



DIVISION OF
CORPORATION FINANCE

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

March 28, 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 Boston Common Asset Management for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal asks the Company to adopt a policy requiring that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from the Company agree to report to the Company, at least annually, the organization's expenditures for political activities, including the amount spent and the recipient, and that each such report be posted on the Company's website.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(6). In our view, the Company does not lack the power or authority to implement the Proposal.

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: Sanford Lewis



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 Boston Common Asset Management
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 Boston Common Asset Management (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, The shareholders of Merck & Co., Inc. (“Merck” or “Company”) ask the Company to adopt a policy requiring that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from Merck agree to report to [*sic*], at least annually, the organization’s expenditures for political activities, including the amount spent and the recipient, and that each such report be posted on Merck’s website.

For purposes of this proposal, “political activities” are (i) influencing or attempting to influence the selection, nomination, election, or appointment of any individual to a public office; or (ii) supporting a party, committee, association, fund, or other organization organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures to engage in the activities described in (i). This proposal does not encompass lobbying spending.

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)(6) because the Company lacks the power or authority to implement the Proposal in the manner that the Proposal requests.

III. Background

On November 22, 2022, the Company received the Proposal by email. The Proposal was accompanied by a letter from U.S. Bank verifying the Proponent’s stock ownership in the Company as of such date. Copies of the Proposal, Supporting Statement and related correspondence with the Proponent are attached hereto as Exhibit A.

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

Rule 14a-8(i)(6) permits a company to exclude a shareholder proposal “[i]f the company would lack the power or authority to implement the proposal.” Notably, the Commission has stated that exclusion under Rule 14a-8(i)(6) “may be justified where *implementing the proposal would require intervening actions by independent third parties.*” Exchange Act Release No. 40018 at n.20 (May 21, 1998) (emphasis added).

The Proposal requests that the Company “adopt a policy requiring that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from Merck agree to report to [Merck],

at least annually, the organization's expenditures for political activities," and that the Company post publicly on its website "each such report" (such policy, the "Requested Policy"). Based on its express terms, the Requested Policy requires and depends upon action by independent third parties (*i.e.*, certain organizations agreeing to provide, and actually providing, the Company details pertaining to their political expenditures and consenting to the Company's public posting of such details), and it is not within the Company's power or authority to guarantee that "any" such organizations would comply with such a policy or request by the Company.

If implemented, the broadly-worded Requested Policy (i) would be triggered any time a third-party covered organization "seeks financial support from Merck," (ii) would apply to any kind of request to the Company for financial support (whether or not related to political expenditures) and (iii) would require the third-party covered organization to report the requested information. Thus, implementation of the Proposal is wholly dependent on the willingness of third-party organizations to comply with the Requested Policy, and the Company's dependence on those third parties renders the Requested Policy impossible to enforce. Said differently, the Company cannot compel third parties that only seek financial support from it, over which the Company exercises no control, to provide the Company with potentially confidential and proprietary information related to such third parties' political expenditures.

Moreover, because the Requested Policy broadly applies to organizations that merely "seek" financial support from the Company (as opposed to those organizations that actually receive financial support), the Company would be required to both request and then compel disclosure from third parties to whom it may choose not to contribute and with whom it may not have any relationship whatsoever, as the Company does not provide financial support to every organization that seeks financial support. In addition, the Proposal lacks a connection to political activity by the Company, and instead seeks to use the Company as a means for publishing certain political expenditure disclosure from third-party organizations, with respect to which the Proponent would not otherwise have access or recourse. The Requested Policy would apply even to organizations that seek a relationship with the Company that is unrelated to the Company's political activity (and where the sought form of financial support is not political in nature). For example, if the Company provides financial support to a community organization or an individual customer, the Requested Policy would require the Company to condition such support on detailed political expenditure reports by such organization or individual. The foregoing is not only impractical and inappropriate, but also beyond the Company's power to enforce. The Proposal, therefore, involves the very kind of situation envisioned by the Commission when it stated that exclusion would be appropriate, because implementing and applying the Requested Policy would require intervening actions by independent third parties.

The Staff has consistently concurred with the exclusion of proposals where it was not within the power of a company to guarantee compliance with the terms requested by the proposal. For example, in *The Goldman Sachs Group, Inc.* (avail Jan. 28, 2015) ("*Goldman 2015*"), a shareholder proposal requested that the company adopt a policy that its chairman be an independent director. The company argued that the proposal did not provide an opportunity or mechanism to cure a situation where the chairman failed to maintain his or her independence, and that it could not guarantee that an independent director would "(1) be elected to the [b]oard

by the [c]ompany's shareholders, (2) be elected as Chairman by the members of the board, (3) be willing to serve as Chairman, and (4) remain independent at all times while serving as Chairman." The Staff concurred with exclusion pursuant to Rule 14a-8(i)(6), noting that "it appears that the proposal is beyond the power of the board to implement" because "it does not appear to be within the power of the board of directors to ensure that its chairman retains his or her independence at all times." *See also The Goldman Sachs Group, Inc.* (avail. Mar. 25, 2010) (concurring with the exclusion of a proposal under Rule 14a-8(i)(6) because it did not "appear to be within the power of the board of directors to ensure that each member of the compensation committee meets the requested criteria at all times"); *Allegheny Technologies Incorporated* (avail. Mar. 1, 2010) (same); *Time Warner, Inc.* (avail. Feb. 22, 2010) (same); *Honeywell International Inc.* (avail. Feb. 18, 2010) (same). As in *Goldman 2015*, where the Staff concurred with the exclusion of a proposal because the company could not ensure compliance with the terms of the requested policy (*i.e.*, that the chairman would always be independent), the Company likewise lacks the power to implement the Proposal because the Company cannot guarantee compliance with the Requested Policy. The detailed disclosure required under the Requested Policy, which must include each third-party covered organization's "expenditures for political activities, including the amount spent and the recipient," can only be provided by third-party organizations. However, the Company has no control to compel action from such third-party organizations before the Company establishes a business relationship with such organizations and has no means of oversight to ensure that such organizations would provide complete and accurate disclosure. The Proposal, therefore, is excludable pursuant to Rule 14a-8(i)(6).

The Staff has also concurred with the exclusion of proposals requiring action by an entity over which the company to whom the proposal was submitted has no control. For example, in *eBay Inc.* (avail. Mar. 26, 2008), the Staff concurred that a proposal requesting that the company enact a policy prohibiting the sale of dogs and cats on the website of a joint venture owned by a wholly owned subsidiary of the company and TOM Online Inc. (an independent online portal and wireless internet company headquartered in China), in which the company had no role in day-to-day operations and over which it had no operating control, was excludable pursuant to Rule 14a-8(i)(6). The company argued that because of the nature of its joint venture-relationship, it lacked the power or authority to take the action that would be required by the proposal, and the Staff concurred that relief was merited. Similarly, the Staff concurred with exclusion of a proposal in *Beckman Coulter, Inc.* (avail. Dec. 23, 2008) requesting that the company implement a set of executive compensation reforms at The Bank of New York Mellon, an unaffiliated bank which served as a trustee for the company under an indenture agreement. The company argued that it was impossible for it to implement the reforms requested by the proposal because it did "not directly or indirectly control" the bank nor did it "have any direct or indirect interest" in the bank. The company further argued that while the bank served as a trustee for the company under an indenture, "this contractual relationship [did] not give the [c]ompany the power or the authority to implement or influence the executive compensation reforms raised in the [p]roposal," and the Staff concurred that relief was merited pursuant to Rule 14a-8(i)(6). *See also Catellus Development Corp.* (avail. Mar. 3, 2005) (concurring with the exclusion under Rule 14a-8(i)(6) of a proposal requesting that the company take certain actions related to property it managed but no longer owned); *Ford Motor Co.* (avail. Mar. 9, 1990) (concurring with the

exclusion of a proposal under the predecessor to Rule 14a-8(i)(6) because the proposal “relate[d] to the activities of companies other than the [c]ompany [to whom the proposal was submitted] and over whom the [c]ompany ha[d] no control”); *Harsco Corp.* (avail. Feb. 16, 1988) (concurring with the exclusion under the predecessor to Rule 14a-8(i)(6) of a proposal requesting that the board of directors sign and implement a statement of principles relating to employment in South Africa where the company’s only involvement with employees in South Africa was its ownership of 50% of the stock of a South African entity, and the owner of the remaining 50% interest had the right to appoint the entity’s chairman, who was empowered to cast the deciding vote in the event of a tie).

Similar to *eBay* and *Beckman Coulter*, the Company does not have the power or authority to unilaterally compel political expenditure disclosure from third-party organizations as would be required by the Requested Policy, let alone compel such disclosure annually or with the level of detail prescribed by the Proposal. The Company has no control over third-party organizations that merely seek its financial support nor is it involved in their day-to-day operations. Furthermore, the relationship between the Company and third-party organizations seeking its financial support appears to be even more attenuated than the relationships found in *eBay* and *Beckman Coulter*. Because the Proposal encompasses *any* covered organization merely *seeking* financial support from the Company, there would not necessarily exist contractual agreements of any sort between the Company and third-party organizations here unlike the joint venture in *eBay* or the indenture in *Beckman Coulter*. In fact, where the Company’s financial support is solicited but not given, the Company may not have any business relationship with the third-party organization. Any such disclosure would have to be voluntarily produced by the third-party organizations seeking financial support, and the Company lacks any power or authority to compel such action.

Additionally, the decision to publicly report on the information requested by the Proposal is a matter under the purview and control of the third-party organizations seeking financial support from the Company, not the Company itself. The Company has no power to direct or mandate that third-party organizations seeking financial support agree, simply as a condition of their request for financial support (which may be completely unsolicited by the Company), to provide annual disclosures to the Company that will subsequently be publicly disclosed by the Company.

Accordingly, for the reasons set forth above and consistent with the aforementioned precedents, the Proposal is excludable under Rule 14a-8(i)(6) because the Company lacks the power or authority to implement the Proposal.

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

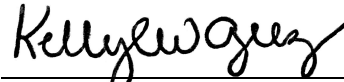
Office of Chief Counsel

January 13, 2023

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response. Any such communication regarding this letter should be directed to me at office.secretary@merck.com or (908) 246-3341.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kelly Grez", written in a cursive style.

Kelly Grez

Enclosures

cc: Amy Orr, Boston Common Asset Management

Exhibit A

(Attached)

November 22, 2022

Merck & Co, Inc.
Office of the Company Secretary
2000 Galloping Hill Road, K1-4157
Kenilworth, NJ 07033 U.S.A.

Attn: Corporate Secretary

Via Email: office.secretary@merck.com

Dear Corporate Secretary,

Boston Common Asset Management is a global investment manager that specializes in sustainable and responsible global equity strategies. Boston Common urges the companies we invest in to improve their sustainable business practices and to promote transparency, accountability, and inclusivity in the way they conduct business with their employees, customers, suppliers, and other partners. The Boston Common ESG Impact US Equity Fund, a long-term investor, is currently the beneficial owner of shares of Merck & Co., Inc. Company (“the Company”, “Merck”).

As long-term Merck shareholders we support transparency and accountability in corporate electoral spending, including the indirect political spending that is the subject of this proposal. We appreciate Merck’s [Political Spending](#) disclosure to date, and its commitment to monitoring voluntary reporting of trade association dues used for political purposes. However, we believe Merck should mandate disclosure, rather than rely on voluntary reporting, to ensure that reporting is reliable and consistent in its coverage of affiliate organizations. We would also like to see the results of such mandated disclosure published on Merck’s political spending website.

Boston Common Asset Management is the lead filer for the enclosed proposal for inclusion in the 2023 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. The Boston Common ESG Impact US Equity Fund has been a shareholder continuously holding at least \$25,000 in market value for the last year and a day as of the filing date and will continue to invest in at least the requisite number of shares for proxy resolutions through the annual shareholders’ meeting. The verification of ownership by our custodian is attached as a separate file in this correspondence. One of the filers will attend the Annual Meeting to present the resolution as required by SEC rules.

We hope that Merck is open to setting some sort of commitments aligned with the resolution asks. We would be happy to schedule a call in the coming weeks to discuss this more. Per SEC requirements, we are available to meet with the company via teleconference at the following times: November 30th at 9 AM Eastern or December 2nd at 2 PM Eastern.

Amy Orr, Director of US Shareholder Engagement

aorr@bostoncommonasset.com

Sincerely, Lauren Compere, Managing Director and Head of Stewardship & Engagement

lcompere@bostoncommonasset.com

Shareholder Proposal – Indirect Political Spending Disclosure

Resolved, The shareholders of Merck & Co., Inc. (“Merck” or “Company”) ask the Company to adopt a policy requiring that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from Merck agree to report to , at least annually, the organization’s expenditures for political activities, including the amount spent and the recipient, and that each such report be posted on Merck’s website.

For purposes of this proposal, “political activities” are (i) influencing or attempting to influence the selection, nomination, election, or appointment of any individual to a public office; or (ii) supporting a party, committee, association, fund, or other organization organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures to engage in the activities described in (i). This proposal does not encompass lobbying spending.

Supporting Statement

As long-term Merck shareholders we support transparency and accountability in corporate electoral spending, including the indirect political spending that is the subject of this proposal. Misaligned or non-transparent funding creates reputational risk that can harm shareholder value. It can also place a company in legal jeopardy. Unless a company knows which candidates and political causes its funds ultimately support, it cannot assure shareholders, employees, or other stakeholders that its spending aligns with core values, business objectives, and policy positions. Without the information requested by this resolution, none of the board, senior management, or shareowners can assess the risks associated with political spending.

The risks are especially serious when giving to trade associations, Super PACs, 527 committees, and “social welfare” organizations – groups that routinely pass money to or spend on behalf of candidates and political causes that a company might not otherwise wish to support. The Conference Board’s 2021 [“Under a Microscope” report](#) details these risks, discusses how to effectively manage them, and recommends the process suggested in this proposal.

Media coverage amplifies the risk a company’s blind spending can pose and contributions to third-party groups can also embroil companies in scandal. Public records show Merck has contributed at least \$1.3 million in corporate funds to third-party groups dating to the 2020 election cycle. Beneficiaries of this spending have been tied to attacks on voting rights, which we believe run counter to Merck’s stated values.

It is unclear whether the Company and its board received sufficient information from these groups to assess (a) the potential risks for Merck and stockholders, and (b) whether the groups’ expenditures aligned with Merck’s core values, business objectives, and policy positions.

Mandating reports from third-party groups receiving Merck’s political money would demonstrate the Company’s commitment to robust risk management and responsible civic engagement.

We urge a vote FOR the commonsense risk management measures contained in this proposal.



Global Fund Services

777 East Wisconsin Avenue
Milwaukee, WI 53202

usbank.com/globalfundservices

November 22, 2022

Office of the Secretary, Merck & Co., Inc.
2000 Galloping Hill Road, K1-4157
Kenilworth, NJ07033U.S.A.

Attn: Merck & Co., Inc Office of the Secretary

Via Email: office.secretary@merck.com

Re: Shareholder proposal submitted by Boston Common Asset Management

Dear Corporate Secretary,

I write concerning a shareholder proposal (the "Proposal") submitted to Merck & Co., Inc. (the "Company") by Boston Common Asset Management.

As of November 22, 2022, Boston Common ESG Impact U.S. Equity Fund (BCAMX) beneficially owned, and had beneficially owned continuously for at least one year, shares of the Company's common stock worth at least \$25,000 (the "Shares")."

US Bank has acted as record holder of the Shares and is a DTC participant. If you require any additional information, please do not hesitate to contact me at Jennifer.smith19@usbank.com.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Smith".

Jennifer Smith
Mutual Funds Administrator
U.S. Bank Global Fund Services

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



Via email (aorr@bostoncommonasset.com)
(lcompere@bostoncommonasset.com)

November 23, 2022

Amy Orr & Lauren Compere
Boston Common Asset Management
200 State Street, 7th Floor
Boston, MA 02109

Re: Shareholder Proposal from Boston Common Asset Management ("BCAM")

Dear Ms. Orr & Ms. Compere:

This is to acknowledge receipt of your letter on behalf of BCAM to Merck & Co., Inc. ("Merck"), dated November 22, 2022, and the accompanying shareholder proposal regarding "Indirect Political Spending Disclosure" (the "Proposal") submitted for inclusion in the proxy materials for Merck's 2023 Annual Meeting of Shareholders.

Please note that notwithstanding this acknowledgement of receipt, Merck reserves the right and may seek to exclude the Proposal in accordance with SEC proxy rules.

We would welcome an opportunity to discuss the Proposal and will be in touch to try to schedule a call.

Thank you,

A handwritten signature in black ink that reads "Kelly Grez".

Kelly Grez
Corporate Secretary

Sanford Lewis & Associates

PO Box 231
Amherst, MA 01004-0231
413 549-7333
sanfordlewis@strategiccounsel.net

February 10, 2023

Via e-mail at shareholderproposals@sec.gov

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

Re: Response to Request by Merck & Co., Inc. to omit proposal submitted by Boston Common Asset Management

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, Boston Common Asset Management (the “Proponent”) submitted a shareholder proposal (the “Proposal”) to Merck & Co., Inc. (“Merck” or the “Company”). In a letter to the Division dated January 13, 2023 (the “No-Action Request”), Merck stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company’s 2023 annual meeting of shareholders. We have been asked by the proponent to respond to the request. A copy of this letter is being shared with the Company.

SUMMARY

The Proposal asks Merck to adopt a policy (the “Policy”) that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from Merck agree to report to Merck, at least annually, the organization’s expenditures for political activities, including the amount spent and the recipient, and that each such report be posted on Merck’s website. The full text of the proposal is appended to this letter.

Merck argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(6), on the ground that the Company lacks the power or authority to implement the Proposal. However, the Company has not met its burden of proving its entitlement to exclude the Proposal on that basis. The Proposal only requests actions by the Company that are within its power to implement. Therefore, the Proponent respectfully requests that Merck’s request for relief be denied.

BACKGROUND

For the past decade and a half, shareholders have submitted proposals addressing corporate

political spending, motivated by concern about the risks such spending can create for companies. In the main, these proposals have sought additional disclosure regarding companies' contributions—both direct and indirect through trade associations and other intermediaries—decision making processes, and board oversight, to help shareholders evaluate risk as well as alignment between contributions and company values and public positions. Proposals on political spending have spurred beneficial changes in disclosure practices.

Risks are heightened when political spending occurs through intermediaries, because organizations may use corporate contributions in ways that generate controversy or are contrary to companies' public positions and expressed values. For example, in 2016 North Carolina prohibited local governments from adopting LGBTQ protections, after the City of Charlotte expanded its antidiscrimination law to cover gender identity.¹ Companies that had donated to the Republican State Leadership Committee ("RSLC"), which helped Republicans take control of North Carolina's legislature, or to trade associations and other organizations that in turn donated to the RSLC, came under scrutiny. More than 30 companies That had provided financial support to the RSLC signed a letter to North Carolina's governor opposing the law, with several publicly stating that the law conflicted with their own corporate policies and values.² The North Carolina example illustrates the additional risks and complexity associated with involvement of multiple intermediaries.

When asked to disclose spending through intermediaries or when challenged about an intermediary's funding choices, some companies respond that they are unaware of the ultimate recipient(s) because the intermediaries do not provide that information. The Proposal is intended to rectify that situation, by imposing a condition for trade associations and other politically-oriented organizations (collectively, "Political Entities") seeking funding from Merck. Under the Proposal, Political Entities would need to agree to report to Merck, at least annually, on the Political Entities' political activities, including amounts donated and recipients. If a Political Entity declines to do so, Merck may not approve its funding request.

ANALYSIS

I. The Proposal is Within the Company's Power or Authority to Implement.

Rule 14a-8(i)(6) allows exclusion of a proposal that the company lacks the power or authority to implement. According to Merck, it lacks the power or authority to implement the Proposal because doing so would require organizations not under Merck's control to take action or consent to disclosure of their confidential information.

However, the Proposal only requests that the Company take actions within its control. The portrayal of the proposal distorts how the Proposal would function in practice.

¹ <https://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people>

² https://www.huffpost.com/entry/corporations-lgbt-north-carolina_n_5720f5f4e4b0b49df6a9d76d; for additional examples, see <https://www.politicalaccountability.net/wp-content/uploads/2021/08/Conflicted-Consequences.pdf>, at 5.

The Company argues in its letter that it cannot implement the Proposal because the Proposal “requires and depends upon action by independent third parties” and is therefore not within the Companies power or authority to “guarantee that ‘any’ such organization would comply with such a policy or request by the Company.” But that account overlooks the fact that the information request would function as a screen for Political Entities seeking new funding; by its terms, the Proposal would only apply to new or renewed requests for funding. If a Political Entity declined to provide the requested data, Merck could simply elect not to fund them and no further action would be required. Implementation is therefore within the Company’s power because the only requested action in the Proposal is action by the Company.

a. The Proposal’s request is clear that the purpose is transparency and accountability in indirect corporate electoral spending, i.e. Merck’s donations to organizations which then use that money for political activities.

The Company argues that the “broadly-worded” Proposal “would apply even to organizations that seek a relationship with the Company that is unrelated to the Company’s political activity” and that the Proposal “would apply to any kind of request to the Company for financial support (whether or not related to political expenditures).” However, the Proposal is clear on which entities are covered by the Proposal and what the purpose of the Proposal is: to provide transparency and accountability in corporate electoral spending.

First, the Proposal clearly enumerates the Political Entities Merck would need to ask to provide information on political activities pursuant to the Policy: (1) trade associations, (2) social welfare organizations, and (3) other organizations organized and operated primarily to engage in political activities. Social welfare organizations are non-profit groups that are exempt from taxation under section 501(c)(4) of the Internal Revenue Code and, unlike non-profits whose tax exemption stems from Section 501(c)(3),³ are permitted to engage in unlimited lobbying.⁴ Finally, other organizations only qualify as Political Entities if engaging in politics is their primary purpose. Community groups and individuals, then, would not be asked to provide information on political activities as a condition of seeking funding from Merck.

Second, the Proposal is explicitly concerned with transparency and accountability in corporate electoral spending, including indirect political spending. As stated in the Supporting Statement, there are risks to the Company when it gives money to organizations that then spend that money on behalf of candidates and political causes that the Company might not otherwise support. The Proposal does not apply to financial support which is not related to political expenditures. Therefore, the Company’s stated concern regarding the scope of the Proposal including *any* organization requesting *any* financial support is unfounded.

b. Merck retains its decision-making power to contribute or not contribute to any organization; disclosure by the organization is merely a condition if the Company chooses to donate.

The Company argues that the Proposal would apply to organizations that “merely ‘seek’

³ <https://www.boardeffect.com/blog/501c3-vs-501c4-vs-501c6/>

⁴ <https://charitylawyerblog.com/2010/09/29/social-welfare-organization/>

financial support from the Company,” regardless of whether the Company chooses to contribute. However, it is clear from the language of the Proposal that disclosure is a condition of contribution and is not necessary if the Company chooses not to contribute. Further, if an organization seeks funding and then refuses to provide the requested disclosure, the Company can simply choose not to contribute.

The Company then argues that the Proposal “would require the third-party covered organization to report the requested information.” However, as stated above, if a Political Entity decided against agreeing to furnish the information, the Policy would not be violated. Rather, the Policy would be complied with when Merck made the request, regardless of outcome. No other person or entity’s action would be necessary to implement the Proposal.

II. This Proposal is Distinguishable from the Company’s Cited Precedents Because the Board Here Has the Power to Ensure Compliance with the Proposal.

That only Merck would need to take action pursuant to the Policy sets the Proposal apart from the proposals in the determinations the Company cites. Several of those determinations involved proposals urging boards to adopt policies requiring that the board chair or members of the board’s compensation committee be independent. In each case, the company argued that because shareholders elect directors, not the board, the board was not capable of ensuring compliance with an independence policy and the Staff concurred.

Merck first cites *The Goldman Sachs Group, Inc.* (January 28, 2015) to argue that its board, like the board in Goldman Sachs, does not have the power to implement the proposal. The Staff remarked when granting relief on the Goldman Sachs 2015 independent chair proposal, “As it does not appear to be within the power of the board of directors to ensure that its chairman retains his or her independence at all times and the proposal does not provide the board with an opportunity or mechanism to cure such a violation of the standard requested in the proposal, it appears that the proposal is beyond the power of the board to implement.” A similar comment accompanied the 2010 Goldman Sachs proposal on compensation committee independence. There, compliance with the proposed policy depended on shareholders electing directors satisfying the policy criteria. That is not the case here. It is worth noting that proposals providing a carveout in situations where compliance was impossible have survived challenges urging exclusion pursuant to Rule 14a-8(i)(6),⁵ so there is no absolute bar on proposals requiring action by third parties.

The proposal in *eBay*,⁶ on which Merck also relies, asked the company to stop selling dogs and cats on an internet-based marketplace website owned by a joint venture between a subsidiary of the company and a Chinese firm. eBay argued that the proposal was excludable as beyond its power or authority to implement because the Chinese firm had control of the joint venture, owning 51% of it, while the eBay subsidiary owned 49%. Accordingly, the Chinese firm’s cooperation would have been required in order to adopt the requested policy. Lack of control or ownership also supported exclusion pursuant to Rule 14a-8(i)(6) in the *Beckman Coulter*,⁷

⁵ See, e.g., *General Electric Company* (Jan. 10, 2006); *The Gap, Inc.* (Mar. 18, 2002).

⁶ *eBay Inc.* (Mar. 26, 2008).

⁷ *Beckman Coulter Inc.* (Dec. 23, 2008).

Catellus Development,⁸ *Ford*,⁹ and *Harsco*¹⁰ determinations cited by Merck. Because the Policy would require action only by Merck, those determinations are inapposite. As such, the proposal is more analogous to *Chevron Corporation* (March 15, 2019) where the proposal requested that the board issue an annual report on plastic pollution. The company asserted that Rule 14a-8(i)(6) should be grounds for exclusion because its principal contribution to plastic pollution came from a 50-50 venture with Phillips 66 and therefore, an operation out of its sole control. However, because the proposal simply asked for a report on its impact on plastic pollution, the action requested was within its control regardless of whether it had control of the related operations.

The Company argues that “there would not necessarily exist contractual agreements of any sort between the Company and third-party organizations here unlike the joint venture in *eBay* or the indenture in *Beckman Coulter*.” As stated above, implementation of the Proposal would entail requesting disclosure before a donation decision is made, as a condition of the donation. Therefore, the existence or nonexistence of a contractual relationship is irrelevant. This further supports the inapplicability of the Company’s cited references. Unlike those cases, this Proposal has nothing to do with the relationship or ownership between the entities because the requested action is required only by the Company, not by the third party. This situation is more properly comparable to decisions in which the Staff found that Companies do have the power to request information from third parties which they do not control.

For example, in *Host Hotels & Resorts, Inc.* (Feb. 28, 2018), the company was a real estate investment trust that owned a diverse portfolio of hotels operating under brands such as Marriott International, Hilton Worldwide Holdings, Hyatt Hotels Corporation, etc. The proposal requested that the company issue an annual sustainability report regarding operations at the company's properties using the Global Reporting Initiative Sustainability Reporting Standards. The company argued that it lacked the power or authority to implement the proposal because in order to gather the information needed to write the report, it would have to compel the managers of these companies to share the data necessary to complete a sustainability report. Given that these companies were controlled by independent third-party managers, the company argued it lacked the power or authority to compel them to gather and convey this information. However, the Staff was unable to conclude that the Company would lack the power or authority to implement the proposal, and could not concur with the request for exclusion on the basis of Rule 14a-8(i)(6).

In *General Electric Company* (January 18, 2011) the proposal requested detailed reporting on animal testing in product development, including the number and species of all animals used “in house” and at contract research laboratories. GE argued under Rule 14a-8(i)(6) that gathering this information from third parties would be impossible. The Staff rejected this assertion.

Rule 14a-8(i)(6) allows exclusion of proposals that are beyond a company’s power to implement, which is not the case here. The only entity over which Merck need exercise control in order to implement the Policy is itself. The Policy would apply only to new or renewed funding requests, and if a Political Entity chose not to provide the requested information, Merck could decide not to fund it. The determinations on which Merck relies all involved proposals

⁸ *Catellus Development Corp.* (Mar. 3, 2005).

⁹ *Ford Motor Company* (Mar. 9, 1990).

¹⁰ *Harsco Corp.* (Feb. 16, 1988).

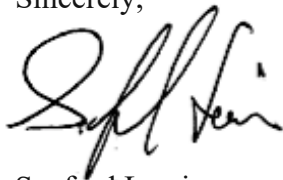
where implementation could be blocked by a third party, making them inapposite.

CONCLUSION

For the reasons set forth above, Merck has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8 (i)(6). The Proponent thus respectfully requests that Merck's request for relief be denied.

We appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact us at (413) 549-7333.

Sincerely,

A handwritten signature in black ink, appearing to read "Sanford Lewis". The signature is written in a cursive, flowing style.

Sanford Lewis

Brittany Blanchard Goad

Shareholder Proposal – Indirect Political Spending Disclosure

Resolved, The shareholders of Merck & Co., Inc. (“Merck” or “Company”) ask the Company to adopt a policy requiring that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from Merck agree to report to , at least annually, the organization’s expenditures for political activities, including the amount spent and the recipient, and that each such report be posted on Merck’s website.

For purposes of this proposal, “political activities” are (i) influencing or attempting to influence the selection, nomination, election, or appointment of any individual to a public office; or (ii) supporting a party, committee, association, fund, or other organization organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures to engage in the activities described in (i). This proposal does not encompass lobbying spending.

Supporting Statement

As long-term Merck shareholders we support transparency and accountability in corporate electoral spending, including the indirect political spending that is the subject of this proposal. Misaligned or non-transparent funding creates reputational risk that can harm shareholder value. It can also place a company in legal jeopardy. Unless a company knows which candidates and political causes its funds ultimately support, it cannot assure shareholders, employees, or other stakeholders that its spending aligns with core values, business objectives, and policy positions. Without the information requested by this resolution, none of the board, senior management, or shareowners can assess the risks associated with political spending.

The risks are especially serious when giving to trade associations, Super PACs, 527 committees, and “social welfare” organizations – groups that routinely pass money to or spend on behalf of candidates and political causes that a company might not otherwise wish to support. The Conference Board’s 2021 [“Under a Microscope” report](#) details these risks, discusses how to effectively manage them, and recommends the process suggested in this proposal.

Media coverage amplifies the risk a company’s blind spending can pose and contributions to third-party groups can also embroil companies in scandal. Public records show Merck has contributed at least \$1.3 million in corporate funds to third-party groups dating to the 2020 election cycle. Beneficiaries of this spending have been tied to attacks on voting rights, which we believe run counter to Merck’s stated values.

It is unclear whether the Company and its board received sufficient information from these groups to assess (a) the potential risks for Merck and stockholders, and (b) whether the groups’ expenditures aligned with Merck’s core values, business objectives, and policy positions.

Mandating reports from third-party groups receiving Merck’s political money would demonstrate the Company’s commitment to robust risk management and responsible civic engagement.

We urge a vote FOR the commonsense risk management measures contained in this proposal.



March 1, 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 Boston Common Asset Management
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 Boston Common Asset Management (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 February 10, 2023, submitted by Sanford Lewis 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 Proponents.

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

As described below, the Proponent’s Letter attempts to re-characterize the Proposal in order to evade exclusion but in doing so, the Proponent disregards the plain text of its own Proposal.

The Proponent’s Letter argues that the Proposal is not excludable under Rule 14a-8(i)(6) because “the only entity over which Merck need exercise control in order to implement the Policy is itself.” In particular, the Proponent’s Letter states that:

if a Political Entity decided against agreeing to furnish the information, the Policy would not be violated. Rather, the Policy would be complied with when Merck made the request,

regardless of outcome. No other person or entity's action would be necessary to implement the Proposal.

The Proponent's Letter improperly mischaracterizes the Proposal by attempting to re-frame it as only requiring the Company to *ask* third-party organizations to report the requested information, which is contradicted by the plain text of the Proposal. The actual text of the Proposal asks "the Company to adopt a policy *requiring* that any trade association, social welfare organization, or organization organized and operated primarily to engage in political activities that seeks financial support from Merck agree to" provide a report, at least annually, containing the detailed political expenditure information about the third-party organizations outlined in the Proposal (emphasis added).

The only way that the Company would be able to provide the disclosure requested by the Proposal would be by somehow *requiring* the independent third-party organizations listed in the Proposal, with which the Company has no contractual relationship and who owe no fiduciary duty to the Company to provide the detailed political expenditure information about the third-party organizations outlined in the Proposal. The Company does not exercise control over any trade associations, social welfare organizations, or other organizations organized and operated primarily to engage in political activities nor is it involved in their day-to-day operations. The Company further cannot control who may "seek" financial support from the Company. As a result, implementation of the Proposal would require intervening action by third-party organizations who are not under the control of the Company, and thus the Proposal may properly be excluded under Rule 14a-8(i)(6) because the Company lacks the power or authority to implement the Proposal.

In addition, by re-framing the Proposal as requiring action only by the Company and not by any third party, the Proponent's Letter mischaracterizes the Staff's position on Rule 14a-8(i)(6) as expressed in previous no-action letters. The Proponent's Letter argues that the no-action letters "on which Merck relies all involved proposals where implementation could be blocked by a third party, making them inapposite."¹ However, the Proponent's attempt to distinguish the Proposal from this group of no-action determinations is misguided. Based on the Proponent's understanding of Rule 14a-8(i)(6), any proponent could avoid a "power or authority" issue by phrasing its proposal in such a way that it only *asks* a third party to take action, when in reality, the actions or outcomes requested by the proposal could not be accomplished unless such third party were compelled to take some action.

For instance, in *eBay* (as further discussed in the No-Action Request), the Staff permitted exclusion of a proposal under Rule 14a-8(i)(6) which requested that a Chinese joint venture 49% controlled by eBay adopt a policy prohibiting the sale of dogs and cats on its website because, as a minority member of the joint venture, eBay lacked the power and authority to cause the joint venture to adopt the policy. Based on the Proponent's interpretation of Rule 14a-8(i)(6), the proponent in *eBay* could have avoided exclusion by arguing, contrary to the text of the proposal,

¹ See, e.g., *eBay Inc.* (avail. Mar. 26, 2008); *Beckman Coulter, Inc.* (avail. Dec. 23, 2008); *Catellus Development Corp.* (avail. Mar. 3, 2005); *Ford Motor Co.* (avail. Mar. 9, 1990); and *Harsco Corp.* (avail. Feb. 16, 1988).

that its proposal only required that eBay *ask* its joint venture to prohibit the sale of dogs and cats on its website, without actually requiring any action by the joint venture. However, without requiring any action by the joint venture, eBay would have been unable to implement the actions requested in the proposal. Here, like in *eBay*, although the Company would have the ability to unilaterally adopt a policy, it would not be able to enforce such policy by requiring the third parties at issue to comply, and as a result, the Company would be unable to effectuate the Proposal.

The Proponent's attempt to re-frame the Proposal is simply an attempt to avoid exclusion pursuant to Rule 14a-8(i)(6). The Proposal asks the Company to "requir[e]" the third-party organizations listed in the proposal to provide a report containing the detailed political expenditure information outlined in the Proposal, which is an outcome that the Company cannot achieve without the intervening action of such third-party organizations. Because the Company is not able to control the independent third parties whose intervening actions are required to implement the Proposal, the Company lacks the power and authority to implement the Proposal.


Therefore, for the reasons set forth above and in the No-Action Request, the Proposal is excludable under Rule 14a-8(i)(6).

II. 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.

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: Amy Orr, Boston Common Asset Management