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

DIVISION OF
CORPORATION FINANCE

April 10, 2023

Raquel Fox
Skadden, Arps, Slate, Meagher & Flom LLP

Re: PayPal Holdings, Inc. (the "Company")
Incoming letter dated January 20, 2023

Dear Raquel Fox:

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 board conduct an evaluation and issue a report within the next year evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights.

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.

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

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BY EMAIL (shareholderproposals@sec.gov)

January 20, 2023

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

RE: PayPal Holdings, Inc. – 2023 Annual Meeting
Omission of Shareholder Proposal of
the National Center for Public Policy Research

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, PayPal Holdings, Inc., a Delaware corporation (the "Company"), to request that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with the Company's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the "Proposal") submitted by the National Center for Public Policy Research (the "Proponent") from the proxy materials to be distributed by the Company in connection with its 2023 annual meeting of shareholders (the "2023 proxy materials").

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D"), we are emailing this letter and its attachments 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 Proponent as notice of the Company's intent to omit the Proposal from the 2023 proxy materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the Company.

I. The Proposal

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

> **Resolved:** Shareholders request the Board of Directors conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights.

II. Basis for Exclusion

We hereby respectfully request that the Staff concur with the Company's view that the Proposal may be excluded from the 2023 proxy materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations.

III. Background

The Company received the Proposal on December 13, 2022, accompanied by a cover letter from the Proponent, dated December 12, 2022. Copies of the Proposal and cover letter are attached hereto as Exhibit A.

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

A. The Proposal relates to the Company's ordinary business matters.

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the company's ordinary business operations." In Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release"), the Commission stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that 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. The second consideration relates to the degree to which the proposal seeks to "micro-manage" the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.

The Commission has stated that a proposal requesting the dissemination of a report is excludable under Rule 14a-8(i)(7) if the substance of the proposal is within the ordinary business of the company. *See* Exchange Act Release No. 34-20091 (Aug. 16, 1983) ("[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7)."). Moreover, in Staff Legal Bulletin 14E (Oct. 27, 2009) ("SLB 14E"), the Staff noted that if a proposal relates to management of risks or liabilities that a company faces as a result of its operations, the Staff will focus on the "subject matter to which the risk pertains or that gives rise to the risk" in making a decision regarding whether a proposal can be properly excluded pursuant to Rule 14a-8(i)(7). Pursuant to SLB 14E, the Staff has consistently permitted exclusion of shareholder proposals under Rule 14a-8(i)(7) requesting an assessment of risks when the underlying subject matter concerns the ordinary business of the company. *See, e.g.*, *Netflix, Inc.* (Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report "describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk assessment results into company policies and decision-making," noting that the proposal related to the ordinary business matter of the "nature, presentation and content of programming and film production"); *Sempra Energy* (Jan. 12, 2012, *recon. denied* Jan. 23, 2012) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that asked the board "to conduct an independent oversight review" of the company's management of risks posed by the company's operations in certain countries, noting that the proposal related to the company's ordinary business matters).

In this instance, the Proposal relates to the Company's ordinary business in a number of ways. Specifically, the Proposal relates to the Company's offerings of products and services to customers, its relationships with its customers, and the application of internal workforce policies. Each of these matters have specifically been recognized by the Staff as ordinary business matters upon which a proposal may be excluded pursuant to Rule 14a-8(i)(7).

1. Products and services.

In accordance with the policy considerations underlying the ordinary business exclusion, the Staff consistently has permitted exclusion under Rule 14a-8(i)(7) of

shareholder proposals relating to the products and services offered to customers by a company. *See, e.g.*, *JPMorgan Chase & Co.* (Mar. 26, 2021) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a study on the costs created by the company in underwriting multi-class equity offerings); *JPMorgan Chase & Co.* (Mar. 19, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report examining the "politics, economics and engineering for the construction of a sea-based canal through the Tehuantepec isthmus of Mexico," noting that the proposal "relates to the products and services offered for sale by the [c]ompany"); *Wells Fargo & Co.* (Jan. 28, 2013, *recon. denied* Mar. 4, 2013) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company report on the adequacy of the company's policies in addressing the social and financial impacts of its direct deposit advance lending service, noting that the proposal "relates to the products and services offered for sale by the company" and that "[p]roposals concerning the sale of particular products and services are generally excludable under rule 14a-8(i)(7)"); *JPMorgan Chase & Co.* (Mar. 16, 2010) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board implement a policy mandating that the company cease its current practice of issuing refund anticipation loans, noting that the proposal "relate[s] to [the company's] decision to issue refund anticipation loans" and that "[p]roposals concerning the sale of particular services are generally excludable under rule 14a-8(i)(7)"); *Bank of America Corp.* (Feb. 21, 2007) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on policies against providing financial services that enable capital flight and result in tax avoidance, noting that the proposal "relat[es] to [the company's] ordinary business operations (i.e., sale of particular services)").

The Proposal here focuses on the Company's products and services offered to customers, which is an ordinary business matter. In this regard, the Proposal's resolved clause requests a report on how the Company oversees risks related to "discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights." The supporting statement clarifies that the subject of this report would relate to the Company's products and services, referring to laws that prohibit discrimination "when providing financial services to the public" as well as "discrimination in the provision of services," "the ability of individuals, groups, and businesses to access and equally participate in the marketplace" and "serving diverse consumers without regard to their beliefs or other factors." These statements, taken together, clearly demonstrate that the Proposal focuses on the Company's decisions regarding the products and services it offers. Accordingly, consistent with the precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).

2. Relationships with customers.

The Staff has regularly permitted exclusion under Rule 14a-8(i)(7) of proposals relating to a company's customer relationships, including decisions with regard to the offering of services to particular types of customers. In *JPMorgan Chase & Co.* (Mar. 12, 2010), for example, the proposal requested a report assessing the impact of mountain top removal coal mining by the company's clients on the environment and people of Appalachia and the adoption of a policy barring future financing of companies engaged in mountain top removal coal mining. The company argued, in part, that the proposal related to its ordinary business matters because the proposal sought "to determine the products and services the [c]ompany should offer, as well as those particular customers to whom the [c]ompany should provide its products and services." In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that the proposal related to the company's "decisions to extend credit or provide other financial services to particular types of customers" and that "[p]roposals concerning customer relations or the sale of particular services are generally excludable under rule 14a-8(i)(7)." *See also, e.g., JPMorgan Chase & Co.* (Feb. 21, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board complete a report on the impact to customers of the company's overdraft policies); *Ford Motor Co.* (Feb. 13. 2013) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting removal of dealers that provided poor customer service); *Anchor BanCorp Wisconsin Inc.* (May 13, 2009) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board adopt a new policy for the lending of funds to borrowers and the investment of assets after taking preliminary actions specified in the proposal, noting that the proposal related to the company's "ordinary business operations (i.e., credit policies, loan underwriting and customer relations)"); *JPMorgan Chase & Co.* (Feb. 21, 2006) (permitting exclusion under Rule 14a-8(i)(7) of a proposal recommending that the company not issue first mortgage home loans, except as required by law, greater than four times a borrower's gross income, noting that the proposal related to the company's "ordinary business operations (i.e., credit policies, loan underwriting and customer relations)").

In particular, the Staff has permitted exclusion under Rule 14a-8(i)(7) of proposals relating to a company's decisions with regard to the handling of customer accounts, including the decision to terminate accounts. In *Comcast Corp.* (Apr. 13, 2022), for example, the excluded proposal requested that the company notify a customer in advance of any termination, suspension or cancellation of service to the customer. The company argued, in part, that the proposal related to ordinary business matters because how the company "handles its customer accounts and customer relations implicates routine management decisions encompassing legal, regulatory, operational, and financial considerations, among others." In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that "the [p]roposal relates to, and does not transcend,

ordinary business matters." *See also, e.g., PayPal Holdings, Inc.* (Apr. 2, 2021)* (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested that the company not freeze or terminate customer accounts without first providing the company's rationale to customers); *TD Ameritrade Holding Corp.* (Nov. 20, 2017) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested that the company's shareholders have the right to be clients of the company, noting that "the [p]roposal relates to the [c]ompany's policies and procedures for opening and maintaining customer accounts"); *Zions Bancorporation* (Feb. 11, 2008) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting the company's board ensure that the "termination of any customer account by a subsidiary of the corporation's branch . . . be deferred until the matter can be heard in arbitration or by a civil court, in any event, termination to be deferred for 180 days pending such independent evaluation of the company's position," noting that the proposal related to the company's "ordinary business operations (i.e., procedures for handling customer accounts)").

In this case, the Proposal focuses on the Company's customer relationships, including the Company's decisions regarding the handling of customer accounts, which is an ordinary business matter. This focus is demonstrated by the statements described above regarding alleged discrimination in the provision of services by the Company to certain customers, as well as the supporting statement's claim that "vague and subjective standards" in company policies, including terms of service, "allow employees to deny or restrict service for arbitrary or discriminatory reasons," and that there is a "potential that such persons or groups will be denied access to essential services as a consequence of their speech or political activity." The supporting statement also claims that application of normal Company policies can "risk giving fringe activists and governments a foothold to demand that private financial institutions deny service." These statements and references make clear the Proposal's focus on the Company's handling of customer accounts. The Company's decisions regarding the policies and procedures relating to customer accounts, including regarding whether to terminate accounts in some circumstances for violations of terms of service, are a fundamental responsibility of management, requiring consideration of legal, business, operational and other factors. Accordingly, consistent with the precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).

3. Management of the workforce.

The Staff also has permitted exclusion under Rule 14a-8(i)(7) of proposals that relate to management of a company's workforce, including its workforce policies. *See* 1998 Release (excludable matters "include the management of the workforce"); *see also, e.g., BlackRock, Inc.* (Apr. 4, 2022, *recon. denied* May 2, 2022) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report detailing the

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

potential risks associated with omitting "viewpoint" and "ideology" from the company's written equal employment opportunity (EEO) policy, noting that the proposal "relates to, and does not transcend, ordinary business matters"); *Walmart, Inc.* (Apr. 8, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested the company's board prepare a report evaluating discrimination risk from the company's policies and practices for hourly workers taking medical leave, noting that the proposal "relates generally to the [c]ompany's management of its workforce"); *Yum! Brands, Inc.* (Mar. 6, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that sought to prohibit the company from engaging in certain employment practices, noting that "the [p]roposal relates generally to the [c]ompany's policies concerning its employees").

In addition to the matters described above, the Proposal focuses on the Company's management of its workforce, which is an ordinary business matter. In this regard, the Proposal's supporting statement notes that certain companies in the financial services industry have "vague and subjective standards in their policies" that "allow employees to deny or restrict service for arbitrary or discriminatory reasons." This reflects the Proposal's concern with how the Company manages its workforce through certain policies. Such issues relate directly to the ordinary business of the Company and are too nuanced to be subject to direct shareholder oversight as a practical matter. Therefore, consistent with the precedent described above, the Proposal is excludable under Rule 14a-8(i)(7).

B. The Proposal does not focus on a significant policy issue.

A proposal may not be excluded under Rule 14a-8(i)(7) if it is determined to focus on a significant policy issue. The mere fact that a proposal may touch upon a significant policy issue, however, does not preclude exclusion under Rule 14a-8(i)(7). Instead, the question is whether the proposal focuses primarily on a matter of broad public policy versus matters related to the company's ordinary business operations. *See* 1998 Release; SLB 14E. The Staff has consistently permitted exclusion of shareholder proposals where the proposal focused on ordinary business matters, even though it also related to a potential significant policy issue. As discussed above, in *JPMorgan Chase & Co.* (Mar. 12, 2010), the proposal requested, among other things, that the company adopt a policy barring the financing of companies engaged in mountain top removal mining. In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that "the proposal addresses matters beyond the environmental impact of [the company's] project finance decisions, such as [the company's] decisions to extend credit or provide other financial services to particular types of customers." *See also, e.g.*, *Comcast Corp.* (Apr. 13, 2022) (permitting exclusion under Rule 14a-8(i)(7) of the proposal requesting, among other things, that the company adopt a policy of notifying a customer in advance of any termination, suspension or cancellation of service to the customer, noting that "the [p]roposal relates to, and does not transcend, ordinary

business matters"); *PetSmart, Inc.* (Mar. 24, 2011) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the potential significant policy issue of the humane treatment of animals, the proposal covered a broad scope of laws ranging "from serious violations such as animal abuse to violations of administrative matters such as record keeping"); *CIGNA Corp.* (Feb. 23, 2011) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the potential significant policy issue of access to affordable health care, it also asked CIGNA to report on expense management, an ordinary business matter); *Capital One Financial Corp.* (Feb. 3, 2005) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

In this instance, the Proposal does not focus on a significant policy issue that has been recognized by the Staff. Although the Proposal's resolved clause purports to raise the issue of discrimination based on individuals' "race, color, religion (including religious views), sex, national origin, or political views," the Proposal's supporting statement clearly indicates that the proposal is "particularly concerned with recent evidence of religious and political discrimination," which, to our knowledge, the Staff has not determined to be significant policy issues. Notably, in *BlackRock, Inc.* (Apr. 4, 2022, *recon. denied* May 2, 2022), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal that requested a report detailing the potential risks associated with omitting "viewpoint" and "ideology" from the company's written equal employment opportunity (EEO) policy, where the supporting statement claimed that company employees were at risk of political discrimination. In permitting exclusion, the Staff noted that "the [p]roposal relates to, and does not transcend, ordinary business matters." *See also Duke Energy Corp.* (Feb. 23, 2017) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on risks and costs to the company caused by discrimination against "religious individuals and those with deeply held beliefs"); *PG&E Corporation* (Feb. 27, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting the company include in all employment and related policies "the right of employees to freely express their personal religious and political thoughts," noting that "the proposal relates to [the company's] policies concerning its employees"). Accordingly, the Proposal does not implicate significant policy issues that have been recognized by the Staff.

Moreover, in this case even if the Proposal were viewed to touch on a potential significant policy issue, the Proposal's overwhelming concern with the Company's products and services offered to customers, customer relationships and workforce management demonstrates that the Proposal's focus is on ordinary business matters. Therefore, even if the Proposal could be viewed as touching upon a significant policy issue, its focus is clearly on ordinary business matters.

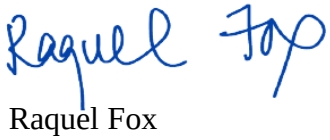
Accordingly, consistent with the precedent described above, the Proposal may be excluded under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

V. Conclusion

Based upon the foregoing analysis, the Company respectfully requests that the Staff concur that it will take no action if the Company excludes the Proposal from its 2023 proxy materials. To be clear, the Company believes that its services, and their implementation, do not, and should not, discriminate against individuals on the basis of their race, color, religion, sex, national origin, or political views. But, as set forth above, the Company does not believe that a report called for by the Proposal is a proper subject for direct shareholder oversight.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of the Company's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (202) 371-7050.

Very truly yours,



Raquel Fox

Enclosures

cc: Brian Y. Yamasaki
Vice President, Corporate Legal and Secretary
PayPal Holdings, Inc.

Sarah Rehberg
National Center for Public Policy Research

EXHIBIT A

(see attached)

December 12, 2022

Corporate Secretary
PayPal Holdings, Inc.
2211 North First Street
San Jose, California 95131

Dear Mr. Yamasaki,

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

I submit the Proposal as the Coordinator of the Free Enterprise Project of the National Center for Public Policy Research, which has continuously owned Company stock with a value exceeding $2,000 for at least 3 years prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2023 annual meeting of shareholders. A proof of ownership letter is forthcoming.

Pursuant to interpretations of Rule 14(a)-8 by the Securities & Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal January 5, 2022 or January 6, 2022 from 1-4 p.m. eastern. If that proves inconvenient, I hope you will suggest some other times to talk. Please feel free to contact me at [redacted] so that we can determine the mode and method of that discussion.

Copies of correspondence or a request for a "no-action" letter should be sent to me at the [redacted] and emailed to [redacted].

Sincerely,

Sarah Rehberg

cc: Scott Shepard, FEP Director
Enclosures: Shareholder Proposal

Report on Ensuring Respect for Civil Liberties

Supporting Statement: Companies that provide banking or financial services are essential pillars of the marketplace. On account of their unique and pivotal role in America's economy, many federal and state laws already prohibit them from discriminating when providing financial services to the public. And the UN Declaration of Human Rights, consistent with many other laws and the U.S. Constitution, recognizes that "everyone has the right to freedom of thought, conscience, and religion."[1] Financial institutions should respect these freedoms.

As shareholders of PayPal, we believe it is of great import that the company respect civil rights by identifying potential factors that may contribute to discrimination in the provision of services based on race, color, religion, sex, national origin, or social, political, or religious views.

We are particularly concerned with recent evidence of religious and political discrimination by companies in the financial services industry, as detailed in the Statement on Debanking and Free Speech.[2]

When companies engage in this kind of discrimination, they hinder the ability of individuals, groups, and businesses to access and equally participate in the marketplace and instead skew it to their own ends.

The Statement on Debanking and Free Speech identified many companies in the financial services industry that frequently include vague and subjective standards in their policies like "hate speech" or promoting "intolerance" that allow employees to deny or restrict service for arbitrary or discriminatory reasons. The 2022 edition of the Viewpoint Diversity Business Index[3] also identified numerous examples of this in many companies' terms of service. The inclusion of vague and arbitrary terms risks impacting clients' exercise of their constitutionally protected civil rights, by creating the potential that such persons or groups will be denied access to essential services as a consequence of their speech or political activity. Moreover, they risk giving fringe activists and governments a foothold to demand that private financial institutions deny service under the sweeping, unfettered discretion that such policies provide.

These actions and policies are an affront to public trust, destabilize the market, and threaten the ability of American citizens to live freely and do business according to their deeply held convictions.

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[1] https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[2] https://storage.googleapis.com/vds_storage/document/Statement%20on%20Debanking%20and%20Free%20Speech.pdf.

[3] https://viewpointdiversityscore.org/business-index.

PayPal also maintains that it promotes good social policy and diversity, equity, and inclusion practices.[4] It is important for the shareholders to know that PayPal is adhering to its own standards by serving diverse consumers without regard to their beliefs or other factors above.

Resolved: Shareholders request the Board of Directors conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights.

[4] https://investor.pypl.com/esg-strategy/default.aspx; https://about.pypl.com/how-we-work/diversity-and-inclusion/default.aspx

February 23, 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 Raquel Fox on behalf of PayPal Holdings, Inc. (the "Company") dated January 20, 2023, 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 PAYPAL'S CLAIMS

Our Proposal asks the Company's Board of Directors to:

> conduct an evaluation and issue a report within the next year, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating how it oversees risks related to discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights.

The Company seeks to exclude our Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because it claims the Proposal 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.

Additionally, if the Staff nonetheless determines to issue the Company relief, that act would raise significant constitutional and administrative law issues.

Should the Staff nonetheless find our Proposal omissible, we intend to seek reconsideration of that decision from the SEC Commissioners. We mention this now to avoid any possibility of a reprise of the developments in *BlackRock, Inc.* (avail. April 4, 2022; *reconsideration denied* May 4, 2022) in which proceeding we indicated to BlackRock and to the Staff our intention to seek reconsideration within approximately 15 minutes of receiving the Staff's decision that our proposal in that proceeding was omissible, and yet by some set of events still not fully clear to us, the Staff allowed BlackRock to unilaterally block our request for reconsideration. The Staff did this by delaying its omissibility decision for an inordinate time, long enough for BlackRock purportedly to have been able to begin its printing process within the 15-odd minutes between the issuance of the Staff's letter and our indication of our intent to seek reconsideration, and then agreeing with BlackRock that this unilateral act by BlackRock barred Commission reconsideration of the Staff's omissibility determination. We think the behavior of the Staff last year, whatever the specific details, demonstrated the arbitrariness, capriciousness and bias of its processes and determinations, and underscored the structural flaws that characterize the entire no-action review process. Relatedly, we ask that any information pertinent to this proceeding, conveyed between the Company and the Staff by any means whatever, promptly be conveyed to us as well, as required by section G.9 of SLB No. 14.[1] This particularly applies to any communications by the Company or any representative of the Company to the Staff of its plans or schedule for printing proxy materials, and includes phone calls, which cannot be used to evade the transparency requirements and are generally discouraged by SEC Staff under section G.10.[2]

Finally, we ask the Staff to render its no-action determination in light of our stated intention to seek reconsideration, and to issue it with sufficient timeliness to avoid functionally denying us a reconsideration opportunity that is facially a part of this review system.

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[1] https://www.sec.gov/pdf/cfslb14.pdf; https://www.sec.gov/corpfin/staff-legal-bulletin-14d-shareholder-proposals; https://www.sec.gov/interps/legal/cfslb14.htm

[2] https://www.sec.gov/interps/legal/cfslb14.htm

Analysis

Part. I. Our Proposal does not implicate the ordinary business operations of the company, and it is a matter of substantial policy concern so that it transcends ordinary-business analysis.

A. Rule 14a-8(i)(7)'s treatment of the ordinary-business exception and significant policy issues.

The Company seeks to prevent shareholders' consideration of 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."[3]

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.'[4]

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**

[3] 17 C.F.R. § 240.14a-8(i)(7).

[4] *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 Feb. 15, 2023) (hereinafter the "1998 Release").

> **business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.**[5]

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.[6] 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.[7] 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.[8] 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.[9] Additional Staff guidance appeared again in the fall of 2019 ("SLB 14K"), wherein Staff underscored the value of the 2018 "delta analysis."[10]

Then most recently, on November 3, 2021, Staff reverted to the 1998 Release by rescinding SLB 14I, SLB 14J, and SLB 14K following "a review of staff experience applying the guidance in them."[11] 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

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[5] *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 Feb. 15, 2023).

[6] *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.").

[7] *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.").

[8] *See Staff Legal Bulletin* No. 14J (Oct. 23, 2018), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals (last accessed Feb. 15, 2023).

[9] *Id.*

[10] *See Staff Legal Bulletin* No. 14K (Oct. 16, 2019), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals (last accessed Feb. 15, 2023).

[11] *See Staff Legal Bulletin* No. 14L (Nov. 3, 2021), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals (last accessed Feb. 15, 2023).

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."[12] Further, the Staff's longstanding position is that "the presence of widespread public debate" must be considered in determining whether the issue transcends ordinary business operations. Division of Corporation Finance, Staff Legal Bulletin No. 14A (July 12, 2002).

B. Our Proposal unambiguously focuses on a significant social policy issue that transcends the company's ordinary business operations.

Proposals that "focus on sufficiently significant social policy issues" that "transcend the ordinary business operations" of the company are not excludable under Rule 14a-8(i)(7). 1998 Release, *supra*; Division of Corporation Finance, Staff Legal Bulletin No. 14L (Nov. 3, 2021). As the Staff reiterated just over one year ago in Staff Legal Bulletin No. 14L, in determining whether a proposal focuses on a matter of significant social policy, the Staff focuses on the "broad societal impact" of the issue raised by the proposal. Further, the Staff's longstanding position is that "the presence of widespread public debate" must be considered in determining whether the issue transcends ordinary business operations. Division of Corporation Finance, Staff Legal Bulletin No. 14A (July 12, 2002).

The Commission's and Staff's interpretations of the "significant social policy exception" repeatedly cite discrimination in civil rights matters as the prototypical examples of significant social policy issues that transcend ordinary business matters. For example, the Commission's 1998 Release explained that proposals *"*focusing on sufficiently significant social policy issues (e.g., *significant discrimination matters*) generally would not be considered to be excludable." 1998 Release, *supra* (emphasis added). Issues like "significant discrimination matters" would not be excludable precisely "*because* the proposals would transcend the day-to-day business matters." *Id.* (emphasis added). And in Staff Legal Bulletin No. 14L, the Staff reiterated this position by citing "[m]atters related to employment discrimination" as an example of an issue that "may rise to the level of transcending the company's ordinary business operations." Staff Legal Bulletin No. 14L, *supra* at n.5.

Consistent with this well-established guidance, the Staff have consistently denied relief requests from companies seeking to exclude proposals that relate to discrimination in civil rights matters. *See, e.g.*, *The Walt Disney Co. (National Center for Public Policy Research.)* (avail. Jan. 19, 2022) (proposal requests that the board commission a workplace non-discrimination audit analyzing the Company's impacts, including the impacts arising from Company-sponsored or promoted employee training, on civil rights and non-discrimination in the workplace, and the impacts of those issues on the Company's business); *Levi Strauss & Co.* (avail. Feb. 10, 2022) (proposal requests that

[12] *Id.*

the board commission a racial-equity audit analyzing the Company's impacts on civil rights and non-discrimination, and the impacts of those issues on the Company's business); *CVS Health Corp.* (avail. Mar. 17, 2022) (proposal requests that the board commission an audit analyzing the Company's impacts on civil rights and non-discrimination, and the impacts of those issues on the Company's business); *Amazon.com, Inc. (New York State Common Retirement Fund)* (Apr. 7, 2021) (same); *McDonald's Corp.* (Apr. 5, 2022) (audit analyzing the "adverse impact" of the company's policies and practices on the civil rights of "company stakeholders"). The Staff have also regularly denied relief for proposals focusing on the issue of discrimination in the context of human rights. *See, e.g.*, *Abercrombie & Fitch Co.* (avail. Apr. 12, 2010) (disclosure based on certain worker and human rights standards, including non-discrimination principles expressed in the International Labor Organization Conventions); *General Motors* (avail. Apr. 18, 2022) (report on child labor outside the United States); *Alphabet*, *Inc.* (avail. Apr. 12, 2022) (evaluation of existing policies and practices to address the human rights impacts of the company's content management policies).

The Staff's precedent permitting shareholders' consideration of civil rights non-discrimination proposals covers a wide range of protected characteristics. The Staff have in recent years denied relief for proposals requesting reports on racial discrimination, *e.g.*, *Levi Strauss & Co.* (Feb. 10, 2022) *supra*; *Amazon.com, Inc.* (avail. Mar. 14, 2017) (report on the risk of racial discrimination resulting from the use of criminal background checks); sex discrimination, *e.g.*, *CBRE Group, Inc.* (avail. Mar. 6, 2019) (report on the impact of the company's mandatory arbitration policy on sexual harassment claims);[13] discrimination against homosexuals, *e.g.*, *The Proctor & Gamble Co.* (avail. Aug. 16, 2016); and discrimination on protected characteristics in general, *e.g.*, *Alphabet, Inc.* (avail. Apr. 15, 2022) (proposal that, according to the Staff, "raise[d] the issue of discriminatory effects of the Company's algorithmic systems").

This is where the analysis of the Company's request for relief should begin and end. Under the Commission's and Staff's guidance and existing precedent, our Proposal unambiguously raises and focuses on an issue of significant social policy concern. Our Proposal raises the issues of "discrimination against individuals based on their race, color, religion (including religious views), sex, national origin, or political views," and "whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights."

As the Commission and Staff have recognized in a wide range of contexts, civil rights issues, even (and perhaps especially) *in general*, are not "day-to-day" routine matters of business, but are fundamental questions of social policy that have "broad societal impact." So it is with our Proposal. The Supporting Statement cites as the motivation for

[13] *See also Apple, Inc.* (avail. Dec. 20, 2021) (proposal requesting a report assessing the risks with the use of concealment clauses "in the context of harassment, discrimination and other unlawful acts").

the Proposal's concern risks related to "an affront to the public trust," "destabiliz[ing] the market," and the ability of the "banking or financial services" sectors to protect rights declared in the United States Constitution and United Nations Declaration of Human Rights. The Supporting Statement also references its concern for consistency with the Company's commitment to "good social policy" and "diversity, equity, and inclusion." Finally, the Supporting Statement references the existence of widespread public debate over the issue of de-banking. The Supporting Statement notes ongoing attempts by "fringe activists and governments" to "demand that private financial institutions deny service" to individuals based on protected characteristics. Our Proposal's concern is not with the Company's ordinary business activities, but with the Company's contribution to emerging and fundamental societal problems related to the de-banking of individuals on arbitrary and discriminatory grounds.

The Company Letter whistles past our Proposal's social significance and fails to cite to or distinguish our Proposal from any of the Staff's numerous denials of relief for civil rights discrimination proposals. Instead, the Company argues our Proposal's identification of "religious and political discrimination" from within a broader list of protected classes, including "race, color, religion (including religious views), sex, national origin, or political views" renders our Proposal excludable by touching on issues not previously "recognized by Staff." Company Letter at 8. In other words, according to the Company's logic, while a proposal regarding race, color, national origin, or sex would transcend ordinary business operations, the addition of religion or political views to the list somehow fundamentally changes our Proposal's focus into a quotidian matter of no particular social importance. This is incorrect and amounts to an invitation that the Staff either reverse itself, discriminate between shareholder proposals based on viewpoint, or both. The Staff should not accept this invitation for at least three reasons.

First, religion and political identity are protected characteristics in civil rights laws. The civil right of religious exercise has a long history in our country. The free exercise of religion is the first civil right protected by the Bill of Rights. U.S. Const. amend. I; *see Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing the First Amendment as one of the "civil-rights Amendments"). Religion—like race, color, sex, and national origin—is one of the characteristics protected by the United States' most significant federal non-discrimination law, the Civil Rights Act of 1964. 42 U.S.C. §§ 2000a, 2000e–2. Many states and cities similarly prohibit religious discrimination in a wide variety of contexts. For example, both Washington D.C. and New York prohibit religious discrimination in housing, employment, public accommodations, and educational institutions. D.C. Code § 2-1401 *et seq*.; N.Y. Exec. § 296. And New York's Human Rights Law also prohibits religious discrimination in providing credit services. N.Y. Exec. § 296(2). Like other civil rights, religion is a protected characteristic under laws the Company is no doubt subject to.

Contrary to the Company's assertions that "religious and political discrimination" are not "significant policy issues that have recognized by the Staff," Company Letter at 8, the

Staff have previously recognized that religious discrimination is a matter of sufficiently significant social policy concern. *See, e.g., Toys "R" Us* (avail. Apr. 8, 1999) (denying relief for a proposal requesting a company adopt a resolution providing for religious non-discrimination in Northern Ireland); *General Electric* (avail. Feb. 10, 2015) (proposal requesting adoption of the "Holy Land" principles, including religious non-discrimination). More recently, the Staff have supported the social significance of discrimination on religious views by denying relief to proposals that addressed a company's commitment to "religious freedom." In *CorVel*, (avail. June 5, 2019), the Staff denied relief for a proposal which specifically noted in its supporting statement that a company's effort to "balance religious freedom with LGBT non-discrimination" "open[ed] itself and shareholders to concerns regarding inclusiveness and discrimination." The Staff stated that "[i]n our view, the Proposal transcends ordinary business matters." Thus, the Staff concluded that the company's commitment to not discriminating against its stakeholders' religious views about homosexuality was a matter of significant social concern. It would be inconsistent for the Staff to recognize that religious non-discrimination is a matter of significant social policy concern when a proposal seeks to diminish it, as in *CorVel*, but not when a proposal seeks to protect it, as with our Proposal.

Barring discrimination against Americans based on their political views likewise has a pedigree in civil rights law. Though political views remain an emerging field in federal nondiscrimination law, the civil rights laws of numerous states already treat political affiliation or political activities as protected characteristics. See, e.g., D.C. Code § 2-1402.11; N.Y. Lab. Law § 201-d; Wash. Rev. Code. Ann. § 42.17A.495(2). Accordingly, both religious and political views are well within the scope of established civil rights and are socially significant, as evidenced by their codification in law.

Second, the Company's principal authority doesn't line up with its argument that discrimination based on political views is not socially significant. In *BlackRock, Inc. (National Center for Public Policy Research)* (avail. Apr. 4, 2022, recon. denied May 2, 2022), the proponents sought an inquiry into the risks that arise from viewpoint discrimination in one of BlackRock's employment policies. Our Proposal differs in two key respects. First, where the proposal in *BlackRock, Inc.* sought a change in the company's *employment* policies, our Proposal here focuses on the effect of the Company's policies on society generally—not only with respect to their interaction with the Company, but outside of the Company as well. Second, the proposal in *BlackRock, Inc*. focused only on *viewpoint* discrimination. By contrast, our Proposal concerns the Company's discrimination on a *series of invidious grounds* and the ultimate connection between that discrimination and negative impacts upon Americans' constitutional rights.

Third, even if the Staff considers discrimination based on religious and political views to be insignificant, the Staff may not use the inclusion of those views in a more general non-discrimination inquiry to find the entire request excludable. The inclusion of insignificant components in a proposal does not render the entire proposal excludable. As the Staff

indicated in Staff Legal Bulletin No. 14B, in determining whether a proposal raises an issue of significant social policy concern, the Staff reviews the proposal "as a whole"—not its component parts in isolation. Division of Corporation Finance, Staff Legal Bulletin No. 14B (Sept. 15, 2004). Our Proposal's concern for the de-banking of individuals based on their religious and political views is inherently connected to other protected grounds—none of which the Company contests.

Our Proposal is well within these precedents. Our Proposal asks for a review to determine whether and to what extent the Company's broader *policies* create a risk of discrimination against its client stakeholders in a series of ways that create reputation, litigation and ethical risks. It would be highly inconsistent for the Staff to find our Proposal's focus on discrimination omissible when it has found other similar proposals that focus on a company's discriminatory impacts non-omissible. Particularly since our Proposal concerns not just issues of protected racial discrimination, but implicates issues of religious discrimination and the exercise of constitutionally protected civil rights. The aforementioned proposals having been found non-omissible, so must our proposal be.

Perhaps no social issue in our Nation's history is as significant as the struggle against invidious discrimination, not only on race and ethnicity, but also on the basis of sex, religion, and political belief. While the business and financial sectors have produced some inspiring examples of leadership on these issues, there are also many instances where companies and banks have worked to perpetuate and deepen wrongful discrimination, not only within the ranks of employees, but in society at large.

Religious discrimination is rising in our country and is becoming increasingly relevant to corporate America—and especially the financial services sector. As but one example, corporations are grappling with how they should deal with rising anti-Semitism. *See, e.g.*, Wilhelmine Preussen, *Adidas scraps deal with Kanye West over anti-Semitic remarks*, Politico (Oct. 25, 2022) https://www.politico.eu/article/german-sportswear-giant-adidas-ends-cooperation-with-kanye-west-after-rappers-antisemitic-remarks/. Corporations also face increasing public blowback from decisions that affect religious groups that, in the past, may have gone relatively unnoticed. *See, e.g.*, Ian M. Giatti, *Religious nonprofit group led by former US Amb. Sam Brownback says Chase closed its bank account*, Christian Post (Oct. 11, 2022) https://www.christianpost.com/news/religious-nonprofit-group-says-chase-closed-its-bank-account.html. In a business environment in which religious diversity is increasingly relevant, risks related to discrimination on the basis of religion are also becoming more relevant. *See, e.g.,* Faygie Holt, *Report: Major corporations 'fail to protect' Jewish employees from rising anti-Semitism,* Jewish News Syndicate (Aug. 12, 2021) https://www.jns.org/watchdog-report-major-corporations-are-failing-to-protect-jewish-employees-from-rising-anti-semitism/. As these recent examples

reveal, religious identity cuts to the heart of some of the most significant and volatile relationships in America—and the world—today.

So too for risks associated with political identity. In an increasingly polarized political age, the risks increasingly cut both ways. On one hand, businesses increasingly deal with public scrutiny and risks based on the politics of those they do business with. *See, e.g.*, Jessica Piper and Zach Montellaro, *Corporations gave $10M to election objectors after pledging to cut them off*, Politico (Jan. 6, 2023) https://www.politico.com/news/2023/01/06/corporations-election-objectors-donations-00076668. On the other hand, businesses face public scrutiny and risks for choosing *not* to do business with groups based on their political affiliations. *See, e.g.*, Lydia Beyoud & Nushin Huq, *Texas Puts Banks in Tight Spot with New Law Backing Gunmakers*, Bloomberg Law (Sept. 1, 2021) https://news.bloomberglaw.com/banking-law/texas-puts-banks-in-tight-spot-with-new-law-backing-gunmakers.

Our Proposal takes no position on the proper balance of these risks. But it is undeniable that they are significant—and are growing in their significance—in our society today. A straightforward and objective approach would recognize our Proposal addresses a matter of immense social significance.

C. Our Proposal does not deal with matters relating to the Company's ordinary business operations.

Our Proposal's undeniable social policy significance makes this an easy case. If a proposal focuses on an issue of sufficient social significance or "broad societal impact," then it "transcend[s] the ordinary business operations" of the company and is not excludable under Rule 14a-8(i)(7). 1998 Release, *supra*; Staff Legal Bulletin No. 14L, *supra*.

But the Company argues that even if our Proposal is on a matter of social policy significance, our Proposal may be excluded because it relates to matters of ordinary business. This argument is both an incorrect statement of law and an inaccurate characterization of our Proposal. After the Staff determines that the subject matter of a proposal transcends ordinary business matters, that is the end of the inquiry. The Staff does not then assess whether the proposal merely "touches upon" or "primarily focuses" on ordinary business matters.

Put another way, a proposal transcends ordinary business matters *because* it focuses on significant social policy issues. As the 1998 Release makes clear, proposals focused on discrimination are generally of sufficient social significance to transcend ordinary business matters even if they, in some way, relate to ordinary business matters. *See* Staff Legal Bulletin No. 14A, *supra* ("[P]roposals relating to ordinary business matters but focusing on sufficiently significant social policy issues generally would not be considered to be excludable." cleaned up)). Under the Company's reading, all proposals would

always fall into the ordinary-business exception insofar as all proposals have to be about some aspect of business activity. This is an obviously not consistent with Staff guidance, previous no-action letters, and the Staff's interpretation of the 1998 Release.

Our Proposal does not relate to matters of ordinary business because it focuses on an issue of social policy significance that transcends them—full stop. Discrimination that impinges on constitutional rights is the root and core of our Proposal. But even setting aside the social policy significance of de-banking, our Proposal still does not relate to matters of ordinary business. None of the Company's arguments here stick.

i. Our Proposal does not relate to the Company's products or services.

The Company argues that our Proposal is excludable under Rule 14a-8(i)(7) because it "focuses on the Company's products and services offered to customers." Company Letter at 4. This argument is both incorrect and inapplicable. Our Proposal does not relate to—let alone "focus on" (a phrase used in none of the precedent the Company cites)—the Company's products and services. Even if it did, our Proposal would still not be excludable in light of its focus on the Company's policies in general.

First, our Proposal does not relate to the products and services offered by the Company. Our Proposal focuses on discrimination as a societal issue that transcends all of the Company's activities. For this reason, the Company does not—and could not possibly—point to any specific product or service on which our Proposal focuses. The Company stretches for examples of products our Proposal might affect, but cannot achieve anything more specific than "the provision of services" (mere repetition of the general rule), "serving diverse consumers" (true of nearly any of the Company's activities) and "providing financial services to the public" (a "service" so general the Company describes it as a mission statement across *all* of its business, *see* PayPal, *Mission, Vision, & Values* https://about.pypl.com/who-we-are/mission-vision-values/default.aspx (last accessed Feb. 21, 2023)). Contrast these generalities with the examples of relief the Company cites in *JPMorgan Chase & Co.* (avail. Mar. 19, 2019), which focused on "the construction of a sea-based canal through the Tehuantepec isthmus of Mexico," or *Wells Fargo & Co.* (avail. Jan. 28, 2013, *recon. denied* Mar. 4, 2013), which focused on the bank's "direct deposit advance lending service." *See also JPMorgan Chase & Co.* (avail. Mar. 26, 2021) (proposal requesting a study of costs of its underwriting multi-class equity offering services). These are examples of specific products and services. "[T]he provision of services" and "serving diverse consumers" are not. Our Proposal is plainly not excludable on this "products and services" argument.

Second, even if our Proposal related to the Company's products and services, its focus on the effectiveness of the Company's policies renders it non-excludable. The Staff have denied relief where a proposal focuses on the effectiveness of policies rather than directing relations with particular suppliers or customers. *See The TJX Companies* (avail. April 9, 2020) (proposal requesting analysis of risks of failing to have a companywide

policy on animal cruelty); *see also MasterCard Incorporated* (avail. Feb. 4, 2022) (report on how company intends to reduce the risk of processing payments for untraceable firearms). Like this precedent, our Proposal focuses the Company's policies because it requests a report that addresses how the Company "oversees" risks related to discrimination. In turn, the way that the Company oversees risks is a Company policy. That is our Proposal's focus, not any given product or service it sells.

ii. Our Proposal does not relate to the Company's relationships with its customers.

The Company next argues that the proposal relates to the Company's customer relationships. But here as well, our Proposal transcends any specific matter of customer relations.

The Company points to a series of cases in which the issue raised by the proposals related to commercial customer-relations issues, such as "poor customer service," *Ford Motor Co.* (avail. Feb. 13, 2013), or related to specific products used by a defined set of customers, such as "overdraft policies," *JPMorgan Chase & Co.* (avail. Feb. 21, 2019), or declining to issue "first mortgage home loans" to borrowers meeting certain characteristics of financial risk, *JPMorgan Chase & Co.* (avail. Feb. 21, 2006). Likewise, the proposals in *Comcast Corp.* (avail. Apr. 13, 2022), *PayPal Holdings, Inc.* (avail. Apr. 2, 2021), *TD Ameritrade Holding Corp.* (avail. Nov. 20, 2017), and *Zions Bancorporation* (avail. Feb. 11, 2008) cited by the Company each specifically related to the management of customer accounts.

As the Company points out in *JPMorgan Chase & Co.* (Feb. 21, 2006), the proposal in that proceeding recommended that JPMorgan Chase not issue first mortgage home loans, except as required by law, no greater than four times the borrower's gross income. But our Proposal contains no such analogous prescription. It does not tell the Company to issue any type of new policy or otherwise change its procedures toward customers whatsoever. All it does is request that the Board issue a report within the next year evaluating how it oversees risks related to discrimination against individuals, and whether such discrimination may impact individuals' exercise of their constitutionally protected civil rights.

Requesting a company review the impact of a current policy or activity is not remotely the same thing as instructing a company to enact or change a policy or activity. This makes additional proceedings cited by the Company similarly irrelevant. For instance, the Company cites *Comcast Corp.* (avail. Apr. 13, 2022) as evidence of our Proposal's omissibility, but even though this proposal is post-SLB 14L, the proposals have vastly different aims. The proposal in *Comcast* would have required:

> Comcast and/or any of its subsidiaries [to] send a registered letter, return receipt requested, at least thirty days in advance of any termination,

> suspension or cancellation of any service to the customer named on the account at the address where such service is located advising the customer of the action to be taken by Comcast and/or any of its subsidiaries.

Again, our Proposal is nothing like this one. It does not instruct the Company to take, how to take, or on what timeline to take particular action. It simply asks the Company to evaluate its preexisting policies with regard to discrimination. Any action the Company takes based on the evaluation is purely up to the Company and the discretion of its Board of Directors—not prescribed by our Proposal. As such, even though *Comcast* was determined after SLB 14L, the contents of its proposal is so vastly different from ours that it is in no way analogous or applicable to ours, ours concerning issues of discrimination that have been routinely found non-omissible by SEC Staff post-SLB 14L.

Our Proposal's focus—not on the petty irritations of ordinary transactions, but on systemic discrimination—puts it in a different class than the precedents the Company cites. The only precedent raised by the Company that contains even a glancing reference to issues of discrimination against protected categories is *JPMorgan Chase & Co.* (Feb. 21, 2019), which sought an analysis of ways in which overdraft fees hurt customers. And even there, the discriminatory implications were not the central fact of the proposal, but were only alluded to by a single word (the effects of overdraft fees on "non-white" patrons). In our Proposal, by contrast, the question of discrimination on grounds including race, color, sex, and religion is *the central issue* and clear focus. Discrimination is not and cannot be treated as the ordinary business of a company, a fact that has been established in many proceedings, including *Levi Strauss & Co.* (Feb. 10, 2022), *The Walt Disney Co.* (January 19, 2022), *Amazon.com, Inc.* (April 7, 2021).

Our Proposal doesn't ask anything about normal transactions or client relationships. Indeed, our Proposal makes no mention of "customers" at all. Instead, our Proposal requests a review to determine whether and to what extent the Company's broader *policies* create a risk of discrimination against "individuals" that impact their exercise of constitutionally protected civil rights. These individuals need not be "customers." To the contrary, the Supporting Statement notes how the Company's policies on discrimination affect "the public trust" and "the market"—the society at large. To the extent that affected individuals are or were previously customers of the Company, our Proposal relates to them as "individuals" and "American citizens," not as "customers." In other words, to the extent our Proposal addresses the Company's client stakeholders, it does so with regard to their constitutionally protected civil rights in general, not exclusively their customer relationship with the Company, much less any particular aspect of that relationship.

Perhaps for this reason, the Staff has regularly denied relief for proposals that deal with broader civil rights audits, even if they affect customer relations. *See Alphabet Inc.* (avail. Apr. 12, 2022) (denying relief for a report on how the company's policies supporting "military and militarized policing" agency activities impact "stakeholders, user

communities, and the Company's reputation and finances"); *The TJX Companies, Inc.* (avail. Apr. 15, 2022) (report detailing "any known and any potential risks and costs," including loss of customers and harm to employees, because of "enacted or proposed state policies severely restricting reproductive rights"). Like these proposals, our Proposal focuses on the outward expressions of civil rights by individuals who are affected by the Company's policies, whether or not those individuals are customers.

Another proceeding cited by the Company, *Anchor BanCorp Wisconsin Inc.* (avail. May 13, 2009), is likewise inapplicable. The proposal in that proceeding requested that company's board "adopt a new policy for the lending of funds to borrowers and the investment of assets of [the company and its subsidiary bank] after taking the following preliminary actions." The proposal then goes on to list several prescriptive measures the company must take including "retain an independent outside investment adviser to review, analyze, and recommend the suitability of such loans and investments, taking into account the capability of management to make, administer and supervise such activity" and "request such outside investment adviser to recommend a lending and investment policy to the Board of Directors[.]" As a result, the SEC found the proposal omissible, stating the proposal related to the company's "ordinary business operations (*i.e.*, credit policies, loan underwriting and customer relations)." But our Proposal is completely distinguishable from *Anchor BanCorp*. Our Proposal does not insist on a new policy for lending and investment practices *per se*, a distinctly business activity for a financial institution, let alone prescribe specific actions that must be taken prior to developing such a policy. It does not prescribe any polices or practices the Company must undertake; our Proposal only seeks a review to determine whether and to what extent the Company's broader policies create a risk of discrimination, or have resulted in discrimination that creates a host of additional risks.

iii. Our Proposal does not relate to the management of the Company's workforce.

The Company finally argues that our Proposal relates to ordinary business matters because it relates to the Company' management of its workforce. Specifically, the Company argues that by highlighting how financial services companies "allow employees to deny or restrict service" to individuals, our Proposal "reflects [a] concern with how the Company manages its workforce through certain policies." Company Letter at 7. As with the Company's other ordinary-business arguments, this argument fails because our Proposal transcends internal employee-management policies.

Our Proposal focuses on any "risks" related to de-banking discrimination, not risks related to employee management. *Compare with BlackRock, Inc*., *supra*. The Supporting Statement, in the course of commenting on the financial services sector, provides numerous examples of how "vague" company policies on the matter of discrimination allow for wrongful behavior. The Supporting Statement notes that "vague and subjective standards in their policies" "allow employees to deny or restrict service for arbitrary or

discriminatory reasons," but also that these policies were found "in many companies' terms of service" and other "policies." Viewed in context, the Supporting Statement's mention of "employees" was just one illustration of the Proposal's concern for "risks" in general. These policies need not necessarily relate to employees. Indeed, the Proposal makes its request to the Board of Directors, which may itself be a source of such policies, and which the Staff have recognized uniquely relate to the management of socially significant policies.

The Company fails to explain how exactly our Proposal, which seeks only an evaluation of preexisting policies, manages the Company's workforce, and it relies on inapplicable proceedings, as none of the proposals it cites deal with religious discrimination. For instance, the Company points to the SEC Staff's decision in *BlackRock, Inc.* (Apr. 4, 2022, recon. denied May 2, 2022) to support its assertion that our Proposal is omissible, but the proposed resolution on viewpoint diversity for BlackRock did not even mention religion. By comparison, our Proposal deals with religious and other kinds of *discrimination*, which are prohibited under numerous state public accommodation laws, employment statutes, and Title VII of the Civil Rights Act. Furthermore, the proposals in both *Walmart, Inc.* (avail. Apr. 8, 2019) and *Yum! Brands, Inc.* (avail. Mar. 6, 2019) predate SLB 14L.

As previously discussed, the Staff made clear in SLB 14L that even if a proposal relates to ordinary business matters, it must still be included if it "focus[es] on sufficiently significant social policy issues (*e.g.,* significant discrimination matters)." So even if the Proposal relates to ordinary business matters, the fact that it focuses on important issues of civil rights and discrimination means it still must be included. That is why the Staff now regularly allows reports and audits on matters dealing with similar issues such as supplier relations, *e.g. Brinker International, Inc.* (avail. Sep. 22, 2022), the sale of particular products and services, *e.g. Mastercard Incorporated* (avail. Apr. 22, 2022), and employment practices, *e.g. Levi-Straus & Co.* (Feb. 10, 2022). And unlike the proposal in *BlackRock, Inc.*, our Proposal makes no request for any specific action relating to the Company's employees. And unlike the proposals cited by the Company in *Walmart, Inc.* (avail. Apr. 8, 2019) and *Yum! Brands, Inc.* (avail. Mar. 6, 2019), which focused on alleged discrimination by companies *against their employees*, our Proposal focuses on the discrimination across all of the Company's policies and in society at-large. There is no employee-management basis to exclude our Proposal.

Part II. Issuing relief to the Company would raise serious constitutional and administrative law concerns.

For the reasons discussed above, our Proposal's merits under Commission and Staff rules, interpretations, guidance, and precedent require that Staff deny the Company's request for relief. If the Staff elects to issue relief to the Company despite its clear merits, the Staff's decision would raise a host of constitutional and administrative law issues.

A. The Company is asking the Staff to discriminate on the basis of viewpoint in violation of the First Amendment.

Our Proposal relates to the protection of civil rights in the financial services and banking sectors—a matter of clear, precedented, and objectively significant social policy concern. By urging the Staff to issue relief for the Proposal regardless, the Company invites the Staff to discriminate based on viewpoint.

It is well-established that the government cannot engage in viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019). This principle prevents governments from regulating speech "because of the speaker's specific motivating ideology, opinion, or perspective." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995). And the Supreme Court defines "the term 'viewpoint' discrimination in a broad sense." *Matal*, 137 S. Ct. at 1763. This is because "[v]iewpoint discrimination is a poison to a free society." *Iancu*, 139 S. Ct. at 2302 (Alito, J., concurring).

The rule against viewpoint discrimination prevents allowing speech based on one "political, economic, or social viewpoint" while disallowing other views on those same topics. *Id.* at 831. It also prohibits excluding views that the government deems "unpopular," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), or because of a perceived hostile reaction to the views expressed, *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

Here, the Company invites the Staff to engage in viewpoint discrimination by issuing relief on our Proposal. Our Proposal requests an audit of how the Company's policies and practices affect individuals' civil rights. The Staff has routinely denied no-action relief to similar requests affecting civil rights. *See, e.g.*, *McDonald's Corp.*, (Apr. 5, 2022) (third-party audit analyzing the adverse impact of the Company's policies and practices on the civil rights of Company stakeholders); *The TJX Companies* (Apr. 15 2022) (report on risks presented by state laws "severely restricting reproductive rights"); *General Motors* (Apr. 18, 2022) (report on how its business plans for electric vehicles rely or depend on child labor outside the United States). And as discussed *supra* Part I, religion and political views are quintessential civil rights protected by both federal and state laws. So if the Staff opts to issue relief to exclude our Proposal, one might reasonably conclude that it could only do so because of its opinion of the political (or religious) *views* expressed by our Proposal. Here, that would be the supporting statement's focus on political views and free exercise of religion.

The Staff—and the Commission—needs a principled basis for such a distinction. The Company proposes none. As the Supreme Court has explained, to avoid viewpoint discrimination the government must have "narrow, objective, and definite" standards to prevent officials from covertly discriminating based on viewpoint through subjective and unclear terms. *Forsyth Cnty., Ga.*, 505 U.S. at 131. And here, the Staff has complete

discretion to determine what "issues" are significant and even to censor on the same issue when they are presented by speakers with certain political or religious views.
The easiest course would be for the Staff to deny relief to the Company, and avoid making such a weighty decision. But if the Staff chooses to discriminate against the viewpoint expressed by the Proposal, that would highlight a new and significant issue with Staff Legal Bulletin 14L, and indeed, the 1998 Release. It would provide a clear demonstration of how the Staff's open-ended discretion in determining which views count as "socially significant" may be facially invalid under the First Amendment.

B. The Company is asking the Staff to take arbitrary and capricious action under the Administrative Procedure Act.

The Company identifies no reasonable basis for distinguishing between our Proposal and other civil rights-related anti-discrimination proposals. As a result, the Company's request for relief invites the Staff to take arbitrary and capricious action.

Under the Administrative Procedure Act (APA), agency action that is "arbitrary and capricious" may be set aside. 5 U.S.C. § 706(2)(A). The Supreme Court has succinctly explained that "[t]he APA's arbitrary and capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *see also Motor Vehicle Mfs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Under this precedent, in order for action to be reasonable and reasonably explained, the agency must at least consider the record before it and rationally explain its decision. *See FCC,* 141 S. Ct. at 1160.

Additionally, where an agency seeks to change its position from a prior regime, it must "display awareness that it is changing position," "show that there are good reasons for the new policy" and provide an even "more detailed justification" when the "new policy rests upon factual findings that contradict those which underlay its prior policy," and "take[ ] into account" "reliance interests" on the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Given the Staff's longstanding precedent permitting the consideration of shareholder proposals relating to civil rights matters, issuing relief to the Company would undoubtedly be a change in its position. Yet if the Staff issued relief for our Proposal, it would allow a proposal that focuses on civil rights discrimination to be excluded. At a bare minimum, the Staff—or the Commission—would have to explain its reasoning for the reversal in position to comply with the APA.

For the above reasons and others, the Staff's decision on our Proposal is an important action. Most often, the Staff's decision to issue relief is the final action by the Commission in dealing with a particular shareholder proposal. While the Commission may also affirm the Staff's decision to issue relief, the vast majority of relief decisions are made by the Staff without formal review. Significant legal consequences also flow

from these decisions because they help determine whether or not the Company will be able to exclude the proposal. It is undeniable that companies treat the no-action process as a safe harbor. And the reality is that by issuing relief, the Staff provides companies with a legal defense in any potential court action. What's more, issuing relief is at the core the Commission's complex regulatory scheme, and the authority of the Commission and Staff to issue relief is expressly indicated by Rule 14a-8. *See* Rule 14a-8(j).

In sum, the Company is asking the Staff to tread in precarious waters by issuing relief to a well-supported Proposal given the APA's requirements for reasoned decisionmaking. The safer and more prudent course would be for the Staff to deny the Company's request.

C. The Company is requesting relief the Staff lacks statutory authority to issue.

If the Staff elects to issue relief for our Proposal, it would raise significant concerns that the Staff is acting beyond its statutory authority. The Proposal is a permissible subject for stockholder concern under state law. If the Staff acted to block our Proposal, the Staff would be reaching beyond what they are authorized to do.

Section 14(a) of the Exchange Act prohibits anyone from "solicit[ing] any proxy" "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1). While this authority might be read "broadly," "it is not seriously disputed that Congress's central concern [in enacting § 14(a)] was with disclosure." *Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990). The purpose of Section 14(a) was to ensure that investors had "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings." S. Rep. No. 792 at 12 (1934).

While Section 14(a) gave the Commission authority to compel investor-useful disclosures, the substantive regulation of stockholder meetings was left to the "firmly established" state-law jurisdiction over corporate governance. *Business Roundtable*, 905 F.2d at 413 (internal citation omitted). Recognizing that state law provides the "confining principle" to Section 14(a)'s otherwise "vague 'public interest' standard," the United States Court of Appeals for the District of Columbia Circuit has held that "the Exchange Act cannot be understood to include regulation of" "the substantive allocation" of corporate governance that is "traditionally left to the states." *Business Roundtable v. SEC*, 905 F.2d at 407, 413 (internal citation omitted). Issuing relief under Rule 14a-8 would exceed this limit by regulating the substantive considerations and outcomes of corporate stockholder meetings, which are properly matters for state law.

i. Substantive regulation of corporations' proxy statements.

Issuing relief under Rule 14a-8 would regulate the substance of corporate governance because it would regulate the substantive matters that a corporation is required to include

in its proxy statement. Under state law, corporate directors tasked with soliciting proxies have "a fiduciary duty to disclose all facts germane" to items presented for stockholders' consideration. *Smith v. VanGorkom*, 488 A.2d 858, 890 (Del. 1986). For an annual meeting, this duty requires that a corporation include a shareholder proposal in its proxy statement if the shareholder proposal will be presented for consideration at the corporation's annual meeting. In turn, a shareholder proposal may be presented for consideration at the corporation's annual meeting if the proposal is a proper subject for action by the corporation's stockholders. *See CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 277 (Del. 2008). A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders' power to adopt, *id.* at 232, but stockholders do not have the power to adopt proposals that would cause the board of directors to breach its fiduciary duties, *see Paramount Commc'ns Inc. v. Time Inc.,* 1989 WL 79880, at *30 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140, (Del. 1990) ("The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares.").

Issuing relief under Rule 14a-8 would displace this system of state law by subjecting the Proposal to additional requirements to be included in the corporation's proxy statement.[14] The current Rule 14a-8 goes far further. Specifically, Rule 14a-8 provides that a corporation may exclude proposals that relate to the company's "ordinary business operations," *id.* at (i)(7), discussed *supra* Part I. And the SEC has further interpreted Rule 14a-8, via sub-regulatory guidance, to permit the exclusion of proposals that do not "transcend the day-to-day business matters" of the corporation, 1998 Release, or which insufficiently "raise[] issues with a broad societal impact," Division of Corporation Finance, Staff Legal Bulletin No. 14L, *supra*.

These additional limits go beyond the limits of the state law proper-subject requirement. A proposal that fails to sufficiently raise an issue "with a broad societal impact" may nonetheless be within stockholders' power to adopt and consistent with the board of directors' fiduciary duties. But issuing relief under Rule 14a-8 would authorize the Company to exclude such a proposal, even though state law would allow it to be considered. That is not what Congress gave the Commission power to do under Section 14(a).

ii. Substantive regulation of stockholder meetings.

Issuing relief under Rule 14a-8 would also regulate the substance of corporate governance because it would regulate the substantive issues that a corporation considers at its stockholder meetings. The matters that may be validly brought before stockholders at a corporation's meetings of stockholders are exclusively governed by state law. "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain

[14] To be sure, one provision of the current Rule 14a-8, (i)(1), mirrors the state law requirement that a shareholder proposal must be a proper subject for action by stockholders. But that is not what the Company has raised here.

responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (emphasis in original). Section 14(a) makes no such express requirement. Section 14(a) provides general language that Congress understood to merely authorize disclosure requirements that ensures investors have "adequate knowledge" of the "major questions of policy . . . decided at stockholders' meetings." S. Rep. No. 792, *supra*. It does not provide the authority for the SEC to regulate *which* questions must be decided at a corporation's stockholder meetings. Yet issuing relief under Rule 14a-8 would regulate the substantive aspects of stockholder meetings in at least two ways.

First, even though Rule 14a-8 applies primarily to the content of a corporation's proxy statement, its regulation of the proxy statement has the eminently predictable *effect* of regulating the stockholder meeting for which proxies are solicited. Today, substantially all stockholder voting is conducted by proxy. "Because most shareholders do not attend public company shareholder meetings in person, voting occurs almost entirely by the use of proxies that are solicited before the shareholder meeting, thereby resulting in the corporate proxy becoming 'the forum for shareholder suffrage.'" *Concept Release on the Proxy System*, SEC Release No. 34-62495 (July 24, 2010) (quoting *Roosevelt v. E.I duPont de Nemours & Co.*, 958 F.2d 416, 422 (D.C. Cir. 1992)). As a practical matter, if a stockholder proposal is excluded from the corporation's proxy statement, it is functionally unavailable for consideration at a stockholder meeting. Not many stockholders would be aware of the proposal, nor would many be able to vote on it. To be sure, a stockholder proponent could pay for his own proxy forms to be distributed. But that is hardly a remedy given the complex realities of the modern proxy system. With Rule 14a-8, the Commission has clearly put its thumb on the scale, allowing some stockholders to access the corporate proxy statement, but not others, on bases untethered to state law. By permitting the exclusion from corporate proxy statements of proposals otherwise valid for consideration under state law, Rule 14a-8 not only regulates the content of the proxy statement—it regulates which proposals are considered by the vast majority of stockholders, and therefore the content and outcomes of corporations' stockholder meetings.

Second, Rule 14a-8 goes beyond the regulation of proxy statements to directly regulate what stockholders may consider at stockholder meetings. Specifically, Rule 14a-8 compels the consideration of its permissible proposals by compelling their inclusion in the corporation's form of proxy. If a proposal meets the Rule's requirements, Rule 14a–8(a) provides that "a company *must* include a shareholder's proposal in its proxy statement and . . . its form of proxy" for a stockholder meeting. Rule 14a-8 (emphasis added). In turn, if a proposal is on the form of proxy, it must be considered at the relevant stockholder meeting. Under federal law, a corporation's "form of proxy" must include the matters to be voted on at the meeting. *See, e.g.*, 17 C.F.R. § 240a-4(a) ("[T]he form of proxy . . . shall identify clearly and impartially each separate matter intended to be acted upon"). By requiring the inclusion of a proposal on the proxy card, Rule 14a-8 compels consideration of the proposal at a stockholder meeting. If the corporation were to put a

proposal on its form of proxy, but not consider the proposal at the meeting, its form of proxy may be unlawfully misleading. Rule 14a-8 therefore requires a corporation to consider a shareholder proposal at its annual meeting even if it could lawfully exclude the shareholder proposal under state law. *See SEC v. Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947) (stating that, assuming a corporate bylaw excluding shareholder proposals was valid under state law, Rule 14a-8 would invalidate the bylaw).

By intruding upon the substantive affairs of corporate governance "traditionally left to the states," issuing relief under Rule 14a-8 would exceed the Commission's—and the Staff's—lawful authority under Section 14(a). As a result, issuing relief to the Company would raise serious concerns about the validity of the Staff's action.

Conclusion

Our Proposal seeks only an assessment and report about discrimination against client stakeholders by the Company, and effect of such discrimination on client stakeholders' constitutional rights. It does not seek to manage the Company in any way, with regard to ordinary business operations or others, and centrally raises an issue of the highest social policy significance. The Company has, so far from proving otherwise, helped to underscore all of these points.

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.

If the Staff nonetheless decides to issue relief to the Company, that action would raise significant constitutional and administrative law concerns that "involve matters of substantial importance and where the issues are novel or highly complex" invoking Commission review under 17 C.F.R. § 202.1(d).

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
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Sarah Rehberg
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cc: Raquel Fox, Skadden, Arps, Slate, Meagher & Flom (Raquel.fox@skadden.com)