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

DIVISION OF
CORPORATION FINANCE

March 29, 2023

Kelly Grez
Merck & Co., Inc.

Re: Merck & Co., Inc. (the "Company")
Incoming letter dated January 13, 2023

Dear Kelly Grez:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by The Bahnsen Family Trust dated July 15th 2003, for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests the Company list the recipients of corporate charitable contributions of $5,000 or more on its website, along with the material limitations, if any, and/or the monitoring of the contributions and its uses, if any, that the Company undertakes.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal seeks to micromanage the Company. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative basis for omission upon which the Company relies.

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: David Bahnsen
The Bahnsen Family Trust Dated July 15th 2003

Merck & Co., Inc.
2000 Galloping Hill Road
Kenilworth, NJ 07033
Email: office.secretary@merck.com

January 13, 2023

VIA E-MAIL

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

Re: *Merck & Co., Inc.*
Shareholder Proposal of David Bahnsen
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that Merck & Co., Inc. ("Merck" or the "Company") intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (collectively, the "2023 Proxy Materials") a shareholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") received from David Bahnsen, Trustee of the Bahnsen Family Trust dated July 15, 2003 (the "Proponent").

Pursuant to Rule 14a-8(j), the Company has:

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission; and

- concurrently sent a copy of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, the Company is taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal (including correspondence regarding the status of any negotiations with the Company), a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

I. The Proposal

The text of the resolution contained in the Proposal is set forth below:

> **Resolved:** That the shareholders request the Company to list the recipients of corporate charitable contributions of $5,000 or more on the company website, along with the material limitations, if any, placed on the restrictions, and/or the monitoring of the contributions and its uses, if any, that the Company undertakes.

II. Basis for Exclusion

The Company hereby respectfully requests that the Staff concur in the Company's view that the Proposal may be excluded from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal.

III. Background

On December 2, 2022, the Company received the Proposal by FedEx and email. On December 16, 2022, Merck received a letter from Fidelity verifying the Proponent's stock ownership in the Company (the "Broker Letter").[1] Copies of the Proposal, Supporting Statement, Broker Letter and related correspondence with the Proponent are attached hereto as Exhibit A.

IV. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Proposal

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if the company has already substantially implemented the proposal. The Commission adopted the "substantially implemented" standard in 1983 after determining that the "previous formalistic application" of the rule defeated its purpose, which is to "avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See* Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the "1983 Release") and Exchange Act Release No. 34-12598 (July 7, 1976). Accordingly, the actions requested by a proposal need not be "fully effected" provided that they have been "substantially implemented" by the company. *See* 1983 Release.

Applying this standard, the Staff has consistently permitted the exclusion of a proposal under Rule 14a-8(i)(10) when it has determined that the company's policies, practices and procedures or public disclosures compare favorably with the guidelines of the proposal. *See, e.g., JPMorgan Chase & Co.* (Mar. 9, 2021)*; *AbbVie Inc.* (Mar. 2, 2021)*; *Devon Energy Corp.* (Apr. 1, 2020)*; *Johnson & Johnson* (Jan. 31, 2020)*; *Pfizer Inc.* (Jan. 31, 2020)*; *The Allstate Corp.* (Mar. 15, 2019); *Johnson & Johnson* (Feb. 6, 2019); *United Cont'l Holdings, Inc.* (Apr. 13, 2018);

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[1] Merck received the Broker Letter, dated as of December 15, 2022, by email on December 16, 2022.

* Citations marked with an asterisk indicate Staff decisions issued without a letter.

eBay Inc. (Mar. 29, 2018); *Kewaunee Scientific Corp.* (May 31, 2017); *Wal-Mart Stores, Inc.* (Mar. 16, 2017); *Dominion Resources, Inc.* (Feb. 9, 2016); *Ryder Sys., Inc*. (Feb. 11, 2015).

In addition, the Staff consistently has permitted exclusion of a proposal under Rule 14a-8(i)(10) where a company already addressed the underlying concerns and satisfied the essential objectives of the proposal, even if the proposal had not been implemented exactly as proposed by the proponent. *See, e.g.*, *The Wendy's Co.* (Apr. 10, 2019) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting a report assessing human rights risks of the company's operations, including the principles and methodology used to make the assessment, the frequency of assessment and how the company would use the assessment's results, where the company had a code of ethics and a code of conduct for suppliers and disclosed on its website the frequency and methodology of its human rights risk assessments); *Oshkosh Corp.* (Nov. 4, 2016) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting six changes to the company's proxy access bylaw, where the company amended its proxy access bylaw to implement three of six requested changes); *MGM Resorts International* (Feb. 28, 2012) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting a report on the company's sustainability policies and performance, including multiple objective statistical indicators, where the company published an annual sustainability report); *Exelon Corp.* (Feb. 26, 2010) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting a report disclosing policies and procedures for political contributions and monetary and non-monetary political contributions, where the company had adopted corporate political contributions guidelines).

In particular, the Staff has permitted exclusion of proposals under Rule 14a-8(i)(10) where a company satisfied the essential objective of a proposal seeking disclosure relating to the company's charitable contributions even if the proposal had not been implemented exactly as proposed by the proponent. For example, in *Pfizer Inc.* (Feb. 5, 2020),* the Staff permitted exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company provide a report disclosing the company's standards and rationale for charitable contributions, including listing the recipients of contributions of $1,000 or more. In arguing that the proposal had been substantially implemented, the company referred to its existing website disclosure of the "standards and rationale for the bulk of its charitable contributions," which also listed the recipients, amounts of donations and other information concerning grants and charitable contributions to medical, scientific, patient and civic organizations. Although the proposal appeared to contemplate disclosure of each and every charitable contribution, the Staff concluded that the company had substantially implemented the proposal. Similarly in *PG&E Corp.* (Mar. 10, 2010), the Staff permitted exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company provide a report disclosing, among other things, the company's standards for choosing the organizations to which the company makes charitable contributions and the "business rationale and purpose for each of the charitable contributions." In arguing that the proposal had been substantially implemented, the company referred to a website where the company had described its policies and guidelines for determining the types of grants that it makes and the types of requests that the company typically does not fund. Although the proposal appeared to contemplate disclosure of each and every charitable contribution, the Staff concluded that the company had substantially implemented the proposal. *See also, e.g.*, *The Boeing Co.* (Feb. 3, 2016) (permitting exclusion on substantial implementation grounds of a proposal requesting a report on, among other matters, the

intended purpose of each charitable contribution by the company, where Boeing disclosed the intended purpose of its charitable giving but did not disclose each contribution made by the company).

Merck has substantially implemented the Proposal, the essential objective of which is to provide disclosure of Merck's charitable giving to promote Merck's reputation and disclosure of the controls related to Merck's charitable giving processes. Specifically, the Proposal requests that Merck disclose on its website the material limitations, restrictions, and/or the monitoring of contributions and their uses, and list the recipients of donations of $5,000 or more. In addition, the recitals explain that the Proposal's request for disclosure is based on the view that "[c]haritable contributions should enhance the image of [Merck] in the eyes of the public" and "increased disclosure of these contributions would serve to create greater goodwill for [Merck]." The Supporting Statement also explains that "[c]urrent disclosure is insufficient to allow the Company's Board and shareholders to evaluate the proper use of corporate assets by outside organizations and how those assets should be used, especially for controversial causes."

Merck's website already contains extensive and robust disclosure relating to Merck's charitable contributions, including the controls Merck maintains over its charitable giving processes and lists of donation recipients and amounts. In particular, Merck discloses on its website its guiding principles and giving priorities underlying its decision-making with respect to charitable contributions and programs, which include: (i) reducing health disparities among people living with Alzheimer's disease, cancer, diabetes and HIV/AIDS in underserved communities; (ii) strengthening health systems to improve the delivery of high-quality care; (iii) empowering patients to better manage their health by helping them overcome social and environmental barriers to care; and (iv) providing financial support to local nonprofit organizations that address critical health and selected social issues in our communities and sharing employees' expertise through volunteerism. [2] Merck also discloses on its website its grant application guidelines for non-profit organizations (the "Grant Guidelines"). Among other things, the Grant Guidelines specify that only 501(c)(3) nonprofit organizations that "have interests and experience that align with [Merck's] giving priorities" are eligible to be considered for charitable contributions. In addition, the Grant Guidelines describe in detail the types of programs and organizations that Merck will ***not*** fund, such as, among other examples, (i) projects that directly influence or advance Merck's business; (ii) political organizations, campaigns, and activities; (iii) fraternal or labor organizations and activities; (iv) religious organizations or groups whose activities are primarily sectarian in purpose; (v) organizations that discriminate on the basis of race, gender, sexual orientation, gender identity, marital status, religion, age, national origin, veteran's status, or disability; (vi) fundraising events, such as concerts, sporting events, annual appeals or membership drives and benefit dinners or galas (unrelated to organizations whose mission reflects Merck's giving priorities); and (vii) unrestricted general operating support programs.[3]

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[2] *See* the "Philanthropy" page of Merck's website, under the section entitled "Guiding principles and priorities," available at https://www merck.com/company-overview/esg/philanthropy/.

[3] *See* Grant Application Guidelines for Non-Profit Organizations, available at https://www merck.com/wp-content/uploads/sites/5/2020/10/Grant-Application-Guidelines.pdf.

In the Grant Guidelines, Merck also provides detailed disclosure related to the monitoring of its contributions and their uses. For instance, Merck requires that recipients of funds (i) agree to use the funds in the manner and for the purpose(s) for which the grant is intended and (ii) provide annual progress reports and a final report within 12 months following receipt of the grant award. Merck also outlines specific information that should be included in these reports, such as, among other things, (i) a description of project accomplishments, including whether project/program objective(s) were achieved (or in the case of interim reports, a plan and timetable for completing the project), and (ii) an account of how the grant funds were spent, with major expenditures indicated. Accordingly, Merck's existing website disclosure publicly discloses the material limitations, restrictions, and monitoring of the contributions for charitable giving and substantially implements the Proposal. *See Pfizer Inc.* (Feb. 5, 2020)*; *The Boeing Co.* (Feb. 3, 2016); *PG&E Corp.* (Mar. 10, 2010).

In addition to the disclosure made by Merck regarding the controls it maintains over its charitable giving efforts, Merck's website also includes detailed disclosure as to the amounts, recipients, and other information regarding its charitable donations. Merck publishes on the "Transparency Disclosures" section of its website[4] reports, updated on a quarterly basis (the "Funding Reports"), disclosing Merck's grants and charitable contributions to non-profit organizations. The Funding Reports include each recipient's name; the date of the grant, contribution or funding; a brief description of the program/project; and the payment amount (including payment amounts below the $5,000 threshold requested by the Proposal). Moreover, Merck provides detailed reports on its website[5] (which contain similar information as the information in the Funding Reports), updated quarterly in the U.S. and annually in ex-U.S. jurisdictions, regarding its grants or donations to third-party medical, scientific and patient organizations. This existing Merck website disclosure of donation recipients not only further substantially implements the Proposal, but also provides extensive disclosure beyond what is requested in the Proposal.

Given the existing and extensive disclosure on Merck's website explaining the controls that Merck maintains over its charitable giving processes for the bulk of its charitable contributions and listing the recipients and amounts of the donations, Merck has not only satisfied the essential objective of the Proposal, but already provides disclosure beyond what is requested in the Proposal. Specifically, Merck discloses the material limitations, restrictions, and monitoring efforts related to its charitable giving, as requested by the Proposal, so that shareholders can understand and assess whether Merck's charitable donations are consistent with shareholder interests. Moreover, the detailed disclosures listing recipients, amounts and other associated details provide full transparency so that shareholders can "evaluate," as requested by the Proposal, "the proper use of corporate assets by outside organizations."

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4 *See* Merck's Transparency Disclosures webpage under "Philanthropic grants and contributions," available at https://www.merck.com/company-overview/esg/transparency-disclosures/.

5 *See* Merck's Transparency Disclosures webpage under "Grants to medical, scientific and patient organizations," available at https://www merck.com/company-overview/esg/transparency-disclosures/.

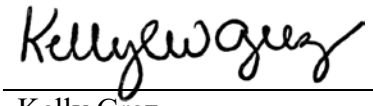
Accordingly, the Proposal has been substantially implemented and may be excluded under Rule 14a-8(i)(10).

V. Conclusion

Based upon the foregoing analysis, the Company respectfully requests that the Staff concur that it will take no action if the Company excludes the Proposal from the 2023 Proxy Materials.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of the Company's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Any such communication regarding this letter should be directed to me at office.secretary@merck.com or (908) 246-3341.

Very truly yours,



Kelly Grez

Enclosures

cc: David Bahnsen

Exhibit A

(Attached)

12/2/2022

Via FedEx & Email

Office of the Secretary
Merck & Co., Inc.
2000 Galloping Hill Road, K1-4157, Kenilworth, NJ 07033 U.S.A
office.secretary@merck.com

Dear Secretary, I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the Merck & Co., 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 14a-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations. I submit the Proposal as DAVID BAHNSEN, TRUSTEE of THE BAHNSEN FAMILY TRUST DATED JULY 15th 2003, which has continuously owned Company stock with a value exceeding $25,000 for at least one year prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2023 annual meeting of shareholders. Pursuant to interpretations of Rule 14(a)-8 by the U.S. Securities and Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal THURSDAY, DECEMBER 8TH AT 2:30PM ET. If that proves inconvenient, please suggest some other times to speak. Feel free to contact me at DBAHNSEN@THEBAHNSENGROUP.COM so that we can determine the mode and method of that discussion.

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 sent 520 NEWPORT CENTER DR., SUITE 300 / NEWPORT BEACH, CA 92660 and emailed DBAHNSEN@THEBAHNSENGROUP.COM.

Sincerely,

DocuSigned by:
12/2/2022
BC7A333992E24D6...

DAVID BAHNSEN

Enclosure: Shareholder Proposal

Charitable Giving Reporting

Whereas: Charitable contributions should enhance the image of our company in the eyes of the public. Increased disclosure of these contributions would serve to create greater goodwill for our Company. It would also allow the public to better voice its opinions on our corporate giving strategy. Inevitably, some organizations might be viewed more favorably than others. This could be useful in guiding our Company's philanthropic decision making in the future. Corporate giving should ultimately enhance shareholder value.

Resolved: That the shareholders request the Company to list the recipients of corporate charitable contributions of $5,000 or more on the company website, along with the material limitations, if any, placed on the restrictions, and/or the monitoring of the contributions and its uses, if any, that the Company undertakes.

Supporting Statement: Current disclosure is insufficient to allow the Company's Board and shareholders to evaluate the proper use of corporate assets by outside organizations and how those assets should be used, especially for controversial causes.

DocuSign

Certificate Of Completion

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Enve ope Or g nator:
Ab ga Murphy
200 W Mad son
Su te 2500
Ch cago, IL 60606
amurphy@h ghtoweradv sors.com
IP Address: 38.140.21.211

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amurphy@h ghtoweradv sors.com

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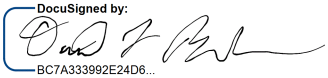
Signer Events	Signature	Timestamp
Dav d Bahnsen dbahnsen@thebahnsengroup.com Partner Secur ty Leve : Ema , Account Authent cat on (None), Authent cat on	DocuSigned by:  BC7A333992E24D6... S gnature Adopt on: Drawn on Dev ce Us ng IP Address: 107.119.53.90 S gned us ng mob e	Sent: 12/2/2022 1:05:00 PM V ewed: 12/2/2022 1:08:21 PM S gned: 12/2/2022 1:08:29 PM

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Company Name: H ghtower Adv sors

In Person Signer Events	Signature	Timestamp

Editor Delivery Events	Status	Timestamp

Agent Delivery Events	Status	Timestamp

Intermediary Delivery Events	Status	Timestamp

Certified Delivery Events	Status	Timestamp

Carbon Copy Events	Status	Timestamp

Witness Events	Signature	Timestamp

Notary Events	Signature	Timestamp

Envelope Summary Events	Status	Timestamps
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Cert f ed De vered	Secur ty Checked	12/2/2022 1:08:21 PM

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Comp eted	Secur ty Checked	12/2/2022 1:08:29 PM

Payment Events	Status	Timestamps

Electronic Record and Signature Disclosure

CONSENT TO ELECTRONIC RECEIPT OF ELECTRONIC DOCUMENTS AND SIGNATURES

Hightower Advisors, LLC ("we" or "us") or ("Custodian") may be required to provide to you certain written notices or disclosures as part of the forms and agreements associated with doing business with us or Custodian. We are independent of and not owned, affiliated with or supervised by the Custodian. If the form or agreement presented is our document, such as a disclosure brochure or investment advisory agreement, then this Consent is between you and us. If the form or agreement presented is a Custodian document, such as an account application agreement, then this Consent is between you and the Custodian. We are your agent who chooses which electronic documents to send you for review and electronic signature. This is the case whether those documents are our forms or Custodian forms. You agree to immediately notify us if you receive any electronic document or information that appears to be in error or not intended for you. Described below are the terms and conditions for providing to you such notices and disclosures electronically for your signature through DocuSign, Inc.

Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to these terms and conditions, please confirm your agreement by clicking the 'I agree' button at the bottom of this document. If you want to use electronic documents and signatures, then you must consent and agree to the terms and conditions relating to the system and process that we and the Custodian will use, as set forth below. By checking the "I agree" button below, you will be giving your informed consent and agreement to use the electronic documents and signature system described below to electronically receive, review, and electronically sign paperless documents sent to you in electronic envelopes. You will be agreeing to be bound by any documents you electronically sign the same as if you had received a paper copy of the document and signed it by hand with an ink pen.

Getting paper copies

At any time, you may request from us a paper copy of any record provided or made available electronically to you from us or Custodian by contacting us. We may always, in our sole discretion, provide you with any document on paper, even if you have authorized electronic delivery.

Withdrawing your consent

We and the Custodian will ask you for this Consent each time you are given an envelope of electronic documents. Once you give your Consent for an envelope, you cannot withdraw it for that envelope. You can, however, choose not to give your consent in the future when you are presented with subsequent envelopes. If you do this, you will be unable to proceed electronically, and you may be required to use paper documents and signatures. If you give your Consent for an envelope, although you may not withdraw it, you can still choose not to electronically sign any or all electronic documents in that envelope.

Once you electronically sign a particular document, you cannot withdraw the Consent and Agreement for that document, but you can choose to not electronically sign any other documents included in the same envelope. In addition, before you complete an electronic signature of a document, you may cancel and exit the electronic signing process before clicking the 'Confirm Signing' (or other similarly titled button) and closing your browser.

How to Update Your Email Address

Please contact us directly if you need to update your email address where we should send notices and disclosures electronically to you.

Minimum required hardware and software

Operating Systems:

Windows 7, Mac OS X, Mac iOS 11

Browsers for SENDERS:

Internet Explorer 11

Browsers for SIGNERS:

Internet Explorer 11, Google Chrome 65, Safari 11, Firefox Standard 59, Firefox Extended 52

Email:

Access to a valid email account

Screen Resolution:

800 x 600 minimum

1024 x 768 recommended

Enabled Security Settings:

Allow per session cookies

Users accessing the internet behind a Proxy Server must enable HTTP 1.1 settings via proxy connection

These minimum requirements are subject to change. If these requirements change, you will be asked to re-accept the disclosure. Pre-release (e.g. beta) versions of operating systems and browsers are not supported.

Your use of the DocuSign system is subject to DocuSign's Terms of Use available at www.docusign.com/company/terms-of-use. We, the Custodian, and DocuSign are not affiliated with each other. Neither we nor the Custodian is responsible for the DocuSign system, and each disclaims any representations and all warranties regarding the DocuSign system. Your use of the DocuSign system is entirely your choice and solely your responsibility.

Security and Privacy Information

In accessing electronic documents and electronically signing them, you should use a computer operating system that has a firewall (software that is designed to prevent unauthorized access to your computer by blocking suspicious people or websites) and that it is turned on and up-to-date. You should also make sure that your computer has anti-virus software that it is turned on and that your subscription is current.

Emails sending you links to envelopes with electronic documents for electronic signature are not encrypted (unless the email expressly says that it is encrypted); but the contents of the envelopes are protected. For security and confidentiality, unencrypted emails will not include your name, full account number, or any other personal identifier. Be aware, however, that some email addresses may use part or all of your name. If you use a work email address, your employer or other employees may have access to your email. As with any form of communication, there is a risk of misdelivery or interception.

DocuSign has agreed with us to safeguard the security and privacy of all confidential customer information. DocuSign's privacy policy applies to your use of the DocuSign system. In addition, our privacy policy applies to information we receive from you as part of the electronic signature process. Links or references to where you can view ours and Custodian's respective privacy policies may be contained in the email notifying you of the documents on which your electronic signature is requested or the documents themselves. You may also contact us to be directed to our and/or Custodian's privacy policy.

Acknowledging your access and consent to receive and sign documents electronically

By checking the 'I Agree' box, I confirm that:

- I can access and read this Electronic CONSENT TO ELECTRONIC RECEIPT OF ELECTRONIC DOCUMENTS AND SIGNATURES document; and
- I can print on paper the disclosure or save or send the disclosure to a place where I can print it, for future reference and access; and
- I will not contest the validity or enforceability of any electronic document I receive or electronically sign because the document and my signature are in electronic form; and
- Until or unless I notify my Advisor as described above, I consent to sign exclusively through electronic means and to receive exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to me.

Fidelity Institutional[SM]

100 Crosby Parkway KCIJ
Covington, KY 41015

DAVID BAHNSEN
[redacted]

December 15, 2022

Dear David Bahnsen,

I am writing in response to your request to confirm the details of equity holdings in your Fidelity Brokerage accounts ending [redacted].

As of December 15, 2022, the aforementioned accounts have been in possession of the following security for at least one year:

Description: MERCK & CO. INC COM
CUSIP: 58933Y105
Quantity: 2299.761 shares

With any questions about this letter or your accounts at Fidelity Investments, please let me know.

Sincerely,

Landon Beam
Client Services Manager

Our file: W805482-15DEC22

Merck & Co., Inc.
2000 Galloping Hill Road
Kenilworth, NJ 07033
Email: office.secretary@merck.com

Via email (dbahnsen@thebahnsengroup.com)

December 5, 2022

David Bahnsen
Trustee of the Bahnsen Family Trust dated July 15, 2003
520 Newport Center Dr., Suite 300
Newport Beach, CA 92660

Re: Shareholder Proposal from David Bahnsen, Trustee of the Bahnsen Family Trust dated July 15, 2003

Dear Mr. Bahnsen:

This is to acknowledge receipt of your letter to Merck & Co., Inc. ("Merck"), dated December 2, 2022 (the "Letter"), and the accompanying shareholder proposal regarding "Charitable Giving Reporting" (the "Proposal") submitted for inclusion in theproxy materials for Merck's 2023 Annual Meeting of Shareholders (the "Annual Meeting").

I. Proof of Ownership (Rule 14a-8(b)(1)(i))

Rule 14a-8(b)(1)(i)(A) through (C) promulgated under the U.S. Securities Exchange Act of 1934, as amended, requires proponents to establish continuous ownership of: (A) at least $2,000 in market value of Merck securities entitled to vote on the Proposal for at least three years; **OR** (B) at least $15,000 in market value of Merck securities entitled to vote on the Proposal for at least two years; **OR** (C) at least $25,000 in market value of Merck securities entitled to vote on the proposal for at least one year (the "Share Ownership Requirements"). For purposes of Rule 14a-8(b)(1)(i), you may not aggregate your holdings with those of another shareholder or group of shareholders to meet the Share Ownership Requirements. Rule 14a-8(b) also sets forth the methods to satisfy the Share Ownership Requirements. Additional guidance with regard to Rule 14a-8(b) is provided under the SEC's Division of Corporate Finance Staff Legal Bulletins Nos. 14L, 14F and 14G, copies of which are attached.

A search of Merck records could not confirm that you are a registered holder ofMerck securities and your letter did not otherwise provide information with respect to the Share Ownership Requirements.

As provided in Rule 14a-8(b)(2), if you wish to proceed with the Proposal, within 14 calendar daysof your receipt of this letter, you must respond in writing and provide us with documentation evidencing full compliance with at least one of the Share Ownership Requirements by submitting either:

- a written statement from the "record" holder of the securities (usually a brokeror bank), verifying that, at the time the Proposal was submitted, you continuously held at least

$2,000, $15,000, or $25,000 in market value of Merck securities entitled to vote on the Proposal for at least three years, two years, or one year, respectively. Most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency acting as a securities depository. DTC participantsand affiliates of a DTC participant will be viewed as "record" holders of November 7, 2022 securities that are deposited at DTC. You can confirm whether a particular broker or bank is a DTC participant by checking DTC's participant list, which is currently available at: https://www.dtcc.com/client-center/dtc-directories.aspx.

If your broker or bank is not on DTC's participant list or an affiliate of a DTC participant, you will need to obtain proof of ownership from the DTC participantthrough which the securities are held. This information should be available by asking your broker or bank.

If you are holding Merck securities through a securities intermediary that is not a broker or bank, a proof of ownership letter from that securities intermediary must be submitted. If the securities intermediary is not a DTC participant or an affiliateof a DTC participant, then you will also need to obtain a proof of ownership letter from the DTC participant or an affiliate of a DTC participant that can verify the holdings of the securities intermediary; **OR**

- (i) a copy of a filed Schedule 13D, Schedule 13G, Form 3, Form 4, Form 5, or amendments to those documents or updated forms, demonstrating that you meet at least one of the Share Ownership Requirements; **AND** (ii) a written statement that you continuously held at least $2,000, $15,000, or $25,000 in market value of Merck securities entitled to vote on the Proposal for at least three years, two years, or one year, respectively.

II. Conclusion

If the requirements under Rule 14a-8(b)(1)(i) cannot be satisfied, in accordance with Rule 14a-8(f), Merck will be entitled to exclude the Proposal. In the event that you comply with Rule 14a-8(b), Merck reserves the right and may seek to exclude the Proposal in accordance with SEC proxy rules. For your convenience, please find enclosed a copy of SEC Rule 14a-8 in its entirety.

Regards,

Anthony Wildasin
Assistant Corporate Secretary

cc: Kelly Grez
Corporate Secretary

Announcement

Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)

Division of Corporation Finance
Securities and Exchange Commission

Action Publication of CF Staff Legal Bulletin

Date: November 3, 2021

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commi ion (the "Commi ion") Further, the Commi ion ha neither approved nor di approved it content Thi bulletin, like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

Contacts: For further information, please contact the Division's Office of Chief Counsel by submitting a web-based request form at https://www.sec.gov/forms/corp_fin_interpretive.

A. The Purpose of This Bulletin

The Division is rescinding Staff Legal Bulletin Nos. 14I, 14J and 14K (the "rescinded SLBs") after a review of staff experience applying the guidance in them. In addition, to the extent the views expressed in any other prior Division staff legal bulletin could be viewed as contrary to those expressed herein, this staff legal bulletin controls.

This bulletin outlines the Division's views on Rule 14a-8(i)(7), the ordinary business exception, and Rule 14a-8(i)(5), the economic relevance exception. We are also republishing, with primarily technical, conforming changes, the guidance contained in SLB No 14I and 14K relating to the u e of graphic and image , and proof of owner hip letters. In addition, we are providing new guidance on the use of e-mail for submission of proposals, delivery of notice of defects, and responses to those notices.

In Rule 14a-8, the Commission has provided a means by which shareholders can present proposals for the shareholders' consideration in the company's proxy statement. This process has become a cornerstone of shareholder engagement on important matters. Rule 14a-8 sets forth several bases for exclusion of such propo al Companie often reque t a urance that the taff will not recommend enforcement action if they omit a proposal based on one of these exclusions ("no-action relief"). The Division is issuing this bulletin to streamline and simplify our process for reviewing no-action requests, and to clarify the standards staff will apply when evaluating these requests.

B. Rule 14a-8(i)(7)

1. Background

Rule 14a-8(i)(7), the ordinary business exception, is one of the substantive bases for exclusion of a shareholder proposal in Rule 14a-8. It permits a company to exclude a proposal that "deals with a matter relating to the company' ordinary bu ine operation " The purpo e of the e ception i "to confine the re olution 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."[1]

2. Significant Social Policy Exception

Based on a review of the rescinded SLBs and staff experience applying the guidance in them, we recognize that an undue empha i wa placed on evaluating the ignificance of a policy i ue to a particular company at the expense of whether the proposal focuses on a significant social policy,[2] complicating the application of Commission policy to proposals. In particular, we have found that focusing on the significance of a policy issue to a particular company has drawn the staff into factual considerations that do not advance the policy objectives behind the ordinary bu ine e ception We have al o concluded that uch analy i did not yield con i tent, predictable results.

Going forward, the taff will realign it approach for determining whether a propo al relate to "ordinary bu ine " with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues,[3] and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues before other hareholder by mean of the company' pro y tatement, while al o recognizing the board' authority over mo t day-to-day business matters. For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad ocietal impact, uch that they tran cend the ordinary bu ine of the company [4]

Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to rai e a policy i ue of ignificance for the company may no longer be viewed a e cludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.[5]

Because the staff is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7), it will no longer expect a board analysis as described in the rescinded SLBs as part of demon trating that the propo al i e cludable under the ordinary bu ine e clu ion Ba ed on our e perience, we believe that board analysis may distract the company and the staff from the proper application of the exclusion. Additionally, the "delta" component of board analysis – demonstrating that the difference between the company's existing actions addressing the policy issue and the proposal's request is insignificant – sometimes confounded the application of Rule 14a 8(i)(10)' ub tantial implementation tandard

3. Micromanagement

Upon further consideration, the staff has determined that its recent application of the micromanagement concept, as outlined in SLB Nos. 14J and 14K, expanded the concept of micromanagement beyond the Commission's policy directives. Specifically, we believe that the rescinded guidance may have been taken to mean that any limit on company or board di cretion con titute micromanagement

The Commission has stated that the policy underlying the ordinary business exception rests on two central con ideration The fir t relate to the propo al' ubject matter; the econd relate to the degree to which the proposal "micromanages" 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."[6] The Commission clarified in the 1998 Release that specific methods, timelines, or detail do not necessarily amount to micromanagement and are not di po itive of e cludability

Con i tent with Commi ion guidance, the taff will take a mea ured approach to evaluating companie ' micromanagement arguments – recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement. Instead, we will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management. We would e pect the level of detail included in a hareholder propo al to be con i tent with that needed to enable inve tor to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input.

Our recent letter to ConocoPhillips Company[7] provides an example of our current approach to micromanagement. In that letter the staff denied no-action relief for a proposal requesting that the company set targets covering the greenhouse gas emissions of the company's operations and products. The proposal reque ted that the company et emi ion reduction target and it did not impo e a pecific method for doing o The staff concluded this proposal did not micromanage to such a degree to justify exclusion under Rule 14a-8(i)(7).

Additionally, in order to assess whether a proposal probes matters "too complex" for shareholders, as a group, to make an informed judgment,[8] we may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic. The staff may also consider reference to well e tabli hed national or international framework when a e ing propo al related to disclosure, target setting, and timeframes as indicative of topics that shareholders are well-equipped to evaluate.

Thi approach i con i tent with the Commi ion' view on the ordinary bu ine e clu ion, which i de igned to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters. As the Commission stated in its 1998 Release:

> [In] the Proposing Release we explained that one of the considerations in making the ordinary business determination was the degree to which the proposal seeks to micro-manage the company. We cited examples such as where the proposal seeks intricate detail, or seeks to impose specific time-frames or to impo e pecific method for implementing comple policie Some commenter thought that the e ample cited seemed to imply that all proposals seeking detail, or seeking to promote time-frames or methods, necessarily amount to 'ordinary business.' We did not intend such an implication. Timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a rea onable level of detail without running afoul of the e con ideration

While the analysis in this bulletin may apply to any subject matter, many of the proposals addressed in the re cinded SLB reque ted companie adopt timeframe or target to addre climate change that the taff concurred were excludable on micromanagement grounds.[9] Going forward we would not concur in the exclusion of similar proposals that suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals.[10] We believe our current approach to micromanagement will help to avoid the dilemma many proponent faced when eeking to craft propo al with ufficient pecificity and direction to avoid being excluded under Rule 14a-8(i)(10), substantial implementation, while being general enough to avoid exclusion for "micromanagement."[11]

C. Rule 14a-8(i)(5)

Rule 14a-8(i)(5), the "economic relevance" exception, permits a company to exclude a proposal that "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwi e ignificantly related to the company' bu ine "

Based on a review of the rescinded SLBs and staff experience applying the guidance in them, we are returning to our long tanding approach, prior to SLB No 14I, of analyzing Rule 14a 8(i)(5) in a manner we believe i con i tent with Lovenheim v. Iroquois Brands, Ltd.[12] As a result, and consistent with our pre-SLB No. 14I approach and Lovenheim, proposals that raise issues of broad social or ethical concern related to the company's business may

not be excluded, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5). In light of this approach, the staff will no longer expect a board analysis for its consideration of a no-action request under Rule 14a-8(i)(5).

D. Rule 14a-8(d)[13]

1. Background

Rule 14a-8(d) is one of the procedural bases for exclusion of a shareholder proposal in Rule 14a-8. It provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words."

2. The Use of Images in Shareholder Proposals

Questions have arisen concerning the application of Rule 14a-8(d) to proposals that include graphs and/or images.[14] The staff has expressed the view that the use of "500 words" and absence of express reference to graphics or images in Rule 14a-8(d) do not prohibit the inclusion of graphs and/or images in proposals.[15] Just as companies include graphics that are not expressly permitted under the disclosure rules, the Division is of the view that Rule 14a-8(d) does not preclude shareholders from using graphics to convey information about their proposals.[16]

The Division recognizes the potential for abuse in this area. The Division believes, however, that these potential abuses can be addressed through other provisions of Rule 14a-8. For example, exclusion of graphs and/or images would be appropriate under Rule 14a-8(i)(3) where they:

- make the proposal materially false or misleading;
- render the proposal so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing it, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires;
- directly or indirectly impugn character, integrity or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; or
- are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote.[17]

Exclusion would also be appropriate under Rule 14a-8(d) if the total number of words in a proposal, including words in the graphics, exceeds 500.

E. Proof of Ownership Letters[18]

In relevant part, Rule 14a-8(b) provides that a proponent must prove eligibility to submit a proposal by offering proof that it "continuously held" the required amount of securities for the required amount of time.[19]

In Section C of SLB No. 14F, we identified two common errors shareholders make when submitting proof of ownership for purposes of satisfying Rule 14a-8(b)(2).[20] In an effort to reduce such errors, we provided a suggested format for shareholders and their brokers or banks to follow when supplying the required verification of ownership.[21] Below, we have updated the suggested format to reflect recent changes to the ownership thresholds due to the Commission's 2020 rulemaking.[22] We note that brokers and banks are not required to follow this format.

> "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least [one year] [two years] [three years], [number of securities] shares of [company name] [class of securities]."

Some companies apply an overly technical reading of proof of ownership letters as a means to exclude a proposal. We generally do not find arguments along these lines to be persuasive. For example, we did not concur with the excludability of a proposal based on Rule 14a-8(b) where the proof of ownership letter deviated from the format set forth in SLB No. 14F.[23] In those cases, we concluded that the proponent nonetheless had supplied documentary support sufficiently evidencing the requisite minimum ownership requirements, as required by Rule 14a-8(b). We took a plain meaning approach to interpreting the text of the proof of ownership letter, and we expect companies to apply a similar approach in their review of such letters.

While we encourage shareholders and their brokers or banks to use the sample language provided above to avoid this issue, such formulation is neither mandatory nor the exclusive means of demonstrating the ownership requirements of Rule 14a-8(b).[24] We recognize that the requirements of Rule 14a-8(b) can be quite technical. Accordingly, companies should not seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements.

We also do not interpret the recent amendments to Rule 14a-8(b)[25] to contemplate a change in how brokers or banks fulfill their role. In our view, they may continue to provide confirmation as to how many shares the proponent held continuously and need not separately calculate the share valuation, which may instead be done by the proponent and presented to the receiving issuer consistent with the Commission's 2020 rulemaking.[26] Finally, we believe that companies should identify any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving the proponent's proof of ownership if such deficiency notice did not identify the specific defect(s).

F. Use of E-mail

Over the past few years, and particularly during the pandemic, both proponents and companies have increasingly relied on the use of emails to submit proposals and make other communications. Some companies and proponents have expressed a preference for emails, particularly in cases where offices are closed. Unlike the use of third-party mail delivery that provides the sender with a proof of delivery, parties should keep in mind that methods for the confirmation of email delivery may differ. Email delivery confirmations and company server logs may not be sufficient to prove receipt of emails as they only serve to prove that emails were sent. In addition, spam filters or incorrect email addresses can prevent an email from being delivered to the appropriate recipient. The staff therefore suggests that to prove delivery of an email for purposes of Rule 14a-8, the sender should seek a reply e-mail from the recipient in which the recipient acknowledges receipt of the e-mail. The staff also encourages both companies and shareholder proponents to acknowledge receipt of emails when requested. Email read receipts, if received by the sender, may also help to establish that emails were received.

1. Submission of Proposals

Rule 14a-8(e)(1) provides that in order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery. Therefore, where a dispute arises regarding a proposal's timely delivery, shareholder proponents risk exclusion of their proposals if they do not receive a confirmation of receipt from the company in order to prove timely delivery with email submissions. Additionally, in those instances where the company does not disclose in its proxy statement an email address for submitting proposals, we encourage shareholder proponents to contact the company to obtain the correct email address for submitting proposals before doing so and we encourage companies to provide such email addresses upon request.

2. Delivery of Notices of Defects

Similarly, if companies use email to deliver deficiency notices to proponents, we encourage them to seek a confirmation of receipt from the proponent or the representative in order to prove timely delivery. Rule 14a-8(f)(1) provides that the company must notify the shareholder of any defects within 14 calendar days of receipt of the proposal, and accordingly, the company has the burden to prove timely delivery of the notice.

3. Submitting Responses to Notices of Defects

Rule 14a-8(f)(1) also provides that a shareholder's response to a deficiency notice must be postmarked, or transmitted electronically, no later than 14 days from the date of receipt of the company's notification. If a shareholder uses email to responds to a company's deficiency notice, the burden is on the shareholder or representative to use an appropriate email address (e.g., an email address provided by the company, or the email address of the counsel who sent the deficiency notice), and we encourage them to seek confirmation of receipt.

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[1] Release No. 34-40018 (May 21, 1998) (the "1998 Release"). Stated a bit differently, the Commission has explained that "[t]he 'ordinary business' exclusion is based in part on state corporate law establishing spheres of authority for the board of directors on one hand, and the company's shareholders on the other." Release No. 34-39093 (Sept. 18, 1997).

[2] For example, SLB No. 14K explained that the staff "takes a company-specific approach in evaluating significance, rather than recognizing particular issues or categories of issues as universally 'significant.'" Staff Legal Bulletin No. 14K (Oct. 16, 2019).

[3] Release No. 34-12999 (Nov. 22, 1976) (the "1976 Release") (stating, in part, "proposals of that nature [relating to the economic and safety considerations of a nuclear power plant], as well as others that have major implications, will in the future be considered beyond the realm of an issuer's ordinary business operations").

[4] 1998 Release ("[P]roposals . . . focusing on sufficiently significant social policy issues. . .generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote")

[5] *See, e.g., Dollar General Corporation* (Mar. 6, 2020) (granting no-action relief for exclusion of a proposal requesting the board to issue a report on the use of contractual provisions requiring employees to arbitrate employment-related claims because the proposal did not focus on specific policy implications of the use of arbitration at the company). We note that in the 1998 Release the Commission stated: "[P]roposals relating to [workforce management] but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day to day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." Matters related to employment discrimination are but one example of the workforce management proposals that may rise to the level of transcending the company's ordinary business operations.

[6] 1998 Release.

[7] *ConocoPhillips Company* (Mar. 19, 2021).

[8] *See* 1998 Release and 1976 Release

[9] *See, e.g.*, *PayPal Holdings, Inc.* (Mar. 6, 2018) (granting no-action relief for exclusion of a proposal asking the company to prepare a report on the feasibility of achieving net zero emissions by 2030 because the staff concluded it micromanaged the company); *Devon Energy Corporation* (Mar. 4, 2019) (granting no-action relief for exclusion of a proposal requesting that the board in annual reporting include disclosure of short-, medium- and long-term greenhouse gas targets aligned with the Paris Climate Agreement because the staff viewed the proposal as requiring the adoption of time bound targets)

[10] *See ConocoPhillips Company* (Mar. 19, 2021).

[11] To be more specific, shareholder proponents have expressed concerns that a proposal that was broadly worded might face exclusion under Rule 14a-8(i)(10). Conversely, if a proposal was too specific it risked exclusion under Rule 14a 8(i)(7) for micromanagement

[12] 618 F. Supp. 554 (D.D.C. 1985).

[13] This section previously appeared in SLB No. 14I (Nov. 1, 2017) and is republished here with only minor, conforming changes.

[14] Rule 14a-8(d) is intended to limit the amount of space a shareholder proposal may occupy in a company's proxy statement. *See* 1976 Release.

[15] *See General Electric Co.* (Feb. 3, 2017, Feb. 23, 2017); *General Electric Co.* (Feb. 23, 2016). These decisions were consistent with a longstanding Division position. *See Ferrofluidics Corp.* (Sept. 18, 1992).

[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.

[17] *See General Electric Co.* (Feb. 23, 2017).

[18] This section previously appeared in SLB No. 14K (Oct.16, 2019) and is republished here with minor, conforming changes. Additional discussion is provided in the final paragraph.

[19] Rule 14a-8(b) requires proponents to have continuously held at least $2,000, $15,000, or $25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively.

[20]Staff Legal Bulletin No. 14F (Oct. 18, 2011).

[21]The Division suggested the following formulation: "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."

[22] Release No. 34-89964 (Sept. 23, 2020) (the "2020 Release").

[23] *See Amazon.com, Inc.* (Apr. 3, 2019); *Gilead Sciences, Inc.* (Mar. 7, 2019).

[24] *See* Staff Legal Bulletin No.14F, n.11.

[25] *See* 2020 Release.

[26] 2020 Release at n.55 ("Due to market fluctuations, the value of a shareholder's investment in a company may vary throughout the applicable holding period before the shareholder submits the proposal. In order to determine whether the shareholder satisfies the relevant ownership threshold, the shareholder should look at whether, on any date within the 60 calendar days before the date the shareholder submits the proposal, the shareholder's investment is valued at the relevant threshold or greater. For these purposes, companies and shareholders should determine the market value by multiplying the number of securities the shareholder continuously held for the relevant period by the highest selling price during the 60 calendar days before the shareholder submitted the proposal. For purposes of this calculation, it is important to note that a security's highest selling price is not necessarily the same as its highest closing price.") (citations omitted).

Modified: Nov. 3, 2021

Shareholder Proposals

Staff Legal Bulletin No. 14F (CF)

Action: Publication of CF Staff Legal Bulletin

Date October 18, 2011

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securitie E change Act of 1934

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Divi ion") Thi bulletin i not a rule, regulation or tatement of the Securitie and E change Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

Contact For further information, plea e contact the Divi ion' Office of Chief Coun el by calling (202) 551 3500 or by submitting a web-based request form at https://www.sec.gov/forms/corp_fin_interpretive.

A. The purpose of this bulletin

Thi bulletin i part of a continuing effort by the Divi ion to provide guidance on important i ue ari ing under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- Broker and bank that con titute "record" holder under Rule 14a 8(b)(2)(i) for purpo e of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- Common errors shareholders can avoid when submitting proof of ownership to companies;
- The submission of revised proposals;
- Procedures for withdrawing no-action requests regarding proposals submitted by multiple proponents; and
- The Division's new process for transmitting Rule 14a-8 no-action responses by email.

You can find additional guidance regarding Rule 14a 8 in the following bulletin that are available on the Commission's website: SLB No. 14, SLB No. 14A, SLB No. 14B, SLB No. 14C, SLB No. 14D and SLB No. 14E.

B. The types of brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Eligibility to submit a proposal under Rule 14a-8

To be eligible to submit a shareholder proposal, a shareholder must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at lea t one year a of the date the hareholder ubmit the propo al The hareholder mu t al o continue to hold the required amount of securities through the date of the meeting and must provide the company with a written statement of intent to do so.[1]

The tep that a hareholder mu t take to verify hi or her eligibility to ubmit a propo al depend on how the shareholder owns the securities. There are two types of security holders in the U.S.: registered owners and beneficial owners.[2] Registered owners have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or its transfer agent. If a shareholder is a registered owner, the company can independently confirm that the hareholder' holding ati fy Rule 14a 8(b)' eligibility requirement

The vast majority of investors in shares issued by U.S. companies, however, are beneficial owners, which means that they hold their ecuritie in book entry form through a ecuritie intermediary, uch a a broker or a bank Beneficial owners are sometimes referred to as "street name" holders. Rule 14a-8(b)(2)(i) provides that a beneficial owner can provide proof of ownership to support his or her eligibility to submit a proposal by submitting a written statement "from the 'record' holder of [the] securities (usually a broker or bank)," verifying that, at the time the propo al wa ubmitted, the hareholder held the required amount of ecuritie continuou ly for at lea t one year.[3]

2. The role of the Depository Trust Company

Most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency acting as a securities depository. Such brokers and bank are often referred to a "participant " in DTC [4] The name of the e DTC participant , however, do not appear as the registered owners of the securities deposited with DTC on the list of shareholders maintained by the company or, more typically, by its transfer agent. Rather, DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants. A company can request from DTC a " ecuritie po ition li ting" a of a pecified date, which identifie the DTC participant having a position in the company's securities and the number of securities held by each DTC participant on that date.[5]

3. Brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), we took the position that an introducing broker could be considered a "record" holder for purposes of Rule 14a-8(b)(2)(i). An introducing broker is a broker that engages in ale and other activitie involving cu tomer contact, uch a opening cu tomer account and accepting cu tomer orders, but is not permitted to maintain custody of customer funds and securities.[6] Instead, an introducing broker engages another broker, known as a "clearing broker," to hold custody of client funds and securities, to clear and execute customer trades, and to handle other functions such as issuing confirmations of customer trades and cu tomer account tatement Clearing broker generally are DTC participant ; introducing broker generally are not. As introducing brokers generally are not DTC participants, and therefore typically do not appear on DTC's securities position listing, *Hain Celestial* has required companies to accept proof of ownership letters from brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the company i unable to verify the po ition again t it own or it tran fer agent' record or again t DTC' ecuritie position listing.

In light of que tion we have received following two recent court ca e relating to proof of owner hip under Rule 14a-8[7] and in light of the Commission's discussion of registered and beneficial owners in the Proxy Mechanics Concept Release, we have reconsidered our views as to what types of brokers and banks should be considered "record" holders under Rule 14a-8(b)(2)(i). Because of the transparency of DTC participants' positions in a company' ecuritie , we will take the view going forward that, for Rule 14a 8(b)(2)(i) purpo e , only DTC participants should be viewed as "record" holders of securities that are deposited at DTC. As a result, we will no longer follow *Hain Celestial*.

We believe that taking this approach as to who constitutes a "record" holder for purposes of Rule 14a-8(b)(2)(i) will provide greater certainty to beneficial owners and companies. We also note that this approach is consistent with Exchange Act Rule 12g5-1 and a 1988 staff no-action letter addressing that rule,[8] under which brokers and banks

that are DTC participant are con idered to be the record holder of ecuritie on depo it with DTC when calculating the number of record holders for purposes of Sections 12(g) and 15(d) of the Exchange Act.

Companie have occa ionally e pre ed the view that, becau e DTC' nominee, Cede & Co , appear on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants, only DTC or Cede & Co. should be viewed as the "record" holder of the securities held on deposit at DTC for purposes of Rule 14a-8(b)(2)(i). We have never interpreted the rule to require a shareholder to obtain a proof of ownership letter from DTC or Cede & Co , and nothing in thi guidance hould be con trued a changing that view

How can a shareholder determine whether his or her broker or bank is a DTC participant

Shareholders and companies can confirm whether a particular broker or bank is a DTC participant by checking DTC' participant li t, which i currently available on the Internet at http://www.dtcc.com/~/media/Files/Downloads/client-center/DTC/alpha.ashx.

What if a shareholder's broker or bank is not on DTC's participant list

The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held The hareholder hould be able to find out who thi DTC participant i by a king the hareholder' broker or bank.[9]

If the DTC participant know the hareholder' broker or bank' holding , but doe not know the shareholder's holdings, a shareholder could satisfy Rule 14a-8(b)(2)(i) by obtaining and submitting two proof of ownership statements verifying that, at the time the proposal was submitted, the required amount of securities were continuously held for at least one year – one from the shareholder's broker or bank confirming the hareholder' owner hip, and the other from the DTC participant confirming the broker or bank' ownership.

How will the staff process no action requests that argue for exclusion on the basis that the shareholder's proof of ownership is not from a DTC participant?

The taff will grant no action relief to a company on the ba i that the hareholder' proof of owner hip i not from a DTC participant only if the company's notice of defect describes the required proof of ownership in a manner that is consistent with the guidance contained in this bulletin. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

C. Common errors shareholders can avoid when submitting proof of ownership to companies

In this section, we describe two common errors shareholders make when submitting proof of ownership for purposes of Rule 14a-8(b)(2), and we provide guidance on how to avoid these errors.

First, Rule 14a-8(b) requires a shareholder to provide proof of ownership that he or she has "continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal" (emphasis added).[10] We note that many proof of owner hip letter do not ati fy thi requirement becau e they do not verify the hareholder' beneficial ownership for the entire one-year period preceding and including the date the proposal is submitted. In some cases, the letter speaks as of a date *before* the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the letter speaks as of a date *after* the date the propo al wa ubmitted but cover a period of only one year, thu failing to verify the hareholder' beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Second, many letters fail to confirm continuous ownership of the securities. This can occur when a broker or bank submits a letter that confirms the shareholder's beneficial ownership only as of a specified date but omits any reference to continuous ownership for a one-year period.

We recognize that the requirements of Rule 14a-8(b) are highly prescriptive and can cause inconvenience for shareholders when submitting proposals. Although our administration of Rule 14a-8(b) is constrained by the terms of the rule, we believe that shareholders can avoid the two errors highlighted above by arranging to have their broker or bank provide the required verification of ownership as of the date they plan to submit the proposal using the following format:

> "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."[11]

As discussed above, a shareholder may also need to provide a separate written statement from the DTC participant through which the shareholder's securities are held if the shareholder's broker or bank is not a DTC participant.

D. The submission of revised proposals

On occasion, a shareholder will revise a proposal after submitting it to a company. This section addresses questions we have received regarding revisions to a proposal or supporting statement.

1. A shareholder submits a timely proposal. The shareholder then submits a revised proposal before the company's deadline for receiving proposals. Must the company accept the revisions?

Yes. In this situation, we believe the revised proposal serves as a replacement of the initial proposal. By submitting a revised proposal, the shareholder has effectively withdrawn the initial proposal. Therefore, the shareholder is not in violation of the one-proposal limitation in Rule 14a-8(c).[12] If the company intends to submit a no-action request, it must do so with respect to the revised proposal.

We recognize that in Question and Answer E.2 of SLB No. 14, we indicated that if a shareholder makes revisions to a proposal before the company submits its no-action request, the company can choose whether to accept the revisions. However, this guidance has led some companies to believe that, in cases where shareholders attempt to make changes to an initial proposal, the company is free to ignore such revisions even if the revised proposal is submitted before the company's deadline for receiving shareholder proposals. We are revising our guidance on this issue to make clear that a company may not ignore a revised proposal in this situation.[13]

2. A shareholder submits a timely proposal. After the deadline for receiving proposals, the shareholder submits a revised proposal. Must the company accept the revisions?

No. If a shareholder submits revisions to a proposal after the deadline for receiving proposals under Rule 14a-8(e), the company is not required to accept the revisions. However, if the company does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, as required by Rule 14a-8(j). The company's notice may cite Rule 14a-8(e) as the reason for excluding the revised proposal. If the company does not accept the revisions and intends to exclude the initial proposal, it would also need to submit its reasons for excluding the initial proposal.

3. If a shareholder submits a revised proposal, as of which date must the shareholder prove his or her share ownership?

A shareholder must prove ownership as of the date the original proposal is submitted. When the Commission has discussed revisions to proposals,[14] it has not suggested that a revision triggers a requirement to provide proof of ownership a second time. As outlined in Rule 14a-8(b), proving ownership includes providing a written statement

that the shareholder intends to continue to hold the securities through the date of the shareholder meeting. Rule 14a-8(f)(2) provides that if the shareholder "fails in [his or her] promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of [the same shareholder's] proposals from its proxy materials for any meeting held in the following two calendar years." With these provisions in mind, we do not interpret Rule 14a-8 as requiring additional proof of ownership when a shareholder submits a revised proposal.[15]

E. Procedures for withdrawing no-action requests for proposals submitted by multiple proponents

We have previously addressed the requirements for withdrawing a Rule 14a-8 no-action request in SLB Nos. 14 and 14C. SLB No. 14 notes that a company should include with a withdrawal letter documentation demonstrating that a shareholder has withdrawn the proposal. In cases where a proposal submitted by multiple shareholders is withdrawn, SLB No. 14C states that, if each shareholder has designated a lead individual to act on its behalf and the company is able to demonstrate that the individual is authorized to act on behalf of all of the proponents, the company need only provide a letter from that lead individual indicating that the lead individual is withdrawing the proposal on behalf of all of the proponents.

Because there is no relief granted by the staff in cases where a no-action request is withdrawn following the withdrawal of the related proposal, we recognize that the threshold for withdrawing a no-action request need not be overly burdensome. Going forward, we will process a withdrawal request if the company provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the proposal on behalf of each proponent identified in the company's no-action request.[16]

F. Use of email to transmit our Rule 14a-8 no-action responses to companies and proponents

To date, the Division has transmitted copies of our Rule 14a-8 no-action responses, including copies of the correspondence we have received in connection with such requests, by U.S. mail to companies and proponents. We also post our response and the related correspondence to the Commission's website shortly after issuance of our response.

In order to accelerate delivery of staff responses to companies and proponents, and to reduce our copying and postage costs, going forward, we intend to transmit our Rule 14a-8 no-action responses by email to companies and proponents. We therefore encourage both companies and proponents to include email contact information in any correspondence to each other and to us. We will use U.S. mail to transmit our no-action response to any company or proponent for which we do not have email contact information.

Given the availability of our responses and the related correspondence on the Commission's website and the requirement under Rule 14a-8 for companies and proponents to copy each other on correspondence submitted to the Commission, we believe it is unnecessary to transmit copies of the related correspondence along with our no-action response. Therefore, we intend to transmit only our staff response and not the correspondence we receive from the parties. We will continue to post to the Commission's website copies of this correspondence at the same time that we post our staff no-action response.

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[1] *See* Rule 14a-8(b).

[2] For an explanation of the types of share ownership in the U.S., see Concept Release on U.S. Proxy System, Release No. 34-62495 (July 14, 2010) [75 FR 42982] ("Proxy Mechanics Concept Release"), at Section II.A. The term "beneficial owner" does not have a uniform meaning under the federal securities laws. It has a different meaning in this bulletin as compared to "beneficial owner" and "beneficial ownership" in Sections 13 and 16 of the

Exchange Act. Our use of the term in this bulletin is not intended to suggest that registered owners are not beneficial owners for purposes of those Exchange Act provisions. *See* Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982], at n.2 ("The term 'beneficial owner' when used in the context of the proxy rules, and in light of the purposes of those rules, may be interpreted to have a broader meaning than it would for certain other purpose[s] under the federal securities laws, such as reporting pursuant to the Williams Act.").

[3] If a shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5 reflecting ownership of the required amount of shares, the shareholder may instead prove ownership by submitting a copy of such filings and providing the additional information that is described in Rule 14a-8(b)(2)(ii).

[4] DTC holds the deposited securities in "fungible bulk," meaning that there are no specifically identifiable shares directly owned by the DTC participants. Rather, each DTC participant holds a pro rata interest or position in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant – such as an individual investor – owns a pro rata interest in the shares in which the DTC participant has a pro rata interest. *See* Proxy Mechanics Concept Release, at Section II.B.2.a.

[5] *See* Exchange Act Rule 17Ad-8.

[6] *See* Net Capital Rule, Release No. 34-31511 (Nov. 24, 1992) [57 FR 56973] ("Net Capital Rule Release"), at Section II.C.

[7] *See KBR Inc. v. Chevedden*, Civil Action No. H-11-0196, 2011 U.S. Dist. LEXIS 36431, 2011 WL 1463611 (S.D. Tex. Apr. 4, 2011); *Apache Corp. v. Chevedden,* 696 F. Supp. 2d 723 (S.D. Tex. 2010). In both cases, the court concluded that a securities intermediary was not a record holder for purposes of Rule 14a-8(b) because it did not appear on a list of the company's non-objecting beneficial owners or on any DTC securities position listing, nor was the intermediary a DTC participant.

[8] *Techne Corp.* (Sept. 20, 1988).

[9] In addition, if the shareholder's broker is an introducing broker, the shareholder's account statements should include the clearing broker's identity and telephone number. *See* Net Capital Rule Release, at Section II.C.(iii). The clearing broker will generally be a DTC participant.

[10] For purposes of Rule 14a-8(b), the submission date of a proposal will generally precede the company's receipt date of the proposal, absent the use of electronic or other means of same-day delivery.

[11] This format is acceptable for purposes of Rule 14a-8(b), but it is not mandatory or exclusive.

[12] As such, it is not appropriate for a company to send a notice of defect for multiple proposals under Rule 14a-8(c) upon receiving a revised proposal.

[13] This position will apply to all proposals submitted after an initial proposal but before the company's deadline for receiving proposals, regardless of whether they are explicitly labeled as "revisions" to an initial proposal, unless the shareholder affirmatively indicates an intent to submit a second, *additional* proposal for inclusion in the company's proxy materials. In that case, the company must send the shareholder a notice of defect pursuant to Rule 14a-8(f)(1) if it intends to exclude either proposal from its proxy materials in reliance on Rule 14a-8(c). In light of this guidance, with respect to proposals or revisions received before a company's deadline for submission, we will no longer follow *Layne Christensen Co.* (Mar. 21, 2011) and other prior staff no-action letters in which we took the view that a proposal would violate the Rule 14a-8(c) one-proposal limitation if such proposal is submitted to a company after the company has either submitted a Rule 14a-8 no-action request to exclude an earlier proposal submitted by the same proponent or notified the proponent that the earlier proposal was excludable under the rule.

[14] *See, e.g.*, Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994].

[15] Because the relevant date for proving ownership under Rule 14a-8(b) is the date the proposal is submitted, a proponent who does not adequately prove ownership in connection with a proposal is not permitted to submit another proposal for the same meeting on a later date.

[16] Nothing in this staff position has any effect on the status of any shareholder proposal that is not withdrawn by the proponent or its authorized representative.

Modified: Oct. 18, 2011

Shareholder Proposals

Staff Legal Bulletin No. 14G (CF)

Action: Publication of CF Staff Legal Bulletin

Date October 16, 2012

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securitie E change Act of 1934

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Divi ion") Thi bulletin i not a rule, regulation or tatement of the Securitie and E change Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

Contact For further information, plea e contact the Divi ion' Office of Chief Coun el by calling (202) 551 3500 or by submitting a web-based request form at https://www.sec.gov/forms/corp_fin_interpretive.

A. The purpose of this bulletin

Thi bulletin i part of a continuing effort by the Divi ion to provide guidance on important i ue ari ing under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- the partie that can provide proof of owner hip under Rule 14a 8(b)(2)(i) for purpo e of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- the manner in which companie hould notify proponent of a failure to provide proof of owner hip for the one-year period required under Rule 14a-8(b)(1); and
- the u e of web ite reference in propo al and upporting tatement

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commi ion' web ite SLB No 14, SLB No 14A, SLB No 14B, SLB No 14C, SLB No 14D, SLB No 14E and SLB No. 14F.

B. Parties that can provide proof of ownership under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Sufficiency of proof of ownership letters provided by affiliates of DTC participants for purposes of Rule 14a-8(b)(2)(i)

To be eligible to ubmit a propo al under Rule 14a 8, a hareholder mu t, among other thing , provide documentation evidencing that the shareholder has continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. If the shareholder is a beneficial owner of the securities, which

mean that the ecuritie are held in book entry form through a ecuritie intermediary, Rule 14a 8(b)(2)(i) provides that this documentation can be in the form of a "written statement from the 'record' holder of your securities (usually a broker or bank)…."

In SLB No. 14F, the Division described its view that only securities intermediaries that are participants in the Depository Trust Company ("DTC") should be viewed as "record" holders of securities that are deposited at DTC for purposes of Rule 14a-8(b)(2)(i). Therefore, a beneficial owner must obtain a proof of ownership letter from the DTC participant through which it ecuritie are held at DTC in order to ati fy the proof of owner hip requirement in Rule 14a-8.

During the mo t recent pro y ea on, ome companie que tioned the ufficiency of proof of owner hip letter from entities that were not themselves DTC participants, but were affiliates of DTC participants.[1] By virtue of the affiliate relationship, we believe that a securities intermediary holding shares through its affiliated DTC participant should be in a position to verify its customers' ownership of securities. Accordingly, we are of the view that, for purpo e of Rule 14a 8(b)(2)(i), a proof of owner hip letter from an affiliate of a DTC participant ati fie the requirement to provide a proof of ownership letter from a DTC participant.

2. Adequacy of proof of ownership letters from securities intermediaries that are not brokers or banks

We under tand that there are circum tance in which ecuritie intermediarie that are not broker or bank maintain securities accounts in the ordinary course of their business. A shareholder who holds securities through a securities intermediary that is not a broker or bank can satisfy Rule 14a-8's documentation requirement by submitting a proof of ownership letter from that securities intermediary.[2] If the securities intermediary is not a DTC participant or an affiliate of a DTC participant, then the hareholder will al o need to obtain a proof of owner hip letter from the DTC participant or an affiliate of a DTC participant that can verify the holdings of the securities intermediary.

C. Manner in which companies should notify proponents of a failure to provide proof of ownership for the one-year period required under Rule 14a-8(b)(1)

As discussed in Section C of SLB No. 14F, a common error in proof of ownership letters is that they do not verify a proponent's beneficial ownership for the entire one-year period preceding and including the date the proposal was submitted, as required by Rule 14a-8(b)(1). In some cases, the letter speaks as of a date *before* the date the propo al wa ubmitted, thereby leaving a gap between the date of verification and the date the propo al wa submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the proponent's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Under Rule 14a-8(f), if a proponent fails to follow one of the eligibility or procedural requirements of the rule, a company may exclude the proposal only if it notifies the proponent of the defect and the proponent fails to correct it In SLB No 14 and SLB No 14B, we e plained that companie hould provide adequate detail about what a proponent must do to remedy all eligibility or procedural defects.

We are concerned that companie ' notice of defect are not adequately de cribing the defect or e plaining what a proponent must do to remedy defects in proof of ownership letters. For example, some companies' notices of defect make no mention of the gap in the period of ownership covered by the proponent's proof of ownership letter or other specific deficiencies that the company has identified. We do not believe that such notices of defect serve the purpo e of Rule 14a 8(f)

Accordingly, going forward, we will not concur in the exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) on the ba i that a proponent' proof of owner hip doe not cover the one year period preceding and including the

date the propo al i ubmitted unle the company provide a notice of defect that identifie the pecific date on which the proposal was submitted and explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the defect. We view the proposal's date of submission as the date the proposal is po tmarked or tran mitted electronically Identifying in the notice of defect the pecific date on which the propo al was submitted will help a proponent better understand how to remedy the defects described above and will be particularly helpful in those instances in which it may be difficult for a proponent to determine the date of submission, such as when the proposal is not postmarked on the same day it is placed in the mail. In addition, companie hould include copie of the po tmark or evidence of electronic tran mi ion with their no action requests.

D. Use of website addresses in proposals and supporting statements

Recently, a number of proponent have included in their propo al or in their upporting tatement the addre e to websites that provide more information about their proposals. In some cases, companies have sought to exclude either the website address or the entire proposal due to the reference to the website address.

In SLB No. 14, we explained that a reference to a website address in a proposal does not raise the concerns addressed by the 500-word limitation in Rule 14a-8(d). We continue to be of this view and, accordingly, we will continue to count a website address as one word for purposes of Rule 14a-8(d). To the extent that the company eek the e clu ion of a web ite reference in a propo al, but not the propo al it elf, we will continue to follow the guidance stated in SLB No. 14, which provides that references to website addresses in proposals or supporting statements could be subject to exclusion under Rule 14a-8(i)(3) if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the pro y rule , including Rule 14a 9 [3]

In light of the growing interest in including references to website addresses in proposals and supporting tatement , we are providing additional guidance on the appropriate u e of web ite addre e in propo al and supporting statements.[4]

1. References to website addresses in a proposal or supporting statement and Rule 14a-8(i)(3)

Reference to web ite in a propo al or upporting tatement may rai e concern under Rule 14a 8(i)(3) In SLB No. 14B, we stated that the exclusion of a proposal under Rule 14a-8(i)(3) as vague and indefinite may be appropriate if neither the shareholders 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 require In evaluating whether a propo al may be e cluded on thi ba i , we con ider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.

If a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would rai e concern under Rule 14a 9 and would be ubject to e clu ion under Rule 14a 8(i)(3) a vague and indefinite. By contrast, if shareholders and the company can understand with reasonable certainty exactly what actions or measures the proposal requires without reviewing the information provided on the website, then we believe that the proposal would not be subject to exclusion under Rule 14a-8(i)(3) on the basis of the reference to the web ite addre In thi ca e, the information on the web ite on y upplement the information contained in the proposal and in the supporting statement.

2. Providing the company with the materials that will be published on the referenced website

We recognize that if a proposal references a website that is not operational at the time the proposal is submitted, it will be impossible for a company or the staff to evaluate whether the website reference may be excluded. In our view, a reference to a non-operational website in a proposal or supporting statement could be excluded under Rule 14a-8(i)(3) as irrelevant to the subject matter of a proposal. We understand, however, that a proponent may wish to include a reference to a website containing information related to the proposal but wait to activate the website until it becomes clear that the proposal will be included in the company's proxy materials. Therefore, we will not concur that a reference to a website may be excluded as irrelevant under Rule 14a-8(i)(3) on the basis that it is not yet operational if the proponent, at the time the proposal is submitted, provides the company with the materials that are intended for publication on the website and a representation that the website will become operational at, or prior to, the time the company files its definitive proxy materials.

3. Potential issues that may arise if the content of a referenced website changes after the proposal is submitted

To the extent the information on a website changes after submission of a proposal and the company believes the revised information renders the website reference excludable under Rule 14a-8, a company seeking our concurrence that the website reference may be excluded must submit a letter presenting its reasons for doing so. While Rule 14a-8(j) requires a company to submit its reasons for exclusion with the Commission no later than 80 calendar days before it files its definitive proxy materials, we may concur that the changes to the referenced website constitute "good cause" for the company to file its reasons for excluding the website reference after the 80-day deadline and grant the company's request that the 80-day requirement be waived.

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[1] An entity is an "affiliate" of a DTC participant if such entity directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the DTC participant.

[2] Rule 14a-8(b)(2)(i) itself acknowledges that the record holder is "usually," but not always, a broker or bank.

[3] Rule 14a-9 prohibits statements in proxy materials which, at the time and in the light of the circumstances under which they are made, are false or misleading with respect to any material fact, or which omit to state any material fact necessary in order to make the statements not false or misleading.

[4] A website that provides more information about a shareholder proposal may constitute a proxy solicitation under the proxy rules. Accordingly, we remind shareholders who elect to include website addresses in their proposals to comply with all applicable rules regarding proxy solicitations.

Modified: Oct. 16, 2012

Bowyer Research

March 14, 2023

VIA EMAIL: shareholderproposals@sec.gov

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

Re: *Merck & Co., Inc.*
Shareholder Proposal of The Bahnsen Family Trust Dated July 15th 2003

To Whom it May Concern:

This letter is a response to the no-action request from Kelly Grez of Merck & Co., Inc. ("Merck" or "Company), seeking permission from the Staff of the Division of Corporate Finance ("Staff") to exclude from Merck's 2023 proxy material ("Proxy") the shareholder proposal of David Bahnsen ("Proposal").

The Company's request provides insufficient rationale for exclusion and should be denied.

The Company's request does not make the case to exclude the proposal, as its central claim is not accurate. Our proposal called for disclosure of any significant contributions that the Company undertakes.

"Resolved: That the shareholders request the Company to list the recipients of corporate charitable contributions of $5,000 or more on the company website, along with the material limitations, if any, placed on the restrictions, and/or the monitoring of the contributions and its uses, if any, that the Company undertakes."

The company's request rests upon one central claim, that the Company already has "substantially implemented" the proposal, but this simply is not true. In correspondence with myself and with the proponent the Company has acknowledged that although it does disclose some forms of giving, this disclosure does not include the Company's matching gifts program, which is not disclosed. It is a dollar-for-dollar program in which gifts from employees are matched by the Merck Foundation. Thus, the request for disclosure of "any" contributions the company makes is not fulfilled.

The Company argues that its current disclosure program is more robust than the resolution because the resolution only calls for disclosure of contributions of $5,000 dollars or more, but again, that only applies to those giving programs that are disclosed, not to the matching program, which is not.

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Further, the Company argues that prior findings of the SEC permit exclusion if the current "public disclosures compare favorably with the guidelines of the proposal". Although the terms do compare favorably in terms of the cut-off amount for disclosure, they compare unfavorably with the resolution in terms of the completeness of the universe of contributions to be disclosed at all. Excluding an entire class of donations, which, given Merck's generous terms of matching up to $30,000 dollars including for current and retired employees may well be quite extensive, falls short of the terms of the resolution.

Furthermore, the Company argues that "the Staff consistently has permitted exclusion of a proposal under Rule 14a8(i)(10) where a company already addressed the underlying concerns and satisfied the essential objectives of the proposal". However, the Company does not demonstrate that its current policies "already addressed the…concerns...and…objectives" intended by the proposal. Those objectives and concerns include completeness with regard to material contributions as is implied by the resolution, so that shareholders can track the way in which the Company is spending their assets – not so that the Company can exclude categories of material spending which it would prefer to hide. The supporting statement also raises the issue of company reputation, which can only be fully safeguarded if all material grants, all possible sources of negative reputational effect, are disclosed. The point of calls for disclosure is to find out what a company is not telling shareholders. The fact that matched grants are not disclosed and that it took several weeks of repeated conversation before that fact was finally made clear, only serves to deepen our concern about the lack of disclosure of this particular type of grant. The concerns and objectives of the resolution will be substantially fulfilled when, and only when, the Company discloses all substantial forms of charitable giving.

Therefore, based upon the analysis set forth above, Mr. Bahnsen respectfully requests that the Staff reject the Company's request for relief concerning the Proposal.

Very truly yours,

Jerry Bowyer
CEO Bowyer Research

On Behalf of David Bahnsen

cc: Kelly Grez, Merck & Co., Inc.
office.secretary@merck.com
David Bahnsen, The Bahnsen Group

6300 Smithfield Street | McKeesport, PA 15135
jerry@bowyerresearch.com 412-896-9722

Merck & Co., Inc.
2000 Galloping Hill Road
Kenilworth, NJ 07033
Email: office.secretary@merck.com

March 27, 2023

VIA E-MAIL

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

Re: *Merck & Co., Inc.*
Shareholder Proposal of David Bahnsen
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

We refer to our letter dated January 13, 2023 (the "No-Action Request"), pursuant to which Merck & Co., Inc. ("Merck" or the "Company") requested that the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") concur with the Company's view that the shareholder proposal (the "Proposal") and statements in support thereof received from David Bahnsen, Trustee of the Bahnsen Family Trust dated July 15, 2003 (the "Proponent") may be omitted from the Company's proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (collectively, the "2023 Proxy Materials").

This letter is in response to the letter to the Staff, dated March 14, 2023, submitted by Jerry Bowyer on behalf of the Proponent (the "Proponent's Letter"), and supplements the No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter also is being sent to the Proponent.

The Company is in the process of finalizing the 2023 Proxy Materials and expects to commence printing the 2023 Proxy Materials on or about March 29, 2023. Given this timing, the Company respectfully requests that the Staff respond to the No-Action Request by March 29, 2023.

I. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Proposal

As noted in the No-Action Request, the Staff has permitted exclusion under Rule 14a-8(i)(10) where a company has already addressed the underlying concerns and satisfied the essential objectives of the proposal, even if the proposal had not been implemented exactly as proposed by the proponent.

In this instance, although the Proponent may have a particular interest in more detailed disclosure of charitable contributions made through the Company's matching funds program,[1] the Company's website already contains extensive and robust disclosure relating to the Company's charitable contributions, including the controls the Company maintains over its charitable giving processes and lists of donation recipients and amounts. Contrary to the Proponent's suggestion that the Company is "exclud[ing] categories of material spending, which [the Company] would prefer to hide," the aggregate dollar amount of contributions made through the Company's matching funds program has historically constituted less than 1% of the total amount of grants and contributions (including, cash, in-kind and product donations) made by the Company each year.[2] Even though the Company's public disclosures may not be as detailed as the Proponent would prefer, the Company's public disclosures nevertheless address the Proposal's underlying concern of providing disclosure about the Company's charitable giving to promote the Company's reputation. Accordingly, the Company has satisfied the Proposal's essential objective, and given the nature and extent of the Company's reporting, such disclosures compare favorably with those requested by the Proposal.

Therefore, for the reasons set forth above and in the No-Action Request, the Proposal is excludable under Rule 14a-8(i)(10).

II. The Company's Matching Funds Program Relates To The Company's Ordinary Business Operations.

Rule 14a-8(i)(7) permits the omission of a shareholder proposal dealing with matters relating to a company's "ordinary business operations." The Commission identified the two primary considerations underlying the general policy for the ordinary business exclusion: (i) the subject matter of the proposal (*i.e.*, whether the subject matter involves a matter of ordinary business), provided the proposal does not raise significant social policy considerations that transcend ordinary business and (ii) the degree to which the proposal attempts to micromanage a 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." *See* Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release").

In particular, the Commission has noted that proposals involving "the management of the workforce" generally relate to ordinary business matters. *See* 1998 Release. The Staff has also explained that "proposals that relate to general employee compensation and benefits are excludable under Rule 14a-8(i)(7)." *See* Staff Legal Bulletin No. 14J (Oct. 23, 2018) ("SLB 14J").

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[1] Merck's matching funds program provides active employees, based in the U.S. and Puerto Rico, the opportunity to support community efforts and organizations that are important to them. Through the program, contributions to eligible nonprofit organizations located in the U.S. and Puerto Rico are matched dollar-for-dollar by the Merck Foundation.

[2] *See* Merck's Environmental, Social & Governance Progress Report for 2021/2022, available at https://www.merck.com/wp-content/uploads/sites/5/2022/08/MRK-ESG-report-21-22.pdf

Here, the Proponent's Letter specifically requests detailed disclosure regarding the Company's charitable giving pursuant to its matching funds program. The Company's matching funds program is a broad-based employee benefit in which thousands of the Company's employees based in the U.S. and Puerto Rico participate each year. Accordingly, disclosure regarding the Company's matching funds program directly relates to one of the Company's general employee benefits, a core component of the Company's ordinary business.

Moreover, to the extent that the Proponent's Letter focuses on disclosure related to the Company's matching funds program, the Proposal also seeks to impermissibly micromanage the Company by requiring, as noted in SLB 14J, "an intricately detailed study or report."[3] Requiring the Company to list the specific recipients who received $5,000 or more in donations pursuant to the Company's matching funds program is burdensome and impractical: over 5000 charitable organizations benefited from, and over 5000 Merck employees participated in, the Company's matching funds program each year during the period from 2017 to 2021.[4] Any effort by the Company to prepare such disclosure regarding employee matching contributions would require a substantial investment of time and resources and would distract the Company's management and employees.

In addition, while the Company has controls in place to ensure that matching donations are going to legitimate charities, it has not historically required its employees to provide the purpose of their donations or monitor the use of the donations, both of which would seem to be required by the Proponent's Letter. The Company is concerned that gathering such additional information from employees participating in the matching program will be administratively infeasible, will have a chilling effect on the willingness of employees to participate in the matching program, and will negatively impact employee morale.

Therefore, for the reasons set forth above, to the extent that the Proposal focuses on the Company's matching funds program, the Proposal is also excludable under Rule 14a-8(i)(7).

III. Conclusion

Based upon the foregoing analysis, together with the analysis in the No-Action Request, the Company respectfully requests that the Staff concur that it will take no action if the Company excludes the Proposal from the 2023 Proxy Materials.

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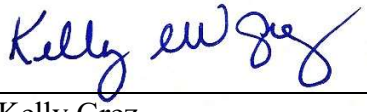
[3] Prior to the release of Staff Legal Bulletin No. 14L (Nov. 3, 2021), the Staff has concurred in the exclusion of proposals requesting disclosure of charitable contributions on the grounds that they seek to micromanage a company's management. *See, e.g. Starbucks Corporation* (Nov. 3, 2020) (permitting exclusion of a proposal requesting an annual report listing and analyzing charitable contributions made or committed during the prior year, where the company argued that compiling such report would require substantial investment of time and resources and would distract the company's management and employees); *The Walt Disney Company* (Oct. 31, 2020) (same).

[4] *See* Merck's Environmental, Social & Governance Progress Report for 2021/2022, available at https://www.merck.com/wp-content/uploads/sites/5/2022/08/MRK-ESG-report-21-22.pdf

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of the Company's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Any such communication regarding this letter should be directed to me at office.secretary@merck.com or (908) 246-3341.

Very truly yours,



Kelly Grez

cc: David Bahnsen

March 27, 2023

VIA EMAIL: shareholderproposals@sec.gov

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

Re: *Merck & Co., Inc.*
Shareholder Proposal of The Bahnsen Family Trust Dated July 15th 2003

To Whom it May Concern:

This letter is a response to a letter to the Office of Chief Counsel dated March 27, 2023, signed by Kelly Grez of Merck & Co., Inc. ("Merck" or "Company) regarding the Shareholder Proposal of David Bahnsen (the "Proposal".)

The letter from Ms. Grez questions our rebuttal of the claim that the company already has substantially implemented the Proposal. We suggested that since Merck does not disclose grants given as part of its matching program it may be omitting material information about corporate grants and that therefore it was not already substantially implementing the Proposal, which called for disclosure of "any" grants of $5,000 dollars and above. Merck's letter of March 27 claims that "the aggregate dollar amount of contributions made through the Company's matching funds program has historically constituted less than 1% of the total amount of grants and contributions (including, cash, in-kind and product donations) made by the Company each year." However, if the reader follows the footnote and goes back to the source document and looks up the pertinent tables one finds this calculation is not based on an "apples to apples" comparison. The "less than 1%" depends upon the inclusion of in-kind contributions as well as product donations, whereas the matching program appears only to include actual grants. This artificially expands the denominator of the calculation dramatically (roughly 18-fold), causing the ratio to appear quite small ("less than 1%".)

However, comparing monetary grants from the matching programs to monetary grants overall (using the data on page 74 of this document: Environmental, Social & Governance (ESG) Progress Report 2021/2022 (merck.com)), a different picture emerges. For 2021, cash contributions were $102 million dollars and matching grants were $18 million. That means that matching monetary grants were slightly less than 18% of total monetary grants. By any reasonable standard, this is a material proportion of grantmaking.

The Company also argues that the topic of the proposal is micromanaging in "ordinary business matters" and specifically refers to "proposals that relate to general employee compensation and benefits of the

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jerry@bowyerresearch.com 412-896-9722

Company" and "to general employee compensation and benefits". However, the proponent is not asking for disclosure of the employees' contributions, but of the Company's. This is not merely a matter of employee benefits: in fact, the document the Company uses to support its claims about the order of magnitude of the matching program is its annual ESG Progress Report (Environmental, Social & Governance (ESG) Progress Report 2021/2022 (merck.com)) where it can be found in the section titled Philanthropic Social Investments, in which the data regarding the matching program are found adjacent to the data regarding all other contributions. Clearly, the Company does not treat the matching program merely as a matter of an employee benefit but also of its general "social" goals similar to its disclosed grantmaking.

The company argues that such reporting would "create a chilling effect" and negatively affect "employee morale". It's hard to see how. Nothing in the proposals calls for the disclosure of employees' contributions, or any other information whatsoever about any individual employee. It only asks for the company to disclose what causes it gives to.

On a related point, the Company mentions the difficulty of disclosing the "purpose of the donations" as given by employees, but again, the disclosure would not include employee information. The Proponent is interested in the purpose for which company dollars are given, not employee dollars. This includes purposes for excluding certain charities. For example, Ms. Grez argues, "the Company has controls in place to ensure that matching donations are going to legitimate charities." Yes, matching donations are given only to legitimate charities, but for some reason "Houses of worship", one of the most common forms of legitimate charity, are excluded with no explanation given. That is a policy of the Company, not the employee, and asking the purpose for such exclusions seems reasonable. It is good that Merck is concerned about a "chilling effect" on employees. Does the exclusion of many employees' favorite charity, their Church or Synagogue, send a certain chilling message about what the company thinks about the social benefit of their faith?

Therefore, based upon the analysis set forth above, Mr. Bahnsen respectfully requests that the Staff reject the Company's reasoning and its request for relief concerning the Proposal.

Very truly yours,

Jerry Bowyer
CEO Bowyer Research

On Behalf of David Bahnsen

cc: Kelly Grez, Merck & Co., Inc.
office.secretary@merck.com
David Bahnsen, The Bahnsen Group

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