagreement both among activist actors and within the public at large about how to understand the summer’s events and the purposes and goals of the people and groups involved in them and responding to them. In order for the Company’s argument to succeed, the Staff would need to accept not only that shareholders go spelunking through the footnotes to tease out hidden meanings, but that they teased out in this instance the single, specific meaning that the Company has divined from those footnotes, but that is certainly not a compelled, compelling or obvious one – not even to the Company itself, which can do no better than to posit that our Proposal “is *seemingly* directed at contributions to specific organizations that support particular racial justice movements.”¹⁶ Of course, the Company’s interpretation is motivated by its desire to exclude our

¹⁴ *Starbucks* No-Action Request, *supra* note 8, at 8.

¹⁵ No-Action Request, *supra* note 2, at 4.

¹⁶ *Id.* (emphasis supplied).

Proposal, which is no doubt why it concludes that it “seems” that our Proposal does the thing that it needs to do in order to make it excludable. But a disinterested and objective reader has no reason whatever to follow the Company to such lengths to reach such a tendentious conclusion.

Precedent unquestionably establishes, as discussed in the next section, that proponents may include in their proposals some information about what impelled them to submit their charitable-giving reporting proposals. We have provided that information in a wholly neutral and circuitous way that does not in any way set up any referendum about any organization or any type of organizations. The only other thing we could do would be to submit a proposal that does not provide any explanation of what motivated us to submit the proposal. But, as we have pointed out before, we are certain that should we have submitted such a proposal, the Company would have asked the Staff to reject the Proposal on the ground that the proposal pointed to no issue of particular salience, and so represented an unnecessary expense. And then it would have made the same argument to shareholders should the Staff have refused to allow them to omit the Proposal. Precedent simply does not require us to set ourselves up for a fall like that, if precedent is being applied fairly and objectively.

Part III. Our Proposal Is Neutral in Its Application and Does Not Set up a “Referendum” on Charitable Giving of a Certain Type.

The Company’s attempt to make our Proposal something it is not, so as to make it omissible, is jarringly disconnected from what the Company needs to demonstrate in order for it to permissibly omit our proposal. Charitable-contribution proposals can be omitted if the proposal will bring on a “referendum” among shareholders about the Company’s donations to certain organizations or types of organizations. But proponents can hardly be shown to be seeking a “referendum” about donations to an organization or topic that they never mention in the proposal, and that can only be posited by deep and highly selective interrogation of footnotes that contain only web addresses.

As we established in Part II, our Proposal does not single out any organization or topic for censure. This places it, as we indicated in our Proposal itself, squarely within the ambit of non-omissible charitable-reporting proposals. As the successful proponents in *McDonald’s Corp.* noted of the proposal in that case, it

does not attempt to direct the Company to make, or stop making, contributions to specific organizations or specific types of organizations. As prior Staff decisions have demonstrated, the inclusion of examples of issues of concern does not render a proposal excludable. The examples in the Supporting Statement are permissible examples, such as those in *Wells Fargo*. In the *Wells Fargo* Supporting Statement, the Proponents describe their concern regarding Wells Fargo’s contributions to controversial causes and provide examples of these controversial causes, which include Planned Parenthood, The Human Rights Campaign and GLAAD. The Supporting Statement also included explanation of why donations to these

organizations are controversial and risk impacting the company's reputation, in the proponent's opinion. The present Proposal is no different. The Supporting Statement similarly provides examples of McDonald's contributions to controversial causes, [and] provides explanation and context as to why donations to these organizations are controversial and why the Proponents are concerned that such could negatively impact the Company's reputation.

McDonald's Corp. Note that our Proposal is far less susceptible to the charge of non-neutrality than are those that were found not-omittable in *McDonald's* and *Wells Fargo*. As the passage just quoted illustrates, the *McDonald's* proposal included specific examples of contributions to which the proponents objected, and named specific causes that the proponents found controversial. We have included nothing anywhere in our Proposal that points to any specific contributions or causes, and have alluded only opaquely and discursively to the trigger of our concerns.

While the resolution of our Proposal sticks closely to the text approved in *McDonald's*, our supporting statement is shorter and more generalized and discreet – *i.e.*, more utterly neutral – especially as revised for this proceeding. The same is true in comparison to the approved proposal in *Wells Fargo*. Our Proposal fits wholly and easily within the area of non-excludability established by those precedents. Exclusion of our Proposal would be improper.

The Company claims that our Proposal resembles the proposals offered, and found excludable, in *JP Morgan* (avail. Feb. 28, 2018) and *Starbucks Corp.* (Jan. 4, 2018). Those proposals were found omissible because, the Staff noted, they “relate[d] to contributions to specific types of organizations.” *Id.* And indeed they did. The proposals' long supporting statements went into significant detail about certain organizations that the proponents found objectionable, and why the proponents found those organizations objectionable. Our Proposal is notable for containing absolutely nothing comparable, in any way.

Conclusion

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

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

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

Office of the Chief Counsel
Division of Corporation Finance
February 4, 2020
Page 10

Staff does not concur with our position, we would appreciate an opportunity to confer with the Staff concerning this matter prior to the determination of the Staff's final position.

Sincerely,

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

Scott Andrew Shepard

cc: Michael Kaplan (michael.kaplan@davispolk.com)
Justin Danhof, National Center for Public Policy Research

Attachment A

Charitable Giving Reporting

Be it RESOLVED that shareholders of Facebook, Inc. (the “Company”) request that the Company prepare and annually update a report to shareholders, at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions during the prior year. The report should

1. Identify organizational or individual recipients of donations, whether cash or in-kind, in excess of \$5000 and aggregate smaller contributions by categories of recipients such as community organizations, schools, medical groups, churches, political or social activism organizations, and the like;
2. Identify for donations not yet spent or used: the purposes to which the donations are to be put, any restrictions on the use of the donations, and any mechanisms by which the restrictions on donations will be monitored and enforced;
3. Identify for donations already spent or used: the purposes to which the donations were to be put, the purposes to which the donations were actually put, the method by which the use of the donations was monitored and ascertained, and an evaluation of the efficacy of the donation and the Company’s intention with regard to future donations to the organization;
4. Include management's analysis of the risks to the Company’s brand, reputation, or shareholder value posed by public controversies associated with the donations, including an explanation of the objective and consistent standards by which such controversies were discovered and their effect on the Company gauged; and
5. Identify, if and as appropriate, philanthropic areas or initiatives considered most germane to corporate values while posing less risk to Company reputation; or in the alternative, any decision to scale back without replacement risky or misused donations.

Supporting Statement

The Securities & Exchange Commission has long and consistently stated that charitable contributions by corporations are “generally found to involve a matter of corporate policy which is extraordinary in nature and beyond a company's ordinary business operations,”¹⁷ and so is amenable, without omission, to shareholder proposals to require reporting about them and about potential or realized risks and controversies arising from them, so long as the proposal relates to the corporation’s “charitable contributions generally,” rather than merely to some segment of the corporation’s charitable contributions.¹⁸

The need for such reporting has grown particularly acute in this shareholder season. Many corporations, including the Company, have committed to making significant charitable

¹⁷ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf>

¹⁸ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johnharrington022817-14a8.pdf>

contributions in recent months.¹⁹ The political and social events which triggered these commitments are potentially highly divisive, and carry with them significant potential for misapplication of well-intentioned contributions to activities fraught with risk to the Company's reputation.²⁰ It has therefore become more important than ever for corporations, and for Company specifically, to monitor carefully, and to report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.

¹⁹ <https://www.cnn.com/2020/06/01/business/us-protests-companies-respond-intl-hnk/index.html>

²⁰ *Id.*; <https://www.latimes.com/world-nation/story/2020-11-16/portland-protests-anarchists-backlash>; <https://pjmedia.com/news-and-politics/tyler-o-neil/2020/11/28/f-thanksgiving-antifa-topples-statues-of-george-washington-veterans-to-fight-colonization-n1179358>; <https://apnews.com/article/breonna-taylor-race-and-ethnicity-shootings-police-new-york-24af876f135f529d95c9c857ad9aaa0e>; https://www.realclearpolitics.com/articles/2020/09/22/nfls_social_justice_experiment_is_no_touchdown_144268.html; <https://www.breitbart.com/politics/2020/06/02/silent-majority-poll-shows-american-voters-support-use-of-military-national-guard-in-riots/>.

Attachment B

Charitable Giving Reporting

Be it **RESOLVED** that shareholders of the Starbucks Corporation (“Company”) request that the Company prepare and annually update a report to shareholders, at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions made or committed during the prior year. The report should:

1. Identify organizational or individual recipients of donations, whether cash or in-kind, in excess of \$500, and aggregate smaller contributions by categories of recipients such as community organizations, schools, medical groups, churches, political or social activism organizations, and the like;
2. Identify for donations not yet spent or used: the purposes to which the donations are to be put, any restrictions on the use of the donations, and any mechanisms by which the restrictions on donations will be monitored and enforced;
3. Identify for donations already spent or used: the purposes to which the donations were to be put, the purposes to which the donations were actually put, the method by which the use of the donations was monitored and ascertained, and an evaluation of the efficacy of the donation and the Company’s intention with regard to future donations to the organization;
4. Include management's analysis of any risks to the Company’s brand, reputation, or shareholder value posed by all public controversies associated with the donations, including an explanation of the objective and consistent standards by which such controversies were discovered and their effect on the Company gauged; and
5. Identify, if and as appropriate, philanthropic areas or initiatives considered most germane to corporate values while posing less risk to Company reputation; or in the alternative, any decision to scale back without replacement risky or misused donations.

Supporting Statement

The SEC has long and consistently stated that charitable contributions by corporations are “generally found to involve a matter of corporate policy which is extraordinary in nature and beyond a company's ordinary business operations,”²¹ and so are amenable, without omission, to shareholder proposals that require reporting about them and about potential or realized risks and controversies arising from them, so long as the proposal relates, as this one does, to the corporation’s “charitable contributions generally,” rather than merely to some segment of the corporation’s contributions.²²

²¹ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf>

²² <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johnharrington022817-14a8.pdf>

The need for reporting has grown acute in this shareholder season. Many contributions seem unlikely to raise material concerns.²³ In recent months, however, the Company has made significant charitable commitments in response to political and social events, commitments that are highly divisive,²⁴ not apparently successful in quelling rioter hate,²⁵ and carry with them significant potential for misapplication to activities very risky to the Company's reputation. The Company's commitment to potentially problematic contributions remains vague: it has, for example, pledged \$1 million in contributions to unspecified organizations to promote "equity," an opaque term often suggesting radical and divisive commitments, in unspecified ways.²⁶ It is therefore vital that the Company monitor carefully, and report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.

²³ <https://www.starbucks.com/responsibility/community/starbucks-foundation>

²⁴ <https://www.breitbart.com/politics/2020/06/02/silent-majority-poll-shows-american-voters-support-use-of-military-national-guard-in-riots/>

²⁵ <https://thepostmillennial.com/amazon-and-starbucks-give-millions-to-blm-still-get-looted-and-destroyed/>; <https://thepostmillennial.com/antifa-rioters-made-lists-of-seattle-businesses-to-destroy>

²⁶ <https://stories.starbucks.com/stories/2020/starbucks-shares-update-on-standing-together-against-racial-injustice/>; <https://thepostmillennial.com/antifa-rioters-made-lists-of-seattle-businesses-to-destroy>

Attachment B

Charitable Giving Reporting

Be it RESOLVED that shareholders of the Walt Disney Company (“Company”) request that the Company prepare and annually update a report to shareholders, at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions made or committed during the prior year. The report should:

1. Identify organizational or individual recipients of donations, whether cash or in-kind, in excess of \$500, and aggregate smaller contributions by categories of recipients such as community organizations, schools, medical groups, churches, political or social activism organizations, and the like;
2. Identify for donations not yet spent or used: the purposes to which the donations are to be put, any restrictions on the use of the donations, and any mechanisms by which the restrictions on donations will be monitored and enforced;
3. Identify for donations already spent or used: the purposes to which the donations were to be put, the purposes to which the donations were actually put, the method by which the use of the donations was monitored and ascertained, and an evaluation of the efficacy of the donation and the Company’s intention with regard to future donations to the organization;
4. Include management's analysis of any risks to the Company’s brand, reputation, or shareholder value posed by all public controversies associated with the donations, including an explanation of the objective and consistent standards by which such controversies were discovered and their effect on the Company gauged; and
5. Identify, if and as appropriate, philanthropic areas or initiatives considered most germane to corporate values while posing less risk to Company reputation; or in the alternative, any decision to scale back without replacement risky or misused donations.

Supporting Statement

The SEC has long and consistently stated that charitable contributions by corporations are “generally found to involve a matter of corporate policy which is extraordinary in nature and beyond a company's ordinary business operations,”²⁷ and so are amenable, without omission, to shareholder proposals that require reporting about them and about potential or realized risks and controversies arising from them, so long as the proposal relates, as this one does, to the corporation’s “charitable contributions generally,” rather than merely to some segment of the corporation’s contributions.²⁸

The need for such reporting has grown acute in this shareholder season. Many contributions seem unlikely to raise any material concerns.²⁹ In recent months, however, the Company has

²⁷ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf>

²⁸ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johnharrington022817-14a8.pdf>

²⁹ <https://thewaltdisneycompany.com/disney-introduces-cloth-face-masks-featuring-disney-pixar-marvel-and-star-wars-characters-and-donates-one-million-cloth-face-masks-to-support-families-and->

made significant charitable commitments in response to political and social events, commitments that have proven highly divisive³⁰ and carry with them significant potential for misapplication to activities fraught with risk to the Company's reputation. The Company's commitment to potentially problematic contributions remains vague: while it has pledged \$2 million to the NAACP, for example, it has pledged \$3 million more in matching funds to unspecified organizations to support "social justice," an opaque term, in unspecified ways.³¹ It is therefore vital that the Company monitor carefully, and report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.

[communities-in-need/](https://thewaltdisneycompany.com/disney-team-of-heroes-and-avengers-endgame-stars-support-5-million-donation-to-benefit-childrens-hospitals/); <https://thewaltdisneycompany.com/disney-team-of-heroes-and-avengers-endgame-stars-support-5-million-donation-to-benefit-childrens-hospitals/>

³⁰ <https://www.breitbart.com/politics/2020/06/02/silent-majority-poll-shows-american-voters-support-use-of-military-national-guard-in-riots/>

³¹ <https://thewaltdisneycompany.com/the-walt-disney-company-pledges-5-million-to-support-nonprofit-organizations-that-advance-social-justice-2/>



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Davis Polk & Wardwell LLP 212 450 4000 tel
450 Lexington Avenue 212 701 5800 fax
New York, NY 10017

January 11, 2021

Re: Stockholder proposal of National Center for Public Policy Research Pursuant
to Rule 14a-8 of the Securities Exchange Act of 1934

U.S. Securities and Exchange Commission
Office of Chief Counsel
Division of Corporation Finance
100 F. Street, N.E.
Washington, D.C. 20549
Via email: shareholderproposals@sec.gov

Dear Sir or Madam:

On behalf of Facebook, Inc., a Delaware corporation (the “**Company**” or “**Facebook**”), and in accordance with Rule 14a-8 under the Securities Exchange Act of 1934, as amended, we are filing this letter with respect to the shareholder proposal and supporting statement (the “**Supporting Statement**”) submitted by the National Center for Public Policy Research (the “**Proponent**”), on December 7, 2020 (the “**Proposal**”) for inclusion in the proxy materials that the Company intends to distribute in connection with its 2021 Annual Meeting of Shareholders (the “**2021 Proxy Materials**”). We hereby request confirmation that the staff of the Office of Chief Counsel (the “**Staff**”) will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from its 2021 Proxy Materials.

Pursuant to Rule 14a-8(j), this letter is being filed with the Commission no later than 80 days before the Company files its definitive 2021 Proxy Materials. Pursuant to Staff Legal Bulletin No. 14D (CF), *Shareholder Proposals* (Nov. 7, 2008), question C, we have submitted this letter to the Commission via email to shareholderproposals@sec.gov.

Pursuant to Rule 14a-8(j), a copy of this submission is being sent simultaneously to the Proponent as notification of the Company’s intention to omit the Proposal from its 2021 Proxy Materials. This letter constitutes the Company’s statement of the reasons that it deems the omission of the Proposal to be proper. We have been advised by the Company as to the factual matters set forth herein.

A copy of the Proposal and related correspondence are attached to this letter as Exhibit A and Exhibit B, respectively.

The Proposal sets forth the following resolution:

Charitable Giving Reporting

Be it RESOLVED that shareholders of Facebook, Inc. (the “Company”) request that the Company prepare and annually update a report to shareholders, at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions during the prior year. The report should:

1. Identify organizational or individual recipients of donations, whether cash or in-kind, in excess of \$5000 and aggregate smaller contributions by categories of recipients such as community organizations, schools, medical groups, churches, political or social activism organizations, and the like;
2. Identify for donations not yet spent or used: the purposes to which the donations are to be put, any restrictions on the use of the donations, and any mechanisms by which the restrictions on donations will be monitored and enforced;
3. Identify for donations already spent or used: the purposes to which the donations were to be put, the purposes to which the donations were actually put, the method by which the use of the donations was monitored and ascertained, and an evaluation of the efficacy of the donation and the Company’s intention with regard to future donations to the organization;
4. Include management’s analysis of the risks to the Company’s brand, reputation, or shareholder value posed by public controversies associated with the donations, including an explanation of the objective and consistent standards by which such controversies were discovered and their effect on the Company gauged; and
5. Identify, if and as appropriate, philanthropic areas or initiatives considered most germane to corporate values while posing less risk to Company reputation; or in the alternative, any decision to scale back without replacement risky or misused donations.

Supporting Statement

The Securities & Exchange Commission has long and consistently stated that charitable contributions by corporations are “generally found to involve a matter of corporate policy which is extraordinary in nature and beyond a company’s ordinary business operations,”¹ and so is amenable, without omission, to shareholder proposals to require reporting about them and about potential or realized risks and controversies arising from them, so long as the proposal relates to the corporation’s “charitable contributions generally,” rather than merely to some segment of the corporation’s charitable contributions.²

The need for such reporting has grown particularly acute in this shareholder season. Many corporations, including the Company, have committed to making significant charitable contributions in recent months.³ The political and social

¹ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf>.

² <https://www.cnn.com/2020/06/01/business/us-protests-companies-respond-intl-hnk/index.html>.

³ <https://www.cnn.com/2020/06/01/business/us-protests-companies-respond-intl-hnk/index.html>.

events which triggered these commitments are potentially highly divisive, and carry with them significant potential for misapplication of well-intentioned contributions to activities fraught with risk to the Company's reputation.⁴ It has therefore become more important than ever for corporations, and for Company specifically, to monitor carefully, and to report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions."

A copy of the Proposal and related correspondence with the Proponent are attached to this letter as Exhibit A and Exhibit B, respectively.

Statement of Reasons to Exclude

The Proposal May Be Excluded Pursuant to 14a-8(i)(7) Because the Proposal Deals with Matters Relating to the Company's Ordinary Business Operations.

A. Background

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the company's ordinary business operations." The purpose of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting."⁵ As explained by the Commission, the term "ordinary business" in this context refers to "matters that are not necessarily 'ordinary' in the common meaning of the word, and is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations."⁶

The ordinary business exclusion is based on two central considerations. First, the Commission notes that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis" that they are not proper subjects for shareholder proposals.⁷ The second consideration "relates to the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."⁸

B. The Proposal relates to charitable contributions that are made to specific types of organizations, and therefore may be omitted under Rule 14a-8(i)(7).

The Company believes that the Proposal may be excluded in reliance on Rule 14a-8(i)(7) because it relates to charitable contributions to specific types of organizations, which is a component of "ordinary business." The Proposal, read together with the Supporting Statement and the Supporting Statement's footnotes, does not have a general and neutral objective with regard to the specific recipients of the Company's charitable contributions. Instead, it is

⁴ *Id.*; <https://www.latimes.com/world-nation/story/2020-11-16/portland-protests-anarchists-backlash>; <https://pimedia.com/news-and-politics/tyler-o-neil/2020/11/28/f-thanksgiving-antifa-topples-statues-of-george-washington-veterans-to-fight-colonization-n1179358>; <https://apnews.com/article/breonna-taylor-race-and-ethnicity-shootings-police-new-york-24af876f135f529d95c9c857ad9aaa0e>; https://www.realclearpolitics.com/articles/2020/09/22/nflsocialjustice_experimentisnotouchdown144268.html; <https://www.breitbart.com/politics/2020/06/02/silent-majority-poll-shows-american-voters-support-use-of-military-national-guard-in-riots/>.

⁵ See Release No. 34-40018 (May 21, 1998) (the "1998 Release").

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

seemingly directed at contributions to specific organizations that support particular racial justice movements, most prominently, the Black Lives Matter movement (“BLM”).

Recently, in *The Walt Disney Company* (Dec. 23, 2020), the Staff permitted exclusion of a nearly identical proposal submitted by the Proponent where the supporting statement specifically referenced the company’s donations to the NAACP and “unspecified organizations to support ‘social justice,’” and in *Starbucks Corp.* (Dec. 23, 2020), the Staff also permitted the exclusion of a nearly identical proposal submitted by the Proponent where the footnotes to the supporting statement that provided links to media stories made clear that the proposal was targeted at company donations in support of BLM and other racial justice movements.

When applying Rule 14a-8(i)(7), the Staff evaluates the “underlying subject matter” of the proposal, regardless of how the proposal is framed. See *Release No. 34-20091* (Aug. 16, 1983); *Staff Legal Bulletin No. 14H* (Oct. 22, 2015). Here, the “underlying subject matter” of the Proposal is made clear by the Supporting Statement, which in part states that the Company has committed to “making significant charitable contributions in recent months” and that such commitments were “triggered” by political and social events that “are potentially highly divisive, and carry with them significant potential for misapplication of well-intentioned contributions to activities fraught with risk to the Company’s reputation.” The reference to “activities fraught with risk” is not generic. Rather, the Proponent provides context and support for these statements by providing footnotes with links to an article describing the Company’s support for BLM and its intention to donate \$10 million to groups fighting racial inequality, as well as to various articles describing recent protests in connection with BLM. The Proposal, when read in conjunction with the accompanying Supporting Statement and its footnotes, plainly seeks to limit the Company’s charitable contributions only with respect to organizations supporting BLM. The Proposal does not refer to any other public controversy associated with the Company’s donations. Accordingly, the Proposal relates directly to an ordinary business matter—namely, the Company’s decision about the nonprofit organizations to which it should or should not make charitable contributions.

In contrast to shareholder proposals that relate to a company’s charitable contributions generally, which are typically not excludable under Rule 14a-8(i)(7), the Staff has consistently granted no-action relief under Rule 14a-8(i)(7) where the proposal requests that charitable contributions be made, or not made, to specific organizations or specific types of organizations. In *The Walt Disney Company* (Nov. 20, 2014), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal urging the company to “preserve the policy of acknowledging the Boy Scouts of America as an charitable organization to receive matching contributions (grants)” after the company decided it would no longer provide the organization with funding. See also *PepsiCo., Inc.* (Feb. 24, 2010) (concurring in the exclusion of a proposal requesting that the company specifically prohibit financial or other support of any “organization or philosophy which either rejects or supports homosexuality,” noting that “[p]roposals that concern charitable contributions directed to specific types of organizations are generally excludable under rule 14a-8(i)(7)”; and *Target Corporation* (Mar. 31, 2010) (concurring in the exclusion of a proposal requesting a report on charitable donations and a feasibility study of policy changes, “including minimizing donations to charities that fund animal experiments,” on the basis that it related to the company’s ordinary business operations in that it concerned “charitable contributions directed to specific types of organizations”).

The fact that the Proposal’s resolution is facially neutral does not change the analysis. The Staff has concurred with the exclusion of proposals where the language of the resolution does not target specific charities or types of charities but where the supporting statement makes clear that the proposal in fact would serve as a shareholder referendum on corporate contributions to a particular charity or type of charity, as is the case with the Proposal. See also *JPMorgan Chase & Co.* (Feb. 28, 2018)(concurring that a proposal related to “contributions to specific types of

organizations” where the proposal requested that the board issue a report disclosing the company’s standards for choosing organizations that receive charitable contributions and where the supporting statement focused on the company’s contributions to Planned Parenthood and the Southern Poverty Law Center; and *Starbucks Corp.* (Jan. 4, 2018) (concurring in the exclusion of a facially neutral proposal in which the supporting statement criticized Planned Parenthood for “being the subject of much controversy”).

* * *

The Company respectfully requests the Staff’s concurrence with its decision to omit the Proposal from the 2021 Proxy Materials and further requests confirmation that the Staff will not recommend any enforcement action if it so omits the Proposal. Please call the undersigned at (212) 450-4111 if you should have any questions or need additional information or as soon as a Staff response is available.

Respectfully yours,



Michael Kaplan

Attachment: Exhibit A

cc: Justin Danhof, Esq., General Counsel, National Center for Public Policy Research
David Kling, Vice President, Deputy General Counsel and Secretary,
Facebook, Inc.

EXHIBIT A
Proposal

Charitable Giving Reporting

Be it RESOLVED that shareholders of Facebook (the “Company”) request that the Company prepare and annually update a report to shareholders, at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions during the prior year. The report should

1. Identify organizational or individual recipients of donations, whether cash or in-kind, in excess of \$5000 and aggregate smaller contributions by categories of recipients such as community organizations, schools, medical groups, churches, political or social activism organizations, and the like;
2. Identify for donations not yet spent or used: the purposes to which the donations are to be put, any restrictions on the use of the donations, and any mechanisms by which the restrictions on donations will be monitored and enforced;
3. Identify for donations already spent or used: the purposes to which the donations were to be put, the purposes to which the donations were actually put, the method by which the use of the donations was monitored and ascertained, and an evaluation of the efficacy of the donation and the Company’s intention with regard to future donations to the organization;
4. Include management’s analysis of the risks to the Company’s brand, reputation, or shareholder value posed by public controversies associated with the donations, including an explanation of the objective and consistent standards by which such controversies were discovered and their effect on the Company gauged; and
5. Identify, if and as appropriate, philanthropic areas or initiatives considered most germane to corporate values while posing less risk to Company reputation; or in the alternative, any decision to scale back without replacement risky or misused donations.

Supporting Statement

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The need for such reporting has grown particularly acute in this shareholder season. Many corporations, including the Company, have committed to making significant charitable contributions in recent months.³ The political and social events which triggered these commitments are potentially highly divisive, and carry with them significant potential for misapplication of well-intentioned contributions to activities fraught with risk to the

¹ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf>

² <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johnharrington022817-14a8.pdf>

³ <https://www.cnn.com/2020/06/01/business/us-protests-companies-respond-intl-hnk/index.html>

Company's reputation.⁴ It has therefore become more important than ever for corporations, and for Company specifically, to monitor carefully, and to report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.

⁴ *Id.*; <https://www.latimes.com/world-nation/story/2020-11-16/portland-protests-anarchists-backlash>; <https://pjmedia.com/news-and-politics/tyler-o-neil/2020/11/28/f-thanksgiving-antifa-topples-statues-of-george-washington-veterans-to-fight-colonization-n1179358>; <https://apnews.com/article/breonna-taylor-race-and-ethnicity-shootings-police-new-york-24af876f135f529d95c9c857ad9aaa0e>; https://www.realclearpolitics.com/articles/2020/09/22/nfls_social_justice_experiment_is_no_touchdown_144268.html; <https://www.breitbart.com/politics/2020/06/02/silent-majority-poll-shows-american-voters-support-use-of-military-national-guard-in-riots/>.

Exhibit B

Shareholder Coorespondence

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ORIGIN ID: TSGA
JUSTIN DANHOF
NORR

SHIP DATE: 04DEC20
ACTWGT: 0.10 LB
CAD: 100230591/NET4280

TO DAVID KLING
FACEBOOK

BILL SENDER



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December 4, 2020

Via FedEx to

Dave Kling
Facebook, Inc.

[REDACTED]
Attention: Corporate Secretary

Dear Mr. Kling,

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the Facebook, Inc. (the "Company") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations.

I submit the Proposal as the Deputy Director of the Free Enterprise Project of the National Center for Public Policy Research, which has continuously owned Company stock with a value exceeding \$2,000 for a year prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2021 annual meeting of shareholders. A Proof of Ownership letter is forthcoming and will be delivered to the Company.

Copies of correspondence or a request for a "no-action" letter should be forwarded to Justin Danhof, Esq, General Counsel, [REDACTED]

[REDACTED] and emailed to [REDACTED]

Sincerely,

Scott Shepard
Enclosure: Shareholder Proposal

Charitable Giving Reporting

Be it **RESOLVED** that shareholders of Facebook (the “Company”) request that the Company prepare and annually update a report to shareholders, at reasonable expense and excluding proprietary information, listing and analyzing charitable contributions during the prior year. The report should

1. Identify organizational or individual recipients of donations, whether cash or in-kind, in excess of \$5000 and aggregate smaller contributions by categories of recipients such as community organizations, schools, medical groups, churches, political or social activism organizations, and the like;
2. Identify for donations not yet spent or used: the purposes to which the donations are to be put, any restrictions on the use of the donations, and any mechanisms by which the restrictions on donations will be monitored and enforced;
3. Identify for donations already spent or used: the purposes to which the donations were to be put, the purposes to which the donations were actually put, the method by which the use of the donations was monitored and ascertained, and an evaluation of the efficacy of the donation and the Company’s intention with regard to future donations to the organization;
4. Include management’s analysis of the risks to the Company’s brand, reputation, or shareholder value posed by public controversies associated with the donations, including an explanation of the objective and consistent standards by which such controversies were discovered and their effect on the Company gauged; and
5. Identify, if and as appropriate, philanthropic areas or initiatives considered most germane to corporate values while posing less risk to Company reputation; or in the alternative, any decision to scale back without replacement risky or misused donations.

Supporting Statement

The Securities & Exchange Commission has long and consistently stated that charitable contributions by corporations are “generally found to involve a matter of corporate policy which is extraordinary in nature and beyond a company’s ordinary business operations,”¹ and so is amenable, without omission, to shareholder proposals to require reporting about them and about potential or realized risks and controversies arising from them, so long as the proposal relates to the corporation’s “charitable contributions generally,” rather than merely to some segment of the corporation’s charitable contributions.²

The need for such reporting has grown particularly acute in this shareholder season. Many corporations, including the Company, have committed to making significant charitable contributions in recent months.³ The political and social events which triggered these commitments are potentially highly divisive, and carry with them significant potential for misapplication of well-intentioned contributions to activities fraught with risk to the

¹ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf>

² <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johnharrington022817-14a8.pdf>

³ <https://www.cnn.com/2020/06/01/business/us-protests-companies-respond-intl-hnk/index.html>

Company's reputation.⁴ It has therefore become more important than ever for corporations, and for Company specifically, to monitor carefully, and to report to shareholders, the content of, intentions for, actual use of and lessons learned from its charitable contributions.

⁴ *Id.*; <https://www.latimes.com/world-nation/story/2020-11-16/portland-protests-anarchists-backlash>; <https://pimedia.com/news-and-politics/tyler-o-neil/2020/11/28/f-thanksgiving-antifa-topples-statues-of-george-washington-veterans-to-fight-colonization-n1179358>; <https://apnews.com/article/breonna-taylor-race-and-ethnicity-shootings-police-new-york-24af876f135f529d95c9c857ad9aaa0e>; https://www.realclearpolitics.com/articles/2020/09/22/nfls_social_justice_experiment_is_no_touchdown_144268.html; <https://www.breitbart.com/politics/2020/06/02/silent-majority-poll-shows-american-voters-support-use-of-military-national-guard-in-riots/>.

[REDACTED]

From: Wesley Libuit [REDACTED]
Sent: Friday, December 18, 2020 1:29 PM
To: [REDACTED]
Cc: Investor Relations; Erin Guldiken
Subject: FB - Shareholder Proposal (National Center for Public Policy Research)
Attachments: FB - Charitable Giving Reporting (12.18.020).pdf

Dear Mr. Danhof,

Attached please find a letter regarding the shareholder proposal from National Center for Public Policy Research, which has also been mailed to your attention. Please feel free to contact me with any questions.

Best,
Wes

Wesley Libuit | Lead Corporate Counsel | Facebook

FACEBOOK

VIA OVERNIGHT MAIL

December 18, 2020

Re: Stockholder Proposal

Justin Danhof, Esq.
General Counsel, National Center for Public Policy Research

Dear Mr. Danhof:

I am writing on behalf of Facebook, Inc. (the "Company"), which received a letter on December 7, 2020 submitting a stockholder proposal relating to charitable giving reporting for inclusion in the Company's proxy statement for the 2021 annual meeting. The proposal contains certain procedural deficiencies, which the Securities and Exchange Commission ("SEC") regulations require us to bring to your attention.

Proof of Ownership. Rule 14a-8(b)(1) of the Securities Exchange Act of 1934, as amended, requires that in order to be eligible to submit a proposal for inclusion in the Company's proxy statement, each shareholder proponent must, among other things, have continuously held at least \$2,000 in market value of the Company's common stock, or 1%, of the company's securities entitled to vote on the proposal at the meeting for at least one year by the date you submitted the proposal.

The Company's stock records do not indicate that you are currently the registered holder on the Company's books and records of any shares of the Company's common stock and you have not provided proof of ownership. Accordingly, you must submit to us a written statement from the "record" holder of the shares (usually a bank or broker) verifying that, at the time you submitted the proposal on December 4, 2020, you had continuously held at least \$2,000 in market value, or 1%, of the Company's common stock for at least the one year period prior to and including December 4, 2020.

Rule 14a-8(b) requires that a proponent of a proposal must prove eligibility as a shareholder of the company by submitting either:

- a written statement from the "record" holder of the securities verifying that at the time the proponent submitted the proposal, the proponent had continuously held the requisite amount of securities for at least one year; or
- a copy of a filed Schedule 13D, Schedule 13G, Form 3, Form 4, Form 5, or amendments to those documents or updated forms, reflecting the proponent's ownership of shares as of or before the date on which the one year eligibility period begins and the proponent's written statement that he or she continuously held the required number of shares for the one year period as of the date of the statement.

To help shareholders comply with the requirements when submitting proof of ownership to companies, the SEC's Division of Corporation Finance published Staff Legal Bulletin No. 14F ("SLB 14F"), dated October 18, 2011, and Staff Legal Bulletin No. 14G ("SLB 14G"), dated October 16, 2012. We have attached copies of both for your reference. A copy of Rule 14a-8, which applies to shareholder proposals submitted for inclusion in proxy statements, is also enclosed for your reference.

Please note that most large U.S. banks and brokers deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). SLB 14F and SLB 14G provide that for securities held through the DTC, only DTC participants should be viewed as "record" holders of securities that are deposited at DTC. You can confirm whether your bank or broker is a DTC participant by checking DTC's participant list, which is currently available on the Internet at <http://www.dtcc.com/client-center/dtc-directories>.

If you hold shares through a bank or broker that is not a DTC participant, you will need to obtain proof of ownership from the DTC participant through which the bank or broker holds your shares. You should be able to find out the name of the DTC participant by asking your bank or broker. If the DTC participant that holds your shares knows your bank or broker's holdings, but does not know your holdings, you may satisfy the proof of ownership requirements by submitting two proof of ownership statements—one from your bank or broker confirming your ownership and the other from the DTC participant confirming the bank or broker's ownership. Both should verify your ownership for the one-year period prior to and including December 4, 2020. Please review SLB 14F carefully before submitting proof of ownership to ensure that it is compliant.

In order to meet the eligibility requirements for submitting a shareholder proposal, the SEC rules require that these defects that we have identified be remedied and any supporting documentation must be postmarked or transmitted electronically to us no later than 14 calendar days from the date you receive this letter. Please send such documentation to Facebook, Inc., c/o Corporate Secretary, [REDACTED] (or alternatively you may transmit the documentation electronically to [REDACTED]).

Sincerely,

/s/ Wesley Libuit

Wesley Libuit
Lead Corporate Counsel

Enclosure

[REDACTED]

From: Justin Danhof [REDACTED]
Sent: Friday, December 18, 2020 1:34 PM
To: Wesley Libuit
Cc: Investor Relations; Erin Guldiken
Subject: Re: FB - Shareholder Proposal (National Center for Public Policy Research)
Attachments: Facebook 2021 Ownership Pack.pdf

Hi Wes,

The attached materials are actually on the way to you all via FedEx. They may arrive today or Monday. FedEx has been a little hit or miss with their timing as of late.

Best,
Justin

On Fri, Dec 18, 2020 at 1:28 PM Wesley Libuit [REDACTED] > wrote:

Dear Mr. Danhof,

Attached please find a letter regarding the shareholder proposal from National Center for Public Policy Research, which has also been mailed to your attention. Please feel free to contact me with any questions.

Best,

Wes

Wesley Libuit | Lead Corporate Counsel | Facebook



Via FedEx


December 17, 2020

Dave Kling
Attention: Corporate Secretary
Facebook, Inc.



Dear Mr. Kling,

Enclosed please find a Proof of Ownership letter from UBS Financial Services Inc. in connection with the shareholder proposal submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations by the National Center for Public Policy Research to Facebook on December 4, 2020.

Copies of correspondence or a request for a "no-action" letter should be forwarded to Justin Danhof, Esq, General Counsel, National Center for Public Policy Research, 20 F Street, NW, Suite 700, Washington, DC 20001 and emailed to .

Sincerely,

A handwritten signature in black ink, appearing to read "Justin Danhof".

Justin Danhof, Esq.





UBS Financial Services Inc.
1000 Harbor Boulevard
Weehawken, NJ 07086
Tel. 877-827-7870
FAX 877-785-8404

UBS Wealth Advice Center

www.ubs.com

Dave Kling
Attention: Corporate Secretary
Facebook, Inc.

December 17, 2020

Confirmation: Information regarding the account of The National Center for Public Policy Research

Dear Mr. Kling,

The following client has requested UBS Financial Services Inc. to provide you with a letter of reference to confirm its banking relationship with our firm.

The National Center for Public Policy Research has been a valued client of ours since October 2002 and as of the close of business on 12/04/2020, the National Center for Public Research held, and has held continuously for at least one year 19 shares of Facebook Inc. common stock. UBS continues to hold the said stock.

Please be aware this account is a securities account not a "bank" account. Securities, mutual funds, and other non-deposit investment products are not FDIC-insured or bank guaranteed and are subject to market fluctuation.

Questions

If you have any questions about this information, please contact Reese Bickham at (844) 964-0333.

UBS Financial Services is a member firm of the Securities Investor Protection Corporation (SIPC).

Sincerely

Catherine R Bickham

Catherine Reese Bickham
Financial Advisor
UBS Financial Services Inc.

FedEx[®] Express

12/17/20, 11:05 AM

ORIGIN ID: TSGA
JUSTIN DANHOF
NCPBR

SHIP DATE: 17DEC20
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TO DAVID KLING
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Via FedEx

December 17, 2020

Dave Kling
Attention: Corporate Secretary
Facebook, Inc.

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Copies of correspondence or a request for a "no-action" letter should be forwarded to Justin Danhof, Esq, General Counsel, National Center for Public Policy Research, 20 F Street, NW, Suite 700, Washington, DC 20001 and emailed to [REDACTED]

Sincerely,

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

Justin Danhof, Esq.



UBS Financial Services Inc.
1000 Harbor Boulevard
Weehawken, NJ 07086
Tel. 877-827-7870
FAX 877-785-8404

UBS Wealth Advice Center

www.ubs.com

Dave Kling
Attention: Corporate Secretary



December 17, 2020

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UBS Financial Services is a member firm of the Securities Investor Protection Corporation (SIPC).

Sincerely

Catherine R Bickham

Catherine Reese Bickham
Financial Advisor
UBS Financial Services Inc.