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Via email

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

Re: Shareholder Proposal to Tractor Supply Company Regarding Public Benefit Corporation on Behalf of James McRitchie

Ladies and Gentlemen:

James McRitchie (the "Proponent") is beneficial owner of common stock of Tractor Supply Company (the "Company") and has submitted a shareholder proposal (the "Proposal") to the Company. I have been asked by the Proponent to respond to the letter dated December 31, 2020 sent to the Securities and Exchange Commission (the "SEC") by Jennifer H. Noonan ("Company Letter"). In the Company Letter, the Company contends that the Proposal may be excluded from the Company's 2021 proxy statement. A copy of the Proposal is attached to this letter.

I have reviewed the Proposal, as well as the Company Letter, the attached opinion of Morris, Nichols, Arsht & Tunnell (the "Delaware Law Opinion") and the letter to the Company dated January 19, 2021 from Jennifer H. Noonan (the "Board Analysis"), and based upon the foregoing, as well as the relevant rules, we respectfully submit that the Proposal must be included in the Company's 2021 proxy materials and that it is not excludable under Rule 14a-8. A copy of this letter is being emailed concurrently to Jennifer H. Noonan.

SUMMARY

The Proposal requests that the Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC") in light of its adoption of the Business Roundtable Statement of the Purpose of a Corporation (the "Statement").

The Company Letter asserts first that the Proposal has been substantially implemented under Rule 14a-8(i)(10) because the Company already addresses stakeholder concerns. In a clever piece of wordplay, the Company argues that because a proposal to convert to a PBC is related to the Statement, that the question under 14a-4(i)(10) is whether the Statement has been substantially implemented. But the question under the Rule is whether the Proposal to become a PBC has been implemented, and the answer to that is clearly, "no." None of the activities referenced in the Company Letter affect the legal mandate of shareholder primacy—the doctrine that a corporation must subordinate stakeholder interests to shareholder interests under conventional corporate law. That mandate that can be changed only by amending the certificate of incorporation of the Company in order to convert it into a PBC.

Second, the Company Letter asserts that the Proposal is excludable as addressing ordinary business under Rule 14a-8(i)(7). However, the Proposal advances an extraordinary transaction, namely, to amend the Company's constitutional documents so as to fundamentally alter the arrangement of rights and interests of shareholders and directors in the corporation. Even if the Proposal did not involve an extraordinary transaction, the underlying issues regarding PBCs and shareholder primacy represent a significant policy issue that transcends ordinary business: indeed, legislatures around the country and around the world have passed laws to create benefit corporations in the last decade, and legislation has been introduced in both houses of the U.S. Congress to make all large companies benefit corporations.[1] In addition to this legislative activity, the efficacy of shareholder primacy has been debated for years. All of this demonstrates that the Proposal addresses a significant policy issue that transcends the business of the Company and is thus not excludable as relating to ordinary business.

In addition, the Proposal does not micromanage the Company, because it does not specify how any particular business question should be resolved—indeed, if adopted, the Proposal would *expand* the discretion of directors with respect business decisions, which is the polar opposite of Proposal that micromanages.

Finally, the Company Letter makes two related assertions that the Proposal should be excluded because it does not include a specific public benefit for inclusion in the proposed certificate amendment. First, the Company asserts this makes the Proposal unlawful under Delaware law and therefore excludable under Rule 14a-8(i)(2); second, the Company claims that the absence of a public benefit makes the Proposal misleading and excludable under Rule 14a-8(i)(3). But the absence of a public benefit or other details of the amendment does not render the Proposal either unlawful or vague. The Proposal does not include the specific text of an

[1] Several states, including Delaware, use the term "public benefit corporation" to refer to their model of benefit corporations.

amendment, but rather asks the Company to "take steps necessary" to implement a PBC amendment, which steps include drafting the amendment language, including a public benefit. That task is particularly appropriate for the directors and executives of the Company.

The (i)(2) argument has no merit whatsoever: it would not be illegal under Delaware law for the shareholders of the Company to vote on the resolution included in the Proposal, which requests the board to take "all steps" necessary to effect an amendment to the certificate of incorporation that would convert the Company into a PBC. If that the Board decided to go forward with the Proposal, the "steps" involved would involve creating that amendment, which would include the drafting of one or more public benefits. The only way that it would become illegal would be if the directors decided to violate Delaware law in drafting the requested amendment. But there is nothing in the Proposal to suggest that the Proponent, or anyone voting for the Proposal, is or would be asking the board to take an illegal step—the Company is simply being asked to undertake the first step in a lawful process, including fulfilling all the requirements of the law.

Nor is the absence of the public benefit in the Proposal vague or misleading. The change effected by conversion to a PBC, whatever the specified public benefit, is extraordinary, because it means that all stakeholders materially affected by the Company's conduct will have a new level of priority, and the shareholders are being asked to vote on that important change. Should the Proposal be accepted, the Company will have to draft an actual amendment that includes a public benefit, and shareholders will have the opportunity to vote on that amendment when presented. It is true that the public benefit will be determined at a later stage in the process, but that does not render a proposal to initiate that process vague or misleading.

BACKGROUND

The Public Benefit Corporation Statute

Each of the proposed bases for exclusion is based on a misconstruction of the way the Delaware General Corporation Law, including the sections of that statute establish PBCs, operates. Accordingly, we begin with an explanation of the purpose and mechanics of Subchapter XV of the DGCL, "Public Benefit Corporations."[2]

a. Conventional Corporate Law

Prior to 2011, directors of all Delaware stock corporations were required to prioritize shareholder interests. While there has been a fierce ongoing debate as to whether corporations should be managed for the benefit of only shareholders or for a broader group of stakeholders,[3] the concept of shareholder primacy has dominated Delaware corporate law. A series of decisions by the Delaware courts cemented the place of shareholder primacy in the United States.[4]

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[2] 8 Del. C. §361 et seq.
[3] Frederick Alexander, Benefit Corporation Law and Governance: Pursuing Profit with Purpose (2018) at 21-26.
[4] Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 Seattle Univ. L. Rev. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")

The most important of these was the famous *Revlon* case decided by the Delaware Supreme Court in 1985.[5] Other Delaware authority has established that corporations exist primarily to generate shareholder value.[6] *eBay Domestic Holdings, Inc. v. Newmark*[7] is a more recent example of the Delaware focus on shareholder wealth maximization, even outside the sale context. The court embraced shareholder primacy, finding that a primary motivation to benefit users of the corporation's platform violated the directors' duties:

> *Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.*[8]

The former Chief Justice of the Delaware Supreme Court has explained that the law clearly favors shareholders, stating that, "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[9]

b. Public Benefit Corporations

The doctrine of shareholder primacy has caused great consternation regarding the harm that it poses to stakeholders and the public.[10] In response, the benefit corporation option was created, to provide a corporate form where directors could prioritize interests other than shareholders. Beginning in 2010, US jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholders interests; a statute has now been adopted in 39 US jurisdictions, one Canadian province and three countries.[11]

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[5] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, directors' duty is to maximize the cash value to shareholders, regardless of the interests of other constituencies, because there is no long term for the shareholders).

[6] *See Katz v. Oak Indus. Inc*., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [*e.g.*, debtholders] . . . does not . . . constitute a breach of duty."); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1169, 1170 (2002) ("The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.")

[7] 16 A.3d 1 (Del. Ch. 2010).

[8] *Id*. at 34-35.

[9] Leo Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law* 50 WAKE FOREST LAW REVIEW 761 (2015).

[10] *See generally, Lynn Stout,* The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public (2012).

[11] These totals represent our own hand count based in part on the data available from *The Social Enterprise Tracker,* available at

Delaware's version, the PBC, was adopted in 2011. It allows any stock corporation to be formed as a PBC and any stock corporation that is not a PBC to amend its certificate of incorporation to become one.[12] Any such amendment must identify one or more public benefits, which are defined as "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[13]

PBC directors have modified obligations that do not prioritize shareholder interests over all others. Instead, as a PBC, a corporation is intended to operate in a "responsible and sustainable manner."[14] Specifically, the directors must balance three considerations: (1) the shareholders' financial interests, (2) the best interests of those materially affected by the corporation's conduct and (3) a specific public benefit identified in the corporation's certificate of incorporation.[15] It is important to note that a PBC does not only serve those named in the public benefit provision—the balancing duty runs to anyone materially affected by the corporation. This balancing obligation distinguishes PBCs from conventional corporations: rather than focusing solely on economic return to shareholders, a PBC must balance the interests of stakeholders other than shareholders as ends in themselves. Its purpose is broader than financial return to shareholders.

In order for a conventional Delaware corporation to become a PBC, the board of directors must approve an amendment to the certificate of incorporation (including a specified public benefit or benefits) and then present that amendment to its shareholders for a vote.[16] In other words, the change is considered so fundamental that shareholder approval is required.

Conversion to a PBC reconfigures the rights and duties of the board and shareholders. While the board maintains discretion under the business judgment rule,[17] it is given

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https://socentlawtracker.org/#/map.

[12] 8 Del. C. §362.

[13] Id.

[14] 8 Del. C. §362.

[15] 8 Del. C. §365.

[16] 8 Del. C. §242.

[17] 8 Del. C. §365(b). This means that decisions remain in the hands of the board and management, with no more shareholder interference than in a conventional corporation. As one author described this element of the statute:

> *[T]he business judgment rule is a doctrine developed by the courts, which prohibits interference with board decisions made by disinterested and fully informed directors acting in good faith. [Chapter XV] states that this rule applies to all balancing decisions made by PBC directors.*

Alexander, *supra* n. 3 at 93. In order to ensure that directors' discretion remains unimpeded for PBC's, the statute was amended in 2020 to clarify that ownership of corporate stock would not render a director "interested" and thus ineligible for the protections of the business judgment rule. Richards, Layton & Finger, *2020 Proposed Amendments to the General Corporation Law of the State of Delaware* ("the amendment clarifies that a director's ownership of or other interest in the stock of the public benefit corporation will not, of itself, create a conflict of interest on the part of the director with respect to any decision implicating the director's balancing requirements, except to the extent such ownership or other interest would create a conflict of interest if the corporation were a conventional corporation") available at https://www.rlf.com/2020-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware/.

responsibility to consider a broad range of stakeholder interests as ends in themselves, rather than only as means to satisfy shareholder interests. Shareholders also gain new rights to bring lawsuits for relief in the event the board breaches its duties regarding stakeholders or the Company's public purpose.

ANALYSIS

The Company has asked that the Staff concur in its view that the Proposal can be excluded because (1) it has been substantially implemented (2) it seeks to micromanage the Company or otherwise relates to ordinary business operations and (3) by not including a public benefit, the Proposal violates Delaware law and is impermissibly vague. But these claims stem from a misunderstanding of Delaware law and the Proposal.

A. The Proposal is not substantially implemented as contemplated by Rule 14a-8(i)(10)

As a matter of Delaware law, it is impossible for the Proposal to have been implemented at all, let alone substantially. As directors of a conventional corporation, the Company's directors would be violating their duties if they prioritized stakeholder interests over those of shareholders, which is the sole feature of the Proposal. Chapter XV imposes a clear set of procedures that must be followed before a corporation's directors are able to prioritize stakeholders alongside (or even above) shareholders, as the Proposal requests. Because of the sheer implausibility of the claim that the Proposal has been implemented, the Company Letter attempts to rewrite the Proposal to include a very different goal:

> *Although the Proposal is couched in terms of proposed amendments to the Company's certificate of incorporation and bylaws, it is evident that the driving force behind such proposed amendments is to align the Company's actions with the Statement. Thus, similar to JPM, <u>the essential objective of the Proposal is aligning the Company's actions with the commitments made in the Statement, and like JPM, the Company already conducts its operations in accordance with the Statement</u>.*[18]

But of course, the Proposal does not ask the Company to "align" its practices with the Statement. It asks for a specific amendment to be made to the certificate of incorporation to change the directors' fiduciary duties. It is true that the Proposal references the Statement, but that is very different from merely asking the Company to align with it.

The long list of matters in the Company Letter that involve consideration of, or even catering to, other stakeholder interests cannot change this fundamental truth: all of those policies and actions are consistent with running a business for the primary purpose of serving shareholder interests. *But that is very different from prioritizing their interests, with is what the Proposal requests.* Indeed, a leading Delaware law firm made exactly this point in a recent memorandum

[18] Company Letter at 3 (emphasis added).

to another issuer: J.P. Morgan Chase & Co. had received a shareholder proposal asking the board to evaluate the issue of becoming a PBC. JP Morgan immediately implemented the proposal by obtaining a report (the ("Richards Report") stated:

> *Because the interests of customers, employees, suppliers, and the community in general are often key to the success of the corporation (and therefore are aligned with the interests of the corporation's stockholders), directors of conventional corporations may, consistent with their fiduciary duties, consider such stakeholder interests in making decisions. If the interests of the stockholders and the other constituencies conflict, however, the board's fiduciary duties require it to act in a manner that furthers the interests of the stockholders.*
>
> *In a public benefit corporation, on the other hand, directors are required to manage the corporation in a manner that balances the pecuniary interest of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or benefits identified in its certificate of incorporation*.[19]

The Company's own Corporate Governance guidelines recognize and reflect the reality that shareholders come first:

> *The Board of Directors (the "Board") of Tractor Supply Company (the "Company") believes that its primary responsibility is to exercise its business judgment to act in what it reasonably believes to be in the best interests of the Company and its stockholders and to provide effective governance over the Company's affairs for the benefit of its stockholders.*[20]

Thus, none of the matters in the long list of stakeholder items allow the interests of stakeholders to be prioritized over shareholders, as the first quoted paragraph from the Richards Report explains. But as the next quoted paragraph makes clear, as a PBC, the Company could actually take stakeholders into consideration *on their own account.*

The Company Letter attempts to demonstrate that the Company's "Mission and Values" statement, as well as diverse actions taken on behalf of stakeholders "convey the Company's commitment to each of the stakeholders set forth in the Statement: customers, employees, suppliers, communities and shareholders."[21] While corporate actions to support stakeholders can be, and very often are appropriate under conventional corporate law, they do not constitute implementation of the Proposal. The Company's actions do not eliminate the fundamental issue

[19] Richards, Layton and Finger, *Report to the Board of Directors of J.P. Morgan Chase & Co. Regarding Public Benefit Corporations. Available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/harringtonjpmorgan011121-14a8-incoming.pdf*

[20] Corporate Governance Guidelines, Tractor Supply Company, available at https://s23.q4cdn.com/539497486/files/doc_downloads/governance/1001253957.pdf

[21]Company Letter, page 3.

raised by the Proposal, which is the question of the priority given to shareholder interest over other stakeholders when those interests clash.

The Company and its Board have not substantially implemented the Proposal because they have not taken action to allow directors to prioritize stakeholders, which is the sole subject of the Proposal. The Company has provided no evidence suggesting that it has otherwise addressed this concern.[22]

The failure to address the Proposal stands in contrast to the action of the board of an issuer in one of a prior Staff response granting relief cited in the Company Letter. In *JPMorgan Chase & Co.* (Feb. 5, 2020), the proposal asked for oversight and guidance by the board relating to the Statement:

> *That shareholders request our Board of Directors to exercise their fiduciary duties by reviewing the Statement of the Purpose of a Corporation, and provide oversight and guidance as to whether and how our Company's full implementation of the new statement of stakeholder theory should alter our Company's long term plans, goals, metrics, executive and Board compensation, and representation of stakeholders in governance of our Company, and publish recommendations regarding implementation.*

In their request for relief, JP Morgan argued that that based on its many programs and policies addressing stakeholder concerns, it had substantially complied with the four corners of the shareholder's proposal; it concluded its argument on this point:

> *As the BRT Statement does not subject the Company to <u>any new commitments</u>, the ongoing actions taken by the Company with oversight of the Board – consistent with its fiduciary duties – <u>are precisely the action sought by the Proposal</u>. As such, the Company's policies, practices, and procedures compare favorably with the action requested in the Proposal and the Proposal may be excluded under Rule 14a-8(i)(10).*[23]

Thus, in its argument to the Staff, JP Morgan had emphasized that the Statement involved no "new commitments" so that ongoing programs were "precisely the action sought by the Proposal." That simply is not true with respect to the Proposal to become a PBC, which involves a new commitment to stakeholders that is prevented by the Company's current legal status. Thus, JP Morgan Letter does not support an argument for relief.

B. The Proposal does not relate to ordinary business and is not excludable under

[23] *JP Morgan Letter at 13 (emphasis added), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/harringtonjpmorgan020520-14a8.pdf.*

Rule 14a-8(i)(7)

The Proposal requests an extraordinary transaction, and therefore does not address ordinary business

Contrary to the Company's assertions, the Proposal does not relate to the Company's ordinary business, because it involves an extraordinary transaction: amending the certificate of incorporation to alter the rights and obligations of the board to account for stakeholder interests and creating new rights of shareholders for relief if the board neglects those interests. The Delaware legislature deemed this change to fiduciary duties so important that it could only be made by an amendment that required board action followed by shareholder approval.

Because of the fundamental nature of a change in fiduciary duties, the Delaware legislature requires a shareholder vote to implement PBC status. The change in governance contemplated by the Proposal is the opposite of ordinary—it is nothing short of extraordinary to change directors' fiduciary duties, as Subchapter XV reflects.

The fact that shareholders have a place in the process also demonstrates the propriety of a request from shareholders for the board to take action. The issue is not a matter reserved to the sole discretion of the board, but one that the Delaware legislature found appropriate for shareholder engagement as well. As a matter of state law, the issue is within the zone of interest of shareholders, and not a matter reserve to the discretion of the board or considered ordinary business.[24]

Proposals requesting that a company reincorporate in a more investor friendly state—proposals that would similarly require board approval followed by a shareholder vote--were found to be non-excludable under Rule 14a-8(i)(7) in *Lowes Companies Inc*. (March 19, 2009) and *American International Group* (March 16, 2009). The registrants argued that the proposal merely related to the determination and implementation of a company's business strategies, and therefore to its ordinary business operations. But the proponent argued that these were not mere business decisions but related to major determinations that would affect the rights and interests of shareholders. Thus, the Staff found that the proposals were not excludable under Rule 14a-8(i)(7). Certainly, a change to the very purpose of the Company from shareholder only to shareholders, workers, communities and others is no less extraordinary than reincorporation to a more investor-friendly jurisdiction. As the Chief Justice of the Supreme Court of Delaware has said:

> *[T]he benefit corporation movement represents a refreshing and substantial step forward for those who believe that corporations—and all business entities—not only can, but should both do well by their investors, but also their workers and the societies in which they operate.*[25]

[24] In contrast, adoption of the Statement does not require the approval of either the shareholders or the board, and, in fact, most boards do not approve the their corporation's adoption of the Statement, *see* Lucian A. Bebchuk Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* (98% of responding signatories did not obtain board approval of signing onto Statement) available at file:///C:/Users/FrederickAlexander/Downloads/SSRN-id3544978%20(5).pdf,

[25] Leo Strine, *Forward,* in Alexander, *supra,* n. 3

The Proposal addresses a significant policy issue that transcends ordinary business

In addition to addressing an extraordinary transaction and not relating to ordinary business, the Proposal transcends ordinary business because it addresses a significant policy issue, as the prior quote from Chief Justice Strine makes clear. The Company itself has recognized the issue by executing the Statement along with another 180 large corporations, which acknowledges the critical nature of the relationship between a corporation and its stakeholders. But while it recognized the issue, it also sidestepped it, like the commentators referred to in another passage from the Chief Justice:

> *Rather than fighting to change the corporate law statutes . . ., these good-hearted, but often faint-willed, commentators just urge the directors to "do the right thing."*[26]

That is exactly what the Company has done: pledged to do the right thing, but not changed the law that actually prevents them from following that pledge if it doesn't redound to the benefit of shareholders. This distinction between the real change of a PBC amendment and the window dressing of the Statement raises a significant policy issue.

The reaction to the Statement's issuance (as well as the number of companies signing on) in August 2019 demonstrated the policy significance of addressing shareholder primacy. One dubious commentator noted that "For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business."[27] Others noted the importance of the change, but also that it was meaningless without ending shareholder primacy:

> *Ensuring that our capitalist system is designed to create a shared and durable prosperity for all requires this culture shift. But it also requires corporations, and the investors who own them, to go beyond words and take action to upend the self-defeating doctrine of shareholder primacy.*[28]

Other commentators were worried not that the Statement did not go far enough, but rather that it went too far:

> *Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril.*[29]

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[26] *Id.*

27 Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019)

28 Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don't Believe the Business Roundtable Until It's CEO's Actions Match Their Words,* FAST COMPANY (August 22, 2019).

29 Karl Smith, *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).

Another writer agreed, also linking the issue to the same essay by Milton Friedman:

> *The issue of which constituency – or "stakeholder" – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally) possible. That all changed on August 19, 2019.* [30]

While exploring the laudable aspects of commitments to corporate social responsibility, the author of these articles returned Friedman's famous article, which stated that:

> *[T]he doctrine of 'social responsibility' taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book Capitalism and Freedom, I have called it a 'fundamentally subversive doctrine' in a free society, and have said that in such a society, 'there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.*[31]

The outpouring of commentary around the Statement[32] raises two distinct significant policy issues: first, should corporations focus more on stakeholders interests and, if so, is a legal change, rejecting shareholder primacy necessary. In a conventional corporation, stakeholders interests are subordinate to the interest of shareholders—the board of directors or management can operate under such pro-stakeholder principles, but only for to the degree that they serve shareholder interests. This is why many commentators on the Statement believe it is necessary but insufficient because there is a need to sometimes put the interests of stakeholders over those of shareholders.

The clearest signal of the significance of the policy issue is legislative action to address the issue around the nation and the world. Legislatures have acted in 39 U.S. jurisdictions, the Canadian province of British Columbia, and the countries of Italy, Colombia, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in the last U.S. Congress in both houses that would have imposed benefit corporation duties on the directors of all billion dollar companies.[33] The issue even surfaced in the most recent U.S.

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30 Christopher Carosa, *Did Business Roundtable Just Break A Fiduciary Oath?*, FiduciaryNews.com. August 27, 2019. http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/.

[31] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (Magazine).

[32] One more recent event has unleashed a second rush of commentary around the shareholders v. stakeholders question: the 50th anniversary of Friedman's essay. See, e.g., *Friedman 50 Years later,* PROMARKET (collecting 27 essays about Friedman's article and its legacy) (Stigler Center for the Study of the Economy and the State).

[33] Copies of the legislation are available here: https://www.congress.gov/bill/116th-congress/senate-

presidential election, as one candidate decried "the era of shareholder capitalism.[34] In response, critics argued that favoring shareholders was the best recipe for a successful economy:

> *In reality, corporations do enormous social good precisely by seeking to generate returns for shareholders.*[35]

Shareholder primacy is clearly an issue of great significance and the Company's decision not to address the fact that it is bound by it matters deeply. In a recent study, Schroders determined that publicly listed companies imposed social and environmental costs on the economy with a value of $2.2 trillion annually—more than 2.5% of global GDP and more than half of the profits those companies earned.[36] These costs have many sources, including pollution, water withdrawal, climate change and employee stress. The study shows exactly the areas where corporations are likely to ignore stakeholder interests, to the detriment of the global economy.

By participating in this common corporate practice of prioritizing the financial return to its shareholders over all stakeholder concerns, the corporations harm those very shareholders, the vast majority of whom are diversified.[37] Such shareholders and beneficial owners suffer when companies follow the shareholder primacy model and impose costs on the economy that lower GDP, which reduces equity value.[38] Thus, while corporations may increase their isolated return to shareholders under the rule of shareholder primacy by ignoring the costs they externalize to stakeholders, their diversified shareholders will ultimately pay these costs. Such shareholders would benefit from corporate governance that enabled corporations to prioritize the stakeholders to whom the Statement refers.

As such, the Proposal relates to the significant public controversy associated with need to address shareholder primacy. These issues have been found by the Staff to address a significant policy issue, and not constitute excludable ordinary business, in recent staff decisions in Bank of America Corporation (February 12, 2020), Goldman Sachs Inc. (February 25, 2020), and Citigroup Inc. (February 25, 2020).

Thus, the Proposal addresses a significant policy issue that is not excludable for purposes of Rule 14a-8(i)(7).[39]

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bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1 (Senate) and here: House: https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2 (House)

[34] *Biden says investors 'don't need me,' calls for end of 'era of shareholder capitalism'*, (CNBC) (July 9, 2020), available at https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html.

[35] Andy Pudzer, *Biden's Assault on 'Shareholder Capitalism,* (Wall Street Journal) (August 17, 2020), available at https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153.

[36] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf

[37] Indeed, as of the January 2020 proxy statement, the top two holders of Company shares were mutual fund companies Vanguard and BlackRock, whose clients are generally indexed or otherwise broadly diversified investors.

[38] See, e.g., https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).

[39] The Board Analysis adds little to the question. Sections A and B repeat the arguments in the Company Letter and rely on the conflation of (1) working with stakeholders as part of the Company's day-to-day business and (2) amending the certificate of incorporation in order to change the fiduciary duty of directors. Most boards do not even approve their corporation's adoption of the Statement, *see* n. 24, *supra,* but the board of the Company did meet to analyze this request, demonstrating that the question presented by the Proposal is of much greater importance than the window dressing of adopting the Statement. The Board analysis

Micromanagement

Finally, the Proposal does not micromanage the Company but merely requests the board to initiate an extraordinary action that Delaware law establishes as a matter that requires the approval of the shareholders as well as the board of directors.

Far from constituting micromanagement—focusing on any single activity or operation—PBC status would overlay every decision, allowing the directors to authentically balance the interests of workers, customers, and others without dictating the outcome of any decision, all of which would remain entirely in the hands of the board and management under the business judgment rule.[40] Indeed, if the Company went forward with the Proposal and became a PBC, directors would have *increased* discretion with respect matters that implicate stakeholder interests, and granting increased discretion is the precise opposite of micromanaging.

The Company's ordinary business argument asserts that the change in duties will affect decisions that are made in the ordinary course of business, and the No-Action Request lists the many areas of decision-making that such a change might affect. But the length of the list simply demonstrates that the Proposal transcends ordinary business because it provides an overall policy shift that potentially touches every decision the board makes.

As the Staff has said, "The purpose of the exception is 'to confine the resolution of ordinary business problems to the management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.'"[41]

The enactment of the suggested amendments actually would enhance rather than limit the directors' discretion by allowing directors to add other considerations and priorities other than shareholder interests. This concept is written right into the statute: as discussed above, Section 365 fully preserves the discretion of the board with respect to business decisions but expands the purposes that can satisfy. The Proposal would thus give the Company's directors and executives greater leeway on every matter listed by the Company in its No-Action Request, rather than in any way "confining" such decisions. Such a request transcends the Company's ordinary business and is not excludable under Rule 14a-8(i)(7).

c. The Proposal cannot be excluded under Rule 14a-8(i)(2) or Rule 14a-8(i)(3) because it reserves to the discretion of the board the opportunity to articulate the Company's public benefit

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also relies on the fact that "No other shareholder has expressed a concern regarding the Statement." Board Analysis at 4. Once again, this conflates the Statement, which was not the subject of the Proposal, with a PBC amendment, which was. Finally, the Board Analysis asserts that because the issue presented by the Proposal has not been voted on or proposed before, it is not significant. This is a non sequitur, as the significance of the issue simply is in no way a function of the number of times it has been proposed. Moreover, such logic would essentially bar all proposals, since there will always be a first time for any proposal. In addition, it would seem to simply ignore the qualification rules under 14a-8, which expressly give the holder of a set amount of stock to bring a proposal before the shareholder and which *increases* the hurdles for proposals voted upon multiple times.

[40] In cases where a higher standard of review applied because of board conflicts or entrenchment concerns, any limitation on board discretion would be the same as the limits that would otherwise apply to a conventional corporation. Alexander, *supra* n. 3, Chapter 8.

[41] Staff Legal Bulletin No. 14I (2017) (citing Release No. 34-40018(May 21, 1998).

After asserting ordinary business and micromanagement, the Company goes on to argue that the Proposal was not detailed enough, making it either unlawful under Delaware law, or misleading, because it does not articulate a specific public benefit to be integrated to the articles of incorporation. This arguments misconstrue both the Proposal and Delaware law.

Rule 14a-8(i)(2).

As to legality, the Delaware Law Opinion that if the Company "were to implement the Proposal as drafted (i.e., amending its certificate of incorporation to organize as a public benefit corporation, but failing to identify one or more specific public benefits) it would violate Delaware law." But the Proposal does not ask the Company to draft an amendment that fails to identify one or more public benefits: the request to the board to take "<u>all</u> steps" required to convert to a PBC necessarily includes drafting a legal amendment, just as it includes all the other steps to become a PBC that are not expressly identified.[42]

The company has not asserted any precedent or principle showing why it would be necessary to include the public benefit in the Proposal. Certainly, if the Proposal had advanced an actual amendment for adoption that did not include a public benefit, that would have been unlawful. But that is not what happened. In this instance, leaving the drafting to the Company represents a reasonable choice to allow the Board to determine the specific terms of the amendment, based on its knowledge of the Company's business.

Because the Delaware Law Opinion is based upon an incorrect description of the Proposal, the "opinion that the Company would violate Delaware law if the Proposal is implemented" is not pertinent to an analysis under Rule 14a-8(i)(2), and we respectfully request that the Staff give the Delaware law opinion receive no deference in light of this faulty premise.

Rule 14a-8(i)(3)

The Proposal is neither vague nor misleading in characterizing the actions that would be taken by the board in implementation of the Proposal. Neither the board nor the shareholders would have difficulty comprehending what is requested.

The characterization of the public benefit corporation law in Delaware is not misleading in the Proposal; indeed, the Proposal's supporting statement expressly states that a specified public benefit, along with stakeholder interests, will rise in the balance of considerations once the request is effectuated.

The Proposal asks the board to take all steps necessary to amend the certificate of incorporation to create a PBC. This would require the board to prepare the amendment, which must include one or more public benefits. While the Proponent certainly could have included a public benefit,

[42] In fact, the Supporting Statement expressly refers to the "specified benefit" that must be balanced along with shareholder and stakeholder interests. While that reference is not necessary to make the request legal, it expressly calls attention to the specified benefit that the board would have to exclude from the amendment in order to create an illegal amendment, meaning the board would actually have to contradict the Supporting Statement to make the requested action violate Delaware law. This further illustrates does illustrate the absurdity of the (i)(2) argument.

it is perfectly appropriate to allow the board to make that determination in the first instance. By asking the board to take all action necessary to effect a conversion to a PBC, the shareholders are asking the board to use its business judgment, as well as all of the resources available to the directors, including legal counsel, corporate management, and other advisors, to draft the optimal public benefit provision for the Company.

The Proponent has confidence that the Board is best-positioned to design a public benefit or benefits that address the role of workers, customers, communities, or other stakeholders closely associated with the Company.

Moreover, the Proposal does not represent a blank check from shareholders to the Board on this issue, as the Company Letter appears to imply by listing a parade of unlikely benefits that might be inserted into an amendment. If the Board assents to the Proposal, they will have to adopt an amendment, including the public benefit provisions, which will then be presented to the shareholders, who will have the opportunity to vote for or against the amendment. No objectionable purpose will be slipped past them. Again, the Proposal only requests that the Board take the steps necessary to give shareholders an opportunity to have that vote.

CONCLUSION

Based on the foregoing, we believe it is clear that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2021 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the company that it is denying the no action letter request. If you have any questions, please contact me.

Sincerely,

Frederick Alexander

Frederick Alexander

cc: Jennifer H. Noonan
James McRitchie

PROPOSAL

ITEM 4* – Transition to Public Benefit Corporation

RESOLVED: Tractor Supply Company ('Company') shareholders request our Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC") in light of its adoption of the Business Roundtable Statement of the Purpose of a Corporation (the "Statement").[1]

SUPPORTING STATEMENT: The Company signed the Statement, which proclaims "we share a fundamental commitment to all of our stakeholders. . . . We commit to deliver value to all of them, for the future success of our companies, our communities and our country."

However, the Company is a conventional Delaware corporation, so that directors' fiduciary duties emphasize the company and its shareholders, but not stakeholders (except to the extent they create value for shareholders over time). Accordingly, when the interests of shareholders and stakeholders such as workers or customers clash, the Company's legal duty excludes all but shareholders.

As one Delaware law firm reported to another signatory considering conversion, directors may consider stakeholder interests only if "*any decisions made with respect to such stakeholders are in the best interests of the corporation and its stockholders.*"[2] That contradicts the commitment made in the Statement.

In contrast, directors of a PBC must "balance" the interests of shareholders, stakeholders and a specified benefit[3], giving legal status to the Statement's empty promise.

This matters. A recent study determined that listed companies create annual social and environmental costs of $2.2 trillion[4]. These costs have many sources, including pollution, climate change and employee stress.[5] A company required to balance stakeholder interests could prioritize lowering these costs, even if doing so sacrificed higher return.

That matters to our shareholders, the majority of whom are beneficial owners with broadly diversified interests. As of the 2020 proxy statement, the Company's top two holders were Vanguard and BlackRock, which are generally indexed or otherwise broadly diversified.

Such shareholders and beneficial owners are unalterably harmed when companies follow Delaware's "shareholder primacy" model and impose costs on the economy that lower GDP, which reduces equity value.[6] While the Company may profit by ignoring costs it externalizes,

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1 https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf.

2 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/harringtonwellsfargo021220-14a8.pdf

3 8 Del C, §365.

4 https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf.

5 Id.

6 See, e.g., https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-

diversified shareholders will ultimately pay these costs. As a PBC, our Company could prioritize reducing these costs.

Shareholders are entitled to vote on a change that would serve their interests and ensure the commitment made to stakeholders is authentic and lasting.

Please vote for: Transition to Public Benefit Corporation – Proposal [4*]

valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).