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

DIVISION OF
CORPORATION FINANCE

March 15, 2023

Thomas J. Kim
Gibson, Dunn & Crutcher LLP

Re: AT&T Inc. (the "Company")
Incoming letter dated January 3, 2023

Dear Thomas J. Kim:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Robert Gaglione for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the board adopt a policy of obtaining shareholder approval for any future agreements and corporate policies that could oblige the Company to make payments or awards following the death of a senior executive in the form of unearned salary or bonuses, accelerated vesting or the continuation in force of unvested equity grants, perquisites or other payments made in lieu of compensation.

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 micromanages 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).

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: Cornish F. Hitchcock

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January 3, 2023

VIA EMAIL

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

Re: *AT&T Inc.*
Stockholder Proposal of Robert Gaglione
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, AT&T Inc. (the "Company"), intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Stockholders (collectively, the "2023 Proxy Materials") a stockholder proposal (the "Proposal") received from Robert Gaglione (the "Proponent").

Pursuant to Rule 14a-8(j), we have:

- 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 copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that stockholder 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, we are 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 the Proposal, 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.

THE PROPOSAL

The Proposal states:

> **RESOLVED**: AT&T shareholders request the Board to adopt a policy of obtaining shareholder approval for any future agreements and corporate policies that could oblige AT&T to make payments or awards following the death of a senior executive in the form of unearned salary or bonuses, accelerated vesting or the continuation in force of unvested equity grants, perquisites or other payments made in lieu of compensation. This policy would not affect compensation that the executive chooses to defer during his or her lifetime. As used herein, "future agreements" include modifications, amendments or extensions of existing agreements. The Board shall retain the option to seek shareholder approval after material terms are agreed upon.

A copy of the Proposal and the Supporting Statement, as well as related correspondence with the Proponent, is attached to this letter as Exhibit A.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal seeks to micromanage the Company.

ANALYSIS

The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because The Proposal Seeks To Micromanage The Company.

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a stockholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." *See* Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for stockholders to decide how to solve such problems at an annual shareholders meeting," and identified two central

considerations that underlie this policy. As relevant here, one of those considerations is "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). The 1998 Release further states that "[t]his consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies."

In Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"), the Staff clarified that not all "proposals seeking detail or seeking to promote timeframes" constitute micromanagement, and that going forward the Staff would "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." To that end, the Staff stated that this "approach is consistent with the Commission's views on the ordinary business exclusion, *which is designed to preserve management's discretion on ordinary business matters* but not prevent shareholders from providing high-level direction on large strategic corporate matters" (emphasis added). SLB 14L.

Consistent with the Staff's traditional approach to analyzing proposals that ask for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document,[1] it is clear that the underlying subject matter of the Proposal seeks to micromanage a complex aspect of the Company's executive compensation program. As such, the Proposal runs afoul of the kind of management-level discretion the Commission sought to preserve with the ordinary business exclusion by dictating how, when and on what terms the Company may offer "golden coffin" arrangements, which can be generally described as arrangements providing for payments or awards to executives in the event of their death. As such, the Proposal goes well beyond providing "high level direction" for the Board to consider, without regard for the highly complex and sophisticated nature of negotiating, designing and implementing competitive executive compensation benefits at a Fortune 50 company, and is thus properly excludable based on micromanagement.

The Proposal inappropriately limits the discretion of the Board in determining executive compensation benefits, going beyond "seeking detail or seeking to promote a timeframe" and instead imposing an exclusive and restrictive method by which approval of payments or awards to executives in the event of their death can be obtained. The Proposal addresses when and on what terms the Company can approve these benefits, stipulating that "shareholder approval" must be obtained "for any future agreements and corporate policies that could oblige AT&T to make payments or awards following the death of a senior

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[1] *See* Staff Legal Bulletin No. 14E, at part B (Oct. 27, 2009).

executive in the form of unearned salary or bonuses, accelerated vesting or the continuation in force of unvested equity grants, perquisites or other payments made in lieu of compensation." By imposing a specific method of approving executive compensation benefits with a high level of granularity (*i.e.*, prescribing extremely specific and limited parameters under which the Company is allowed to approve payments or awards to executives in the event of their death), the Proposal does more than limit Board discretion; the Proposal eliminates discretion. By imposing a specific method to address the complex issue of executive compensation design and administration, the Proposal would, in the words of SLB 14L, "inappropriately limit[] discretion of the board or management" and is properly excludable under Rule 14a-8(i)(7) because it seeks to micromanage the Company.

The Staff has recently concurred with the exclusion of similar proposals addressing executive compensation based on micromanagement under Rule 14a-8(i)(7). For example, in *Rite Aid Corp.* (avail. Apr. 23, 2021, *recon. denied* May 10, 2021), the Staff concurred with the exclusion of a proposal that requested the board adopt a policy that would prohibit equity compensation grants to senior executives when the company common stock had a market price lower than the grant date market price of any prior equity compensation grants to such executives. There, the company argued that the proposal prescribed specific limitations on the ability of its compensation committee "to make business judgments, without any flexibility or discretion," and restricted the compensation committee from "making any equity compensation grants to senior executives in certain instances without regard to circumstances and the committee's business judgment." *See also Gilead Sciences, Inc.* (avail. Dec. 23, 2020) (concurring with the exclusion of a proposal recommending the company reduce its named executive officer pay ratios each year until they reached 20 to 1, where the company argued the terms of the proposal were prescriptive and would unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill fiduciary duties to stockholders); *Comcast Corp.* (avail. Apr. 1, 2020) (concurring with the exclusion of a proposal reducing a company's CEO pay ratio by 25-50%); *The Walt Disney Co. (Karen Lizette Perricone Revocable Trust)* (avail. Dec. 6, 2019) (concurring with the exclusion of a proposal limiting the annual total compensation of the company's chairman and chief executive officer to a ratio not to exceed the total annual compensation of the company's median employee by more than 500:1, within a five-year timeframe); *JPMorgan Chase & Co.* (avail. Mar. 22, 2019) (concurring with the exclusion of a proposal that requested the board adopt a policy prohibiting the vesting of equity-based awards for senior executives who voluntarily resigned to enter government service); *AbbVie Inc.* (avail. Feb. 15, 2019) (concurring with the exclusion of a proposal requesting a policy to prohibit financial performance metric adjustments to exclude legal or compliance costs for the purposes of determining senior executive incentive compensation, noting that the proposal "would prohibit any adjustment of the broad categories of expenses covered by the

[p]roposal without regard to specific circumstances or the possibility of reasonable exceptions").

We acknowledge that the Staff was recently unable to concur with the exclusion of a proposal requesting a company seek stockholder approval of any senior manager's new or renewed pay package that provides for severance or termination payments with an estimated value exceeding 2.99 times the sum of the executive's base salary plus target short-term bonus under Rule 14a-8(i)(7) as micromanaging the company. *See FedEx Corporation* (avail. Aug. 2, 2021). There, the Staff concluded that the proposal did not "probe 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" because the proposal related "to aspects of compensation available only to senior executives" and did "not seek to impose specific timeframes or methods for implementing complex policies" because the proposal did "not seek to prohibit such payments but instead provide[d] that such payments *above a certain threshold* be subject to shareholder approval" (emphasis added). While the Proposal similarly relates to compensation available only to senior executives, rather than seeking to impose specific timeframes or methods for approval of payments above a certain threshold, as in *FedEx*, the Proposal seeks shareholder approval of "*any* future agreements and corporate policies" (emphasis added) that could oblige the Company to make payments or awards to certain executives in the event of their death. The Proposal's key request of the Company thus goes well beyond the proposal in *FedEx*, imposing a singular method by which the Company can approve payments or awards to certain executives in the event of their death, regardless of their value. The Proposal therefore probes too deeply into matters of a complex nature upon which stockholders would not be in a position to make an informed judgment.

Moreover, the Staff's position that proposals which unduly limit the board's or management's discretion are excludable under micromanagement is longstanding, even when the proposal raises important policy considerations. For example, in *Wendy's Co.* (avail. Mar. 2, 2017), the company received a proposal urging the board to join the Fair Food Program. The company argued that the selection of suppliers and management of supplier relationships was a complex process that stockholders were not in a position to make an informed judgment about and that the proposal sought to substitute management's existing practices and processes. The Staff concurred with the exclusion of the proposal, noting the proposal sought "to micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." In *SeaWorld Entertainment, Inc.* (avail. Mar. 30, 2017, *recon. denied* Apr. 17, 2017), the Staff concurred with exclusion based on micromanagement where the company received a proposal which urged the board to retire the current resident orcas to seaside sanctuaries and replace the captive-orca exhibits with innovative virtual and augmented reality or other types of non-animal experience. There, the company argued that

its management and board invested significant time and effort in determining which experiences to offer, while also striving to generate an attractive return to company stockholders, and that plans for new exhibits and attractions are within the purview of management. *See also Amazon.com, Inc.* (avail. Mar. 20, 2013) (concurring with the exclusion of a proposal requesting the company hold a competition for giving public advice on the voting items in the company's proxy statement with certain specific features); *General Electric Co.* (avail. Jan. 25, 2012, *recon. denied* Apr. 16, 2012) (concurring with the exclusion of a proposal to adopt a procedure to evaluate independent directors' performance by using a specific method). Consistent with the foregoing precedent, and as discussed above, the Proposal inappropriately attempts to substitute the Board's views with respect to the Company's existing compensation practices, notwithstanding that the detailed considerations required to negotiate, design and implement competitive executive compensation benefits, consistent with best practices and in the interest of stockholders, are exceedingly complex. The Proposal thus probes too deeply into matters of a complex nature upon which stockholders would not be in a position to make an informed judgment, and is properly excludable under Rule 14a-8(i)(7), and consistent with the 1998 Release.

As discussed above, if implemented, the underlying subject of the Proposal inappropriately strips the Board of its discretion to set and determine appropriate payments or awards to executives in the event of their death, and would dictate how, when and on what terms the Company may offer and approve payments or awards to executives in the event of their death. As described above, the Proposal thus seeks to impose a specific method for implementing executive compensation benefits with a "level of granularity" that "inappropriately limits discretion of the board or management." As such, consistent with SLB 14L and the aforementioned precedent, the Proposal is properly excludable under Rule 14a-8(i)(7) because it seeks to micromanage the Company.

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2023 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter

should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 887-3350.

Sincerely,

/s/ Thomas J. Kim

Thomas J. Kim

Enclosures

cc: Bryan Hough, AT&T Inc.
Moni DeWalt, AT&T Inc.
Robert Gaglione

EXHIBIT A

Shareholder Approval of Senior Executive Death Benefits

Robert Gaglione, who owns 998 shares of the Company's common stock, hereby notifies the Company that he intends to introduce the following resolution at the 2023 Annual Meeting for action by the stockholders:

RESOLVED: AT&T shareholders request the Board to adopt a policy of obtaining shareholder approval for any future agreements and corporate policies that could oblige AT&T to make payments or awards following the death of a senior executive in the form of unearned salary or bonuses, accelerated vesting or the continuation in force of unvested equity grants, perquisites or other payments made in lieu of compensation. This policy would not affect compensation that the executive chooses to defer during his or her lifetime. As used herein, "future agreements" include modifications, amendments or extensions of existing agreements. The Board shall retain the option to seek shareholder approval after material terms are agreed upon.

SUPPORTING STATEMENT

Shareholders support a "pay for performance" compensation philosophy designed to motivate and retain talented executives focused on sustainable, long-term returns to investors. Compensation policies that consistently tie pay to performance best align the interests of senior executives and shareholders.

We believe that "golden coffin" agreements, which can require AT&T to make significant payments or awards after an executive's death, are inconsistent with that approach.

AT&T's 2022 Proxy Statement discloses that: "In the event of the officer's death, the officer's unvested Restricted Stock Units . . . will vest, and outstanding Performance Shares will pay out at 100% of target" (2022 Proxy, page 84).

Thus, if CEO John Stankey had died at the end of 2021, he would have received an estimated $15.77 million in Performance Shares. Jason Kilar's death would have triggered the payment of $47.3 million in accelerated restricted stock as of year-end 2020 (he left the company in 2022).

If an executive does not pass away, these equity awards would not vest or pay out until the end of the performance period – as long as 3 years later – and could be worthless if performance conditions are not satisfied.

We see no reason to saddle shareholders with payments or awards when shareholders receive no services in return. Senior executives have ample opportunities to provide for their estate by contributing to retirement saving plans, purchasing life insurance, deferring compensation, or engaging in other estate planning strategies. Indeed, financial and estate planning is a company-paid benefit for executive officers.

The 2022 Proxy disclosed that AT&T paid $505,000 in life insurance premiums for Stankey in 2021 alone. In addition, he has over $34 million in two management pension plans. Senior executives can also accumulate millions more in savings by deferring up to 95% of their annual bonus in the Stock Purchase and Deferral Plan, which includes a 20% matching contribution. There is also a separate Cash Deferral Plan.

We believe that a shareholder approval requirement may induce restraint when parties negotiate such agreements.

The current policy also could undermine employee morale given that the company eliminated – as of January 2022 – the far more modest death benefit that the survivors of 220,000 retirees and retirement-eligible employees counted on for decades.

Please vote FOR this proposal.

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20 January 2023

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

By electronic mail: shareholderproposals@sec.gov

Re: Shareholder proposal to AT&T Inc. from Robert Gaglione

Dear Counsel:

This is a response on behalf of Robert Gaglione to the letter ("AT&T Letter") from counsel for AT&T Inc. ("AT&T" or the "Company") dated 3 January 2023, in which the Company advises of its intent to omit Mr. Gaglione's shareholder proposal (the "Proposal") from AT&T's 2023 proxy materials. For the reasons below, we respectfully ask you to advise AT&T that the Division does not concur with the Company's view that the Proposal may be excluded from AT&T's proxy materials.

The Proposal.

The Proposal states:

> **RESOLVED:** AT&T shareholders request the Board to adopt a policy of obtaining shareholder approval for any future agreements and corporate policies that could oblige AT&T to make payments or awards following the death of a senior executive in the form of unearned salary or bonuses, accelerated vesting or the continuation in force of unvested equity grants, perquisites and other payments made in lieu of compensation. This policy would not affect compensation that the executive chooses to defer during his or her lifetime. As used herein, "future agreements" include modifications, amendments or extensions of existing agreements. The Board shall retain the option to seek shareholder approval after material terms are agreed upon.

The Supporting Statement, while expressing support for a "pay for performance" philosophy on executive compensation, expresses opposition to "golden coffin" agreements, which can require AT&T to make significant payments or awards after an executive's death.

Under the current policy, a senior executive's death will trigger the vesting of his or her unvested Restricted Stock Units and outstanding Performance Shares, which otherwise vest over a three-year period, with the Performance Shares paying out at 100% of target. The Statement notes the significant cost of this policy. The Company's proxy statement for 2021 reported that if CEO John Stankey had died at the end of 2021, he would have received an estimated $15.77 million in PSUs. The death of Senior VP and General Counsel David McAtee would have triggered payment of an estimated $17.4 million in PSUs and RSUs. And the death of then WarnerMedia CEO Jason Kilar at the end of 2020 would have accelerated a payout of $47.3 million in accelerated restricted stock. (Mr. Kilar left the company in 2022).

The Supporting Statement argues against saddling shareholders with payments or awards when shareholders receive no services in return. The Statement notes how senior executives have ample opportunities to provide for their estate by contributing to retirement saving plans, purchasing life insurance, deferring compensation, or engaging in other estate planning strategies. Indeed, financial and estate planning is a company-paid benefit for executive officers.

Specifically, the Company's proxy statement notes that AT&T paid $505,000 in life insurance premiums for Mr. Stankey in 2021 alone. In addition, he has over $34 million in two management pension plans. More generally, senior executives can accumulate millions of dollars in savings by deferring up to 95% of their annual bonus in the Stock Purchase and Deferral Plan, which includes a 20% matching contribution. There is also a separate Cash Deferral Plan.

The Supporting Statement expresses the view that requiring shareholder approval of such "golden coffin" awards may induce restraint when parties negotiate such agreements.

The Supporting Statement adds a concern that the current "golden coffins" policy could undermine employee morale given that as of January 2022 AT&T eliminated a far more modest death benefit that the survivors of 220,000 retirees and retirement-eligible employees had counted on for decades.

AT&T's letter responds to the Proposal by seeking no-action relief under the "ordinary business" exemption in Rule 14a-8(i)(7). In brief, the Company argues that the Proposal impermissibly seeks to micromanage the Company's operations.

This argument lacks merit. The Proposal is in line with numerous proposals over the years that recommend changes to a company's compensation practices for senior executives, as to which the Division denied no-action relief. To that discussion we now turn.

Analysis.

The "ordinary business" exclusion in Rule 14a-8(i)(7) is intended to leave to management and the board the ability to decide questions about the day-to-day running of the corporation. That said, proposals 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." Release No. 34-40018 (21 May 1998). In assessing proposals under that exclusion, one consideration is the extent to which a proposal would micromanage the company "by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *Id.*

The Division's current guidance on "micromanagement" appears in section B(3) of STAFF LEGAL BULLETIN 14L ("SLB 14L"), which rescinded STAFF LEGAL BULLETINS 14J and 14K, explaining that "the rescinded guidance may have been taken to mean that any limit on company or board discretion constitutes micromanagement." SLB 14L summed up the Division's current approach towards "micromanagement" as follows—

> [P]roposals 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 expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input.

Id. An additional factor is whether the topic is "too complex" for shareholders, as a group, to make an informed judgment. *Id.* Going forward, SLB 14L stated that it would be appropriate for proposals to "suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals." *Id.*

AT&T seizes upon the quoted language in SLB 14L, arguing that the Proposal "seeks to micromanage a complex aspect of the Company's executive compensation program" by "imposing a specific method of approving executive compensation benefits with a high level of granularity," thus "run[ning] afoul of the kind of management-level discretion" that is reserved to the Company and

"inappropriately limit[ing] the discretion of the Board in determining executive compensation benefits." AT&T Letter, pp. 3-4.

However, the factors cited in SLB 14L have nothing to do with this Proposal.

- The Proposal contains no "targets."
- The Proposal sets no "timelines."
- There is nothing "granular" about a simple request for a vote on death benefits for senior executives.
- A shareholder vote on this facet of executive compensation is no more "complex" than shareholder votes that are mandated by statute on a company's "say on pay" report or on "golden parachute" payouts to executives in a change in control situation. 15 U.S.C. § 78n-1.
- Contrary to AT&T's Letter (p. 3), the proposal does not "dictat[e] how, when and on what terms the Company may offer 'golden coffin' arrangements," but simply requires a shareholder vote.
- And, of course, shareholders routinely vote on equity incentive plans proposed by the board on multiple types of incentive-based pay.

In short, this Proposal is about as un-granular as they come.

It should be obvious that the factors cited in SLB 14L are irrelevant to the sort of "golden coffin" proposal at issue here. To be sure, SLB 14L stated that the requisite analysis could apply to any topic, but the clear focus of the cited factors is on proposals "addressed in the rescinded SLBs [that] requested companies [to] adopt timeframes or targets to address climate change that the staff concurred were excludable on micromanagement grounds" because they were too prescriptive. Plainly, that sort of analysis has nothing to do with the topic of this Proposal. If anything, it appears that AT&T is arguing that any limitation on board discretion regarding executive compensation is micromanagement. That is not the law.

AT&T also overlooks the fact that for more than 30 years, the Division has viewed proposals on a range of topics involving senior executive compensation as generally falling outside the ambit of the (i)(7) exclusion. In *Transamerica Corp.* (10 January 1990) the Division, in a reversal of prior policy, opined that the "ordinary business" exception could not be invoked to exclude a shareholder proposal to deny compensation to executives if the payment is contingent upon a merger or acquisition. In a series of letters in 1992, the Division broadened this analysis and stated that "senior executive compensation" would no longer be considered ordinary business. *E.g., Bell Atlantic Corp.* (13 February 1992) (seeking abolition of short-term incentive plan for senior managers); *Battle Mountain Gold Co.* (13 February 1992) (proposing cuts in salaries and stock options).

As for the precise issue here – death benefits for senior executives – AT&T fails to mention that the Division previously denied no-action relief as to a death

benefits proposal that the company claimed could be excluded on "ordinary business" grounds. In *The Charles Schwab Corp.(AFL-CIO Reserve Fund)* (6 March 2009) the resolution sought the adoption of a policy for obtaining shareholder approval for "future agreements and corporate policies that would obligate the Company to make payments, grants, or awards following the death of a senior executive in the form of salary, bonuses, accelerated vesting of awards or benefits, or the continuation of unvested equity grants, perquisites and other payments or benefits in lieu of compensation. This policy would not affect compensation that the executive earns and chooses to defer during his or her lifetime." That resolution was nearly identical to the one AT&T challenges here.

In addition AT&T makes no mention of the fact that the Division has denied relief on "ordinary business" grounds for a variety of proposals seeking to impose limits on various forms of executive compensation, including:

- Proposed limits on hedging or pledging of an executive's stock holdings in he company. *Celgene Corp.* (25 March 2013).

- Proposed policy that senior executives should retain a significant percentage of equity awards until reaching normal retirement age. *Id.*

- Proposals to limit repricing of underwater stock options. *General DataComm Industries*, Inc. (9 December 1998).

- Proposed limits on accelerated vesting of unearned equity awards during a change in control. *The Ryland Group, Inc.* (5 February 2009).

- Proposals to exclude "pension credits" (paper gains on assets in a company's pension plan) in determining whether the criteria for a performance-based equity award have been met. *Qwest Communications International Inc.* (2 March 2001).[1]

- Proposals to discontinue awards of stock options, provided that they are limited to senior executives. *Ford Motor Co.* (9 January 2008).

Then there are proposals recommending a shareholder vote for certain "golden parachute" severance awards. AT&T grudgingly acknowledges that even

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[1] Proposals on "pension credits" responded to the fact that FASB standards require a company with a defined benefit pension plan to include the plan's performance in a company's consolidated financial statement. Thus, if incentive awards were based on factors relating to the company's overall performance, and if the pension plan had a good year, either because of market trends or otherwise, equity could be awarded (at least in part) for reasons having nothing to do with the company's operational performance.

when STAFF LEGAL BULLETINS 14J and 14K were in effect, the Division denied no-action relief in *FedEx Corp.* (2 August 2021), which involved a garden-variety "golden parachute" proposal of the sort that has been voted at dozens of companies in recent years. The proposal there sought a shareholder vote on "golden parachute" severance agreements for senior executives if the estimated total value exceeds 2.99 times the sum of the executive's base salary plus target short-term bonus. The Division denied relief in language that is equally applicable here:

> The Proposal addresses the basic issue of severance and termination payments (often called "parachute payments") for departing executives. It does not seek to prohibit such payments but instead provides that such payments above a certain threshold be subject to shareholder approval. The Proposal does not therefore probe 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.

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AT&T struggles to distinguish this *FedEx* letter on two grounds, neither of which is persuasive. First, AT&T notes that the golden parachute proposal seeks a shareholder vote only if the payout would exceed a certain threshold, *i.e.*, 2.99 times base salary and bonus. Here, by contrast, the Proposal seeks a shareholder vote on any form of death benefit. The difference is one of degree, not of kind. If a shareholder should think that death benefits up to a certain level are acceptable, the shareholder can vote against the proposal.

Second, AT&T argues that this Proposal is far more restrictive than the *FedEx* proposal because here the Proposal seeks a shareholder vote on "*any* future agreements." AT&T Letter, p. 5 (emphasis added by AT&T). However, the difference in wording between the two proposals is irrelevant. The *FedEx* proposal sought "shareholder approval of *any* senior manager's new or renewed pay package" that exceeds the pertinent threshold (emphasis added). To be sure, the word "any" modifies future agreements in this Proposal, and it modifies "senior manager's new or renewed pay package" in the *FedEx* example, but the difference (if any) between an "agreement" and a "pay package" is so small as to be non-existent.

AT&T tries to bolster its argument by citing a series of no-action decisions, but the proposals at issue in those letters were more restrictive and prescriptive than the Proposal at issue here. AT&T Letter, pp. 4-5. In addition, none of them proposed a shareholder vote as to the pay practice in question, but sought to impose a direct, unreviewable prohibition on the board's ability to make certain types of compensation decisions. Finally, the cited letters were all issued during a period when the rescinded STAFF LEGAL BULLETINS 14I, 14J and 14K were in effect, and thus the precedential value of those letters is limited.

Thus, in *Rite Aid Corp.* (23 April 2021, *on reconsideration,* 10 May 2021) (chart), the proposal sought flatly to "prohibit equity compensation grants to senior

executives under specified circumstances without providing any discretion to the Company." In *Gilead Sciences, Inc*. (23 December 2020) (chart), *Comcast Corp.* (1 April 2020) (chart) and *The Walt Disney Co. (Karen Lizette Perricone Revocable Trust* (6 December 2019) (chart), the proposals sought to limit executive pay based on a fixed ratio, *e.g*., not more than 500:1 above a company's median compensation. The proposal in *JPMorgan Chase & Co.* (22 March 2019) sought another flat prohibition, this one on vesting equity-based awards for senior executives who left the company for government service. In *AbbVie Inc.* (15 February 2019), the Division granted relief as to a proposal to prohibit a board from factoring out the company's legal and compliance costs in determining the amount or vesting of any equity of a senior executive's incentive awards. The Division viewed this proposal as prohibiting "any adjustment of the broad categories of expenses covered by the Proposal without regard to specific circumstances or the possibility of reasonable exceptions."[2]

In short, none of the proposals cited by AT&T involved a proposal of this sort, which gives the board discretion to award a type of executive pay at a level the board deems appropriate but would subject those judgments to a shareholder vote.

If anything, executive pay is a topic on which shareholders vote with great regularity on a range of topics. Shareholders are routinely asked to vote on management proposals to approve an equity incentive plan for executives. In addition, many companies hold annual "say on pay" votes on management's executive compensation report, and there are shareholder votes on golden parachute awards that are in a change in control situation. See p. 4, *supra.*

AT&T cites letters on topics other than executive compensation, but the proposals in those letters are radically different from what this Proposal is seeking. AT&T Letter, pp. 5-6. The proposals at issue in those letters sought to dictate elements of the company's day-to-day operations, and even if the proposals touched on a policy question at some level, the requested actions were deemed too complex to let shareholders make an informed judgment. A description of what was being proposed in those letters should be sufficient to highlight the difference in scope between those proposals and the Proposal here.

- In *Wendy's Co.* (2 March 2017), the proposal went beyond asking the company to address human rights issues in the supply chain, as it proposed

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[2] Apart from the fact that the *AbbVie* proposal involved a flat prohibition, the result in *AbbVie* marked a 180-degree turn from a decision one year earlier in which the Division denied no-action relief as to the same proposal at *Johnson & Johnson* (2 February 2018). The *AbbVie* letter did not explain why the Division had decided to reverse its prior position allowing a vote on this proposal, which had been filed at a number of companies over their role in the opioids crisis and had incurred significant legal and compliance costs in dealing with that topic.

that the company enter into a binding agreement with a third party that would control the company's selection of suppliers and its product purchasing options.

- The proposal in *SeaWorld Entertainment, Inc*. (30 March 2017, *on reconsideration*, 17 April 2017) involved questions of animal cruelty, but asked the company to "retire the current resident orcas to seaside sanctuaries and replace the captive-orca exhibits with innovative virtual and augmented reality or other types of non-animal experiences."

- The proposal in *Amazon.com, Inc.* (20 March 2013) asked the company to hold a competition for giving public advice on the items to be voted at the upcoming annual meeting; the proposal also went on to specify (a) the entry fee for contestants ($2000); (b) the dollar amounts of the first, second, third and fourth prizes; (c) the details to be posted on the company web site including a list of the entrants in chronological order, and (d) other details.

- In *General Electric Co*. (25 January 2012, *on reconsideration,* 16 April 2012), the proposal sought an evaluation of independent directors according to GE's system of ranking employees as A, B or C players and the removal of directors in the last category. The proposal went on to prescribe additional and intricate details, for example, ranking directors with over ten or more years of board service, stating when a director shall not be re-nominated, and in some cases allowing re-nomination of an experienced director only if he or she receives a vote of all directors by secret ballot.

The level of "granularity" and "micromanagement" in these proposals is apparent and far greater and more intrusive than the Proposal at issue here.

Conclusion.

For these reasons, we respectfully ask the Division to advise AT&T Inc. that the Division does not concur with the Company's view that the proposal may be omitted from the Company's proxy materials.

Thank you for your consideration of these points. Please do not hesitate to contact me if there is any further information we can provide.

Respectfully submitted,

Cornish F. Hitchcock

cc: Thomas J. Kim