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

DIVISION OF
CORPORATION FINANCE

March 8, 2023

Sarkis Jebejian
Kirkland & Ellis LLP

Re: Eli Lilly and Company (the "Company")
Incoming letter dated December 23, 2022

Dear Sarkis Jebejian:

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

The Proposal requests that the Company issue a public report prior to December 31, 2023 detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters and does not micromanage the Company.

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: Sarah Rehberg
National Center for Public Policy Research

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

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December 23, 2022

VIA EMAIL

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

Email: shareholderproposals@sec.gov

Re: Shareholder Proposal of the National Center for Public Policy Research

Ladies and Gentlemen:

We submit this letter on behalf of Eli Lilly and Company ("*Lilly*" or the "*Company*") to notify the Securities and Exchange Commission (the "*Commission*") that the Company intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (the "*2023 Annual Meeting"* and such materials, the "*2023 Proxy Materials*") a shareholder proposal and supporting statement (the "*Proposal*") submitted by the National Center for Public Policy Research (the "*Proponents*"). We also request confirmation that the staff of the Division of Corporation Finance (the "*Staff*") will not recommend enforcement action to the Commission if the Company omits the Proposal from the 2023 Proxy Materials for the reasons discussed below.

The Company currently anticipates filing a preliminary proxy statement with the Commission on or around February 24, 2023 due to the inclusion in the 2023 Proxy Materials of proposals to amend the Company's Amended Articles of Incorporation and expects to file its definitive 2023 Proxy Materials on or around March 17, 2023. Accordingly, in compliance with Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended, we have filed this letter with the Commission no later than 80 calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission. In light of the Company's timeline for filing a preliminary proxy statement, the Company requests that the Staff respond to this letter prior to February 24, 2023 if practicable.

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008), we are emailing this letter to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponents as notice of the Company's intent to omit the Proposal from the 2023 Proxy Materials. Likewise, we

take this opportunity to inform the Proponents that if the Proponents elects to submit any correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be provided concurrently to the undersigned on behalf of the Company.

THE PROPOSAL

The Proposal sets forth the following resolution to be voted on by shareholders at the 2023 Annual Meeting:

> **Resolved**: Shareholders request the Company issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.[1]

BASIS FOR EXCLUSION

The Company hereby respectfully requests that the Staff concur in its view that the Company may exclude the Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because it relates to the Company's ordinary business.

ANALYSIS

1. The Proposal May be Excluded Under Rule 14a-8(i)(7) Because it Relates to the Company's Ordinary Business

A. Background

Rule 14a-8(i)(7) permits the exclusion of shareholder proposals dealing with matters relating to a company's "ordinary business operations." The Commission has 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 shareholders to decide how to solve such problems at an annual shareholders meeting." 1998 Release. The term "ordinary business" in this context refers to "matters that are not necessarily 'ordinary' in the common meaning of the word, and is rooted in the corporate law concept

[1] The Proposal in full is attached hereto as Exhibit A.

providing management with flexibility in directing certain core matters involving the company's business and operations." *Id.*

The ordinary business exclusion rests on two central considerations: (1) the subject matter of the proposal (*i.e.*, whether the subject matter involves a matter of ordinary business), provided the proposal does not raise significant social policy considerations that transcend ordinary business; and (2) the degree to which the proposal attempts to micromanage a company by "probing too deeply into matters of a complex nature upon which shareholders as a group, would not be in a position to make an informed judgment." *Id.*

A shareholder proposal requesting the publication of a report is excludable pursuant to Rule 14a-8(i)(7) if the substance of the requested report deals with the ordinary business of the company. Exchange Act Release No. 20091 (Aug. 13, 1983) ("[T]he staff will consider whether the subject matter of the special report … involves a matter of ordinary business; where it does, the proposal will be excludable..."). The Staff takes a similar approach to shareholder proposals requesting a report on certain risks. The Staff explained how it evaluates shareholder proposals that address risk in Staff Legal Bulletin No. 14E (Oct. 27, 2009) ("*SLB 14E*"):

> [R]ather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk . . . [S]imilar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document—where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business—we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company.

For example, the Staff recently permitted exclusion under Rule 14a-8(i)(7) of a proposal in *Amazon.com, Inc.* (Apr. 7, 2022) (*UAW Retiree Medical Benefits Trust*) where the proposal requested a report on risks to the company related to staffing of its business and operations.

B. The Proposal May Be Excluded Because It Relates to an Ordinary Business Matter, the Company's Management of Its Workforce

Although the resolved clause in the Proposal refers to "risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regarding abortion," the supporting statement makes clear that the Proposal is focused on matters of ordinary business. Specifically, the first paragraph of the supporting statement immediately following the resolved clause provides: "In 2022, Eli Lilly made clear its opposition to an Indiana law that restricts abortion … The Company claimed that as a result of this law, its ability to attract diverse employees would be hindered, and it would be 'forced to plan for more

employment growth outside our home state.' The Company also said it expanded its employee health plan coverage to include travel for abortion" (internal citations omitted). This language shows that the Proposal focuses on the Company's hiring of employees and its employee health plan coverage. These are issues of workforce management, which is an ordinary business matter under Rule 14a-8(i)(7). This fact is supported not only by Staff precedent, but also by a Commission-level release. In *United Technologies Corp.* (Feb. 19, 1993), the Staff provided the following examples of excludable ordinary business categories: "employee health benefits, general compensation issues not focused on senior executives, management of the workplace, employee supervision, labor-management relations, employee hiring and firing, conditions of the employment and employee training and motivation." Subsequently, the Commission stated in the 1998 Release that a company's "management of [its] workforce, such as the hiring, promotion, and termination of employees" is a prime example of an excludable ordinary business matter. 1998 Release. Granting relief here would be consistent with the Commission's view expressed in 1998 as well as a long line of Staff no-action letter precedent that has allowed for the exclusion of proposals that deal with relations between a company and its employees and workforce management. In particular, the Staff has historically permitted the exclusion of proposals that, like the Proposal, refer to the hiring and retention of employees. *See Delhaize America, Inc.* (Mar. 9, 2000) (permitting, under Rule 14a-8(i)(7), the exclusion of a proposal requesting that the company adopt a policy "to be more aggressive in employee retention when the issue of compensation is considered"); *Sprint Corporation* (Jan. 28, 2004) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on "the impact on the [c]ompany's recruitment and retention of employees due to the [c]ompany's changes to retiree health care and life insurance coverage"); *Consolidated Edison, Inc.* (Feb. 24, 2005) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting the termination of certain employees because it related to "the termination, hiring, or promotion of employees"); *Merck & Co., Inc.* (Mar. 6, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting "that the company fill only entry-level positions with outside candidates and re-introduce its original policy of developing individuals for its higher level research and management positions exclusively from the ranks of its [current] employees" because in the Staff's view, "the proposal relates to procedures for hiring and promoting employees. Proposals concerning a company's management of its workforce are generally excludable under rule 14a-8(i)(7)").

The Proposal is comparable to the proposals in *Deere & Company* (Nov. 14, 2014, *recon. denied* Jan. 5, 2015) and *The Walt Disney Company* (Nov. 24, 2014, *recon. denied* Jan. 5, 2015) that requested the companies' boards of directors adopt anti-discrimination policies that protect employees' human rights. The Staff granted no-action relief pursuant to Rule 14a-8(i)(7), noting in each case "that the proposal relates to [the company's] policies concerning its employees." Here, the Proposal also relates to the Company's policies concerning its employees because it focuses on the Company's policies adopted in order to attract and retain employees. These are workforce

management policies, which, as the Commission has explained, fall squarely within the ordinary business exclusion.

The Proposal is also comparable to several proposals that dealt with workforce management that the Staff determined were excludable pursuant to Rule 14a-8(i)(7) during the 2022 proxy season. For example, as mentioned above, in *Amazon.com, Inc.* (*UAW Retiree Medical Benefits Trust*), the proposal requested a report on risks to the company related to staffing of its business and operations. The company argued that the proposal was excludable under Rule 14a-8(i)(7) because it related to "the quintessential ordinary business topic of managing workforce staffing." The Staff agreed and permitted exclusion pursuant to Rule 14a-8(i)(7). Here, the Proposal also asks for a report on risks to the Company related to its policies for attracting and retaining employees as well as geographic staffing decisions. The Staff should reach the same determination here as it did in *Amazon.com, Inc.* (*UAW Retiree Medical Benefits Trust*) and allow the Company to exclude the Proposal pursuant to Rule 14a-8(i)(7).

As another example from the 2022 proxy season, several companies received proposals requesting that they report information about the distribution of stock-based incentives to employees, including data about EEO-1 employee classification. *See, e.g.*, *Amazon.com, Inc.* (Apr. 8, 2022) (*James McRitchie*); *Repligen Corporation* (Apr. 1, 2022). The Staff permitted exclusion of these proposals pursuant to Rule 14a-8(i)(7). In addition, the Staff in *Dollar Tree, Inc.* (May 2, 2022) permitted exclusion of a proposal pursuant to Rule 14a-8(i)(7) that requested a report on risks to the company's business strategy, including a discussion of employee benefits and safety. Like in those examples, the Proposal seeks a report on information related to employee hiring and retention incentives, including employee benefits, which at its core is the Company's ordinary business. The Staff last season also permitted exclusion of the proposal in *BlackRock, Inc.* (Apr. 4, 2022) that requested a report on the risks of not having a more inclusive equal employment opportunity policy that prevents discrimination based on viewpoint and ideology. As one further example, in *Intel Corporation* (Mar. 18, 2022), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on "whether and/or to what extent, the public display of the pride flag has impacted current, and to the extent reasonable, past and prospective employees' view of the company as a desirable place to work." As discussed further below, these proposals all referenced or touched on a significant social policy issue but were excludable because the focus of the proposals was on ordinary business matters related to workforce management. The Proposal should similarly be excludable under Rule 14a-8(i)(7).

C. The Proposal Does Not Focus on a Significant Social Policy Issue

The Company recognizes that the Staff recently changed its approach to how it evaluates significant social policy issues, explaining in Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("*SLB 14L*"):

> proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.

However, the Staff's shift in approach has not resulted in the significant social policy exception swallowing the rule that proposals dealing with ordinary business matters are excludable. Since the publication of SLB 14L, the Staff has continued to distinguish between proposals that focus on a significant social policy issue and those that contain references to significant social policy issues like human capital management, but are actually directed at a company's ordinary business matters.

The no-action letters referenced in the preceding section relate to proposals that the proponent might argue raise a significant social policy issue. For instance, the proposal in *Amazon. Inc.* (*UAW* Retiree *Medical Benefits Trust*) was drafted in a manner to suggest that human capital management was the focus of the proposal. However, the Staff determined that the focus was actually on workforce management and should come to the same conclusion with respect to the Proposal, despite references in the Proposal to reproductive rights. As in *Amazon.com, Inc.* (*UAW Retiree Medical Benefits Trust*), references to a significant social policy issue in a proposal are not enough to transcend ordinary business where the proposal requests a report on the company's management of its workforce.

Similarly, in *Amazon.com, Inc.* (*James McRitchie*) and *Repligen Corporation*, despite declarations in the supporting statements that the intention was for the proposals to address a significant social policy issue, the Staff concluded that the proposals addressed the companies' ordinary business matters and permitted exclusion pursuant to Rule 14a-8(i)(7).The Proposal is distinguishable from the proposals in *Lowe's Companies, Inc.* (Apr. 7, 2022), *The TJX Companies, Inc.* (Feb. 7, 2022), and *Walmart Inc.* (Apr. 12, 2022). Those proposals requested that the companies issue reports detailing any risks and costs to the companies resulting from enacted or proposed state policies that restrict access to reproductive health care, "and detailing any strategies beyond litigation and legal compliance that the [companies] may deploy to minimize or mitigate these risks." Those proposals were directed at risks to the companies resulting from state policies regarding reproductive health care. The focus was squarely on the issue of state policies affecting reproductive health care, which the Staff determined "transcends ordinary business matters." Here, the focus of the Proposal is not on risks related to state-level reproductive health care policies—a topic on which the general public as voters has become sophisticated due to the robustness of public discussion and analysis on the topic—but rather, as the Proposal's supporting statement makes clear, the focus is on health care policies that the Company adopts to attract and retain employees. In other words, the Proposal focuses on risks from the Company's own actions

regarding employee benefits and management of the workforce. Therefore, the Proposal does not focus on a significant social policy issue such that it transcends ordinary business and the Staff should permit exclusion pursuant to Rule 14a-8(i)(7).

D. The Proposal May Be Excluded Because It Seeks To Micromanage the Company

In addition to focusing on a core ordinary business matter and not on a significant social policy issue, the Proposal seeks to impermissibly 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." 1998 Release. The Staff recently explained in SLB 14L that going forward, when evaluating micromanagement as a basis for exclusion, it "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."

The Proposal is comparable to several proposals that the Staff permitted to be excluded last season under Rule 14a-8(i)(7) for seeking to micromanage the companies "by probing too deeply into matters of a complex nature by seeking disclosure of intricate details regarding the [companies'] employment and training practices." In *Deere & Company* (Jan. 3, 2022), *Verizon Communications Inc.* (Mar. 17, 2022), and *American Express* (Mar. 11, 2022), the proposals requested publication of employee-training materials. Here, while the Proposal focuses on hiring and retention, rather than training, it also seeks to put shareholders in management's shoes by having them evaluate employment practices, a quintessential component of workforce management. The company explained in *Deere & Company*:

> [D]ecisions concerning internal [diversity, equity, and inclusion] efforts are multi-faceted and are based on a range of factors that are outside the knowledge and expertise of shareholders, and therefore inappropriate for such oversight and vote. The Proposal thus prescribes specific actions that the Company's management must undertake without affording management sufficient flexibility or discretion to address and implement its policy regarding the complex matter of diversity, equality, and inclusion.

Similarly, the Proposal focuses on a complicated topic that is core to management's ability to run the business. Decisions regarding employee benefits are not as simple as the Proposal suggests, and, accordingly, the Company did not respond in a reactionary manner when adopting its policies regarding reproductive health. Determining health benefits such as parental leave and insurance coverage for myriad issues is an extremely complicated process and is informed by a number of factors such as local market data, employee input, and financial affordability (just to name a few). The Company must consider our benefit offerings with our global workforce in mind where roughly 55% of our full-time workforce works outside of the United States and benefit packages are developed at the individual country level. In the U.S., nearly 40% of our

workforce lives outside of the state of Indiana, which is also an important consideration for benefits packages being developed for our U.S. employees.

Like in the proposals from *Deere & Company*, *Verizon Communications Inc.*, and *American Express*, the Proposal attempts to micromanage the Company by having shareholders weigh in on a complex ordinary business matter about which they are not in a position to make an informed judgment even if the Company provided the requested report. The Proposal is therefore excludable pursuant to Rule 14a-8(i)(7) for seeking to micromanage the Company.

Because the Proposal deals with the ordinary business matter of workforce management, does not focus on a significant social policy issue, and seeks to micromanage the Company, the Proposal is excludable pursuant to Rule 14a-8(i)(7).

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that the Company may exclude the Proposal from the 2023 Proxy Materials. Should the Staff disagree with the conclusions set forth in this letter, or should you require any additional information in support of our position, we would welcome the opportunity to discuss these matters with you as you prepare your response. Any such communication regarding this letter should be directed to me at sarkis.jebejian@kirkland.com or (212) 446-5944.

Sincerely,

Sarkis Jebejian, P.C.

cc: Anat Hakim
Executive Vice President, General Counsel and Secretary, Eli Lilly and Company

Sarah Rehberg
The National Center for Public Policy Research

Exhibit A
[Copy of Proposal]

Report on Risks of Supporting Abortion

Resolved: Shareholders request the Company issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.

Supporting Statement: In 2022, Eli Lilly made clear its opposition to an Indiana law that restricts abortion in cases other than rape, incest, or where a woman's life is in danger.[1] The Company claimed that as a result of this law, its ability to attract diverse employees would be hindered, and that it would be "forced to plan for more employment growth outside our home state."[2] The Company also said it expanded its employee health plan coverage to include travel for abortion.[3]

Ironically, in spite of making these statements and policy changes that demonstrate a clear pro-abortion stance, the Company criticized state officials for taking a stance on such a controversial issue. Indeed, the Company claimed to recognize abortion as a "divisive and deeply personal issue with no clear consensus among the citizens of Indiana," but then itself went on to take a position through its condemnation. "Despite this lack of agreement, Indiana has opted to quickly adopt one of the most restrictive anti-abortion laws in the United States," the Company stated.[4]

We agree with the Company that abortion is a "divisive and deeply personal issue." Views on the topic are often rooted in an individual's religious or other core belief system, making taking a position on it a potential reputational, legal, and financial liability for a company—yet Eli Lilly has insisted on doing just that.

By criticizing laws that restrict abortion and implementing a benefit to pay for abortion access, the Company makes clear its opposition to pro-life legislation that limit abortion. This positioning is particularly troubling considering the emphasis the Company has placed on so-called "Diversity & Inclusion." The Company claims that embracing differences drives its business success,[5] but apparently that embrace of diversity ends at diversity of thought, opinion, and religious convictions.

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[1] https://www.cbsnews.com/news/abortion-indiana-eli-lilly-cummins-roche/; https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html; https://www.wthr.com/article/news/special-reports/indiana-abortion/eli-lilly-condemns-new-abortion-ban-looks-to-expand-outside-indiana/531-7dedb5c9-0dda-4d9e-acf1-8f18e0b988db

[2] https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html

[3] https://www.cbsnews.com/news/abortion-indiana-eli-lilly-cummins-roche/; https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html

[4] https://www.cnbc.com/2022/08/06/eli-lilly-says-indianas-abortion-law-will-lead-the-drugmaker-to-grow-in-other-states.html

[5] https://www.lilly.com.au/operating-responsibly/diversity-inclusion; https://blog.kelley.iupui.edu/2020/10/05/eli-lilly-ceo-to-lead-healthcare-focused-conversation-on-inclusive-leadership/

Taking positions on issues the Company admits are “divisive,” “deeply personal,” and on which there is “no clear consensus,” can only serve to alienate consumers, employees, and investors and impact the Company’s bottom-line. The Company should instead focus on its pharmaceutical mission and its fiduciary duty to shareholders, a fiduciary duty that is likely to be violated by engaging in politically divisive rhetoric and actions.

January 20, 2023

Via email: shareholderproposals@sec.gov

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen,

This correspondence is in response to the letter of Sarkis Jebejian on behalf of Eli Lilly (the "Company") dated December 23, 2022, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2023 proxy materials for its 2023 annual shareholder meeting.

RESPONSE TO ELI LILLY'S CLAIMS

Our Proposal asks the Company to:

> issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.

The Company seeks to exclude the Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because it claims the subject matter of the Proposal directly concerns the Company's ordinary business operations.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Analysis

Part I. Rule 14a-8(i)(7).

The Company seeks to prevent action on our Proposal via Rule 14a-8(i)(7), the ordinary business exception. The exception, in its entirety, permits exclusion of a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."[1]

The initial rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Legal Bulletin (SLB) in 2002. There the Staff explained that:

> [t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. …[P]roposals that relate to ordinary business matters but that focus on 'sufficiently significant social policy issues … would not be considered to be excludable because the proposals would transcend the day-to-day business matters.'[2]

As the amendment itself explained, in detail particularly relevant to our considerations here:

> The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. **However, proposals relating to such matters but focusing on sufficiently significant social policy issues (*e.g., significant discrimination matters*) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.**[3]

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[1] 17 C.F.R. § 240.14a-8(i)(7).

[2] *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998), *available at* https://www.sec.gov/rules/final/34-40018.htm) (last accessed Jan. 3, 2022).

[3] *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added), *available at* https://www.sec.gov/rules/final/34-40018.htm (last accessed Jan. 3, 2022).

There matters stood until 2017. That fall, Staff issued a bulletin ("SLB 14I") recognizing that corporate boards would likely have some insight into whether issues raised in shareholder proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.[4] It therefore invited corporations, in arguing for an ordinary business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of those proposals.[5] Staff expanded this guidance further in 2018 ("SLB 14J") and suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff.[6] In doing so, Staff welcomed details about particulars such whether the company had already addressed the issue in some manner, including the difference – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presented a significant policy issue for the company.[7] Additional Staff guidance appeared again in the fall of 2019 ("SLB 14K"), wherein Staff underscored the value of the 2018 "delta analysis."[8]

Then most recently, on November 3, 2021, Staff reverted to the aforementioned 1998 guidance by rescinding SLB 14I, SLB 14J, and SLB 14K following "a review of staff experience applying the guidance in them."[9] Relevantly, of the rescinded bulletins, Staff said an "undue emphasis was placed on evaluating the significance of a policy issue to a particular company at the expense of whether the proposal focuses on a significant social policy…." Staff went on to explain that it was prospectively realigning its "approach for determining whether a proposal relates to 'ordinary business' with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release."[10]

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[4] *See Staff Legal Bulletin* No. 14I (Nov. 17, 2017), *available at* https;//www.sec.gov/interps/legal/cfslb14i.htm (Feb. 20, 2020) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

[5] *See id.* ("Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

[6] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed Jan. 3, 2022).

[7] *Id.*

[8] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals (last accessed Jan. 3, 2022).

[9] *See Staff Legal Bulletin* No. 14L (Nov. 3, 2021), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals (last accessed Jan. 3, 2022).

[10] *Id.*

Part II. The non-omissibility of our Proposal is fully established by the Staff's decision in Lowe's Companies, Inc. (avail. Apr. 7, 2022), Walmart Inc. (avail. Apr. 12, 2022), and TJX Companies, Inc. (avail. April 15, 2022).

Our Proposal is substantially indistinguishable, for Staff-review purposes, from the proposals that were found non-omissible in *Lowe's Companies, Inc.* (avail. Apr. 7, 2022), *Walmart Inc.* (avail. Apr. 12, 2022), and *TJX Companies, Inc.* (avail. April 15, 2022). The resolution of our Proposal is based on and is materially indistinguishable from the proposals in those three proceedings. The supporting statements of each proposal cover similar territory in explaining the very similar concerns that animated submission of the proposals. The only distinction between our Proposal and the one submitted in *Lowe's Companies, Inc.* (Apr. 7, 2022), *Walmart Inc.* (Apr. 12, 2022), and *TJX Companies, Inc.* (April 15, 2022) is that ours seeks a report detailing the risks to the Company resulting from its opposition to or change in policy resulting from enacted or proposed state laws "regulating abortion," whereas the focus of the proposals in *Lowe's*, *Walmart*, and *TJX* is the impact to the Company of state policies "restricting reproductive rights," but both unequivocally address the significant social policy issue of abortion. The only difference is that our proposal is framed through a pro-life lens, unlike the proposals in *Lowe's*, *Walmart*, and *TJX*, which are framed through a pro-abortion access lens. But the Staff may not permit or deny omission of proposals on the grounds of the Staff's personal attitude toward the focus of otherwise identical proposals. As a result, *Lowe's*, *Walmart*, and *TJX* are determinative in this case.

As we have noted, the resolution of our Proposal asks the Company to:

> issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.

The proposal in *Lowe's*, *Walmart*, and *TJX* asked those companies to:

> issue a public report prior to December 31, 2022, omitting confidential and privileged information and at a reasonable expense, detailing any known and any potential risks and costs to the Company caused by enacted or proposed state policies severely restricting reproductive health care, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.

These proposals are substantially similar. Each raises the critical issue of abortion. Each therefore implicates *the very same* issue of substantial social policy that transcend ordinary business. The *Lowe's*, *Walmart*, and *TJX* proposal having been found non-omissible, so must our Proposal be.

Additionally, each supporting statement explains the concerns that motivate the proposal in materially equivalent ways. Like our Proposal, the *Lowe's*, *Walmart*, and *TJX* proposal cited concerns surrounding abortion policy and the potential impact of such policy on the respective companies. Each express concern over the abortion issue with respect to "diversity and inclusion" goals at the respective companies. And like our Proposal, the *Lowe's*, *Walmart*, and *TJX* proposal expressed concern over how abortion policy impacts employees. Yet none of this content was deemed to have intruded into ordinary business operations in a way that rendered the proposal inadmissible. And nor can it in this proceeding simply because ours views the issue through a pro-life as opposed to a pro-abortion access lens.

Therefore, the proposals in *Lowe's*, *Walmart*, and *TJX* having been found non-omissible, so must ours be.

Part III. The Proposal does not relate to the Company's ordinary business operations.

A. The Proposal does not seek to manage the Company's workforce.

As its plain language states, our Proposal requests the Company issue a report "detailing the known and reasonably foreseeable risks and costs to the Company caused by opposing or otherwise altering Company policy in response to enacted or proposed state policies regulating abortion." In spite of this incontrovertible text, the Company asserts that our "supporting statement makes clear that the Proposal is otherwise focused on matters of ordinary business." To support its assertion, the Company cites some of the examples we use to demonstrate how the Company has injected itself into a controversial and significant social policy issue. But these statements by the Company, some of which allude to its employee recruitment strategy in light of a pro-life state law, are merely some of several exemplary of the Company's position on a "divisive" issue about which (in its own words) there is "no clear consensus." Simply because some of *the Company's* illustrative statements may relate to its employment strategies does not transform our Proposal from one concerned about the Company's position on an issue of significant social policy (in this instance, abortion), to one about managing its workforce.

We also include as examples statements the Company made regarding the "divisive and deeply personal" nature of the abortion issue, as well as the Company's allegation that the Indiana law to which the Company's comments refer is "one of the *most restrictive anti-abortion laws* in the United States." (emphasis added). The Company ignores these other examples and focuses on our rendition of its own comments about its workforce, in the course of its taking a general and partisan stand on this controversial issue in order to try to gin up a claim that we're interfering in its ordinary business. We do not. We simply repeat those statements as an example of the Company's position—they are the Company's words—not ours. And had we failed to include them or any other examples of the Company's position, we surely would have been accused of misrepresentation, vagueness, and otherwise of simply making up the Company's position on Indiana's abortion-related law.

In arguing that our Proposal focuses on management of the Company's workforce, the Company relies on *United Technologies Corp.* (avail. Feb. 19, 1993), but that proceeding is irrelevant to this one. The proposal in *United* contained a laundry list of "nine MacBride Principles" that the Board would have had to either implement or increase activity on. These "principles" included very specific management dictates such as "[i]ncreasing the representation of individuals from underrepresented religious groups in the workforce…banning of provocative religious or political emblems from the workplace…[and] the development of training programs that will prepare substantial numbers of current minority employees for skilled jobs…." Upon reviewing the proposal and arguments presented in *United*, Staff set forth the view that "proposals directed at a company's employment policies and practices with respect to its non-executive workforce [are] uniquely matters related to the conduct of the company's ordinary business operations." Then Staff proceeded to list several examples of such ordinary business categories (*e.g.,* employee health benefits, management of the workplace, and employee hiring and firing, to name a few). Our Proposal, however, does not seek to dictate company policy or practice; it merely seeks a report on the risks to the Company of it taking positions on or changing Company policy (any policy—not just those related to employment) in response to a significant social policy issue.

Moreover, the Staff decision in *United Technologies Corp.* is superseded by SLB 14L when it comes to the question of social policy significance. Staff in that proceeding took the now-defunct position that social policy concerns cannot override the ordinary business exception and instead determined that the employment-based nature of the proposal is alone controlling. The Staff decision in that case reads:

> [T]he Division has determined that the fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals are properly governed by the employment based nature of the proposal.

The conclusion reached in *United Technologies Corp.*, therefore, is inapplicable to the Proposal at hand, as it has been abrogated by the plain language of SLB 14L – as well as the 1998 Amendments that SLB 14L is premised upon. The additional proceedings cited by the Company to support this specific claim—*Delhaize America Inc.* (avail. Mar. 9, 2000), *Sprint Corporation* (avail. Jan. 28, 2004), *Consolidated Edison* (avail. Feb. 24, 2005), *Merck & Co., Inc.* (avail. Mar. 6, 2015), *Deere & Company* (avail. Nov. 14, 2014) and *The Walt Disney Company* (avail. Nov. 24, 2014)—were likewise issued before the substantial changes instituted by SLB 14L, and are otherwise so clearly linked to specific employee recruitment and retention policies to be wholly unrelatable to our Proposal.

The few precedents cited by the Company that follow 14L are irrelevant. For instance, the Company claims that our Proposal should be omitted because it is similar to the proposal in *Amazon.com, Inc.* (avail. Apr. 7, 2022) (*UAW Retiree Medical Benefits Trust*), but any such

comparison boggles the mind. The proposal in that proceeding asked the Board of Directors to oversee the preparation of a report:

> on the risks to the Company related to ensuring adequate staffing of Amazon's business and operations, including risks associated with tighter labor markets, and how Amazon is mitigating or plans to mitigate those risks. The report should include a discussion of the extent to which Amazon relies on part-time, temporary and contracted workers in each of its three operating segments, and whether staffing considerations have affected any of Amazon's decisions about strategy, such as expansion plans or entering new geographies or lines of business.

Our Proposal cannot possibly, by any stretch of the imagination, be precluded on the same grounds as the above proposal in *Amazon*. That proposal's resolution unequivocally seeks a report about that company's employment—the "adequate staffing of Amazon's business and operations." It furthermore prescribes what the report should contain, which includes very specific discussions of the types of employees the company relies on, e.g., "the extent to which Amazon relies on part-time, temporary and contracted workers." It is therefore unclear how this proposal relates to ours, which seeks a risk report on the Company's position regarding an issue of significant social policy. Our Proposal contains no such prescriptions for what the report should contain, other than a risk assessment that includes any mitigating factors, nor does it touch on obvious labor issues, as does the UAW's proposal in the *Amazon.com* proceeding.

Our Proposal implicates employment issues to exactly the same extent that those issues were implicated by the proposals in *Lowe's*, *Walmart*, and *TJX*, and those having been found non-omissible, so must ours be. The implication having proven insufficient to permit omission in those proceedings, so must it be here.

B. The Proposal focuses on a Significant Social Policy issue.

Next the Company alleges our Proposal does not focus on a significant social policy issue. But this, too, misrepresents our Proposal in an attempt to preclude it when the Company knows that other similar proposals have been found non-omissible on significant social policy grounds. The Company's no-action request attempts to distinguish our Proposal from the previously discussed proposal in the *Lowe's Companies, Inc.* (Apr. 7, 2022), *Walmart Inc.* (Apr. 12, 2022), and *TJX Companies, Inc.* (April 15, 2022) proceedings. However, the only distinction between those proposals and ours is that ours seeks a report detailing the risks to the Company resulting from its opposition to or change in policy resulting from enacted or proposed state laws "regulating abortion," whereas the focus of the proposals in *Lowe's*, *Walmart*, and *TJX* is the impact of state policies "restricting reproductive rights." The Company tries to create an additional distinction, arguing that the *Lowe's, Walmart*, and *TJX* proposals focus on the risk that arise from state law while our proposal focuses on the risks arising from the Company's reaction to state law, but this is a distinction without a difference; all the proposals seek exactly the same analysis: the risk from acting or not acting in the face of state abortion-related laws. Each requires the same analysis of laws about the same issues, and each implicates, *vel non*, ordinary business matters in

precisely the same way. The only material distinction to be made between our Proposal and the others is that our proposal is framed through a pro-life lens, unlike the proposals in *Lowe's*, *Walmart*, and *TJX*, which are framed through a pro-abortion access lens. But again, proposals may not be permitted or denied on the grounds of the Staff's personal attitude toward the focus of otherwise identical proposals.

Our Proposal, therefore, likewise involves an issue of significant social policy that transcends ordinary business as was determined in *Lowe's*, *Walmart*, and *TJX*.

C. The Proposal does not seek to micromanage the Company.

Finally, the Company argues that our Proposal seeks to impermissibly micromanage it "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 doing so, the Company again misrepresents our Proposal, claiming that our Proposal's focus is on employee recruitment and retention. But again, our Proposal merely repeats statements from the Company illustrating its position on the Indiana pro-life law, statements that are just some of several used in an exemplary manner with regard to the Company's posture on a state pro-life law. In no way does using them as examples of the Company taking a position on an issue of significant social policy transform our Proposal into a Proposal seeking to dictate the Company's employment policies. Interpreting it in such a way completely ignores the plain text of our Proposal and misrepresents it in an attempt to exclude an otherwise non-omissible proposal.

The Company does this while making the absurd, if not insulting, assertion that shareholders are unable to understand this simple proposal that seeks to report on the risks associated with the Company's actions related to a significant social policy issue. To support its claims, the Company once again cites to proceedings completely inapplicable to the one at hand, and does so featuring proposals of ours previously found to be omissible by the SEC Staff. But the proposals in those proceedings—*Deere & Company* (avail. Jan. 3, 2022)*, Verizon Communications, Inc.* (avail. Mar. 17, 2022)*,* and *American Express* (avail. Mar. 11, 2022)—all expressly concerned employee-training materials, a topic not at issue nor contemplated in our Proposal except for in the Company's misrepresentation of it, and sought the *publication* of those materials. The proposals in those proceedings are so unrelated that their inclusion in the Company's no-action letter seems nothing more than a thinly-veiled attempt to try to assert that because a few of our proposals have been found to be omissible on micromanagement grounds in the past, our Proposal to the Company in this proceeding must of course be similarly omissible. But having failed to meet its burden that our Proposal micromanages the Company, our Proposal must be found non-omissible.

Conclusion

Our Proposal seeks only a report on the risks of the Company's actions, not in any way the management of the Company, and it does so about issues that the Staff has unquestionably declared of significant social policy interest.

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

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

Sincerely,

Scott Shepard
FEP Director

Sarah Rehberg
National Center for Public Policy Research

cc: Sarkis Jebejian, P.C. (sarkis.jebejian@kirkland.com)