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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 Submitted to Alphabet, Inc. Regarding Public Benefit Corporation on Behalf of James McRitchie and Myra K. Young

Ladies and Gentlemen:

James McRitchie and Myra K. Young (the "Proponents") beneficially own common stock of Alphabet, Inc (the "Company") and have submitted a shareholder proposal (the "Proposal") to the Company. I have been asked by the Proponent to respond to the letter dated February 2, 2020 ("Company Letter") sent to the Securities and Exchange Commission (the "SEC") by Jeffrey D. Karpf ("Company Counsel") and accompanied by a letter to the Company dated February 1, 2021 from Potter, Anderson and Corroon, LLP (the "Delaware Opinion"). 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.

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 Company Counsel.

SUMMARY

The Proposal requests that the board of directors of the Company (the "Board") take steps necessary to amend the Company's certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation (a "PBC") contingent on shareholders converting certain high-vote Class B shares into either Class A shares (which have one vote) or Class C shares (which have no votes).

The letter cites four different classes of exclusion in its request:

1. The Proposal may be omitted pursuant to Rule 14a-8(i)(6) because it is not within the Company's power or authority to implement the Proposal;

2. The Proposal may be omitted pursuant to Rule 14a-8(i)(3) because the Proposal is impermissibly vague, indefinite, and susceptible to various interpretations so as to be inherently misleading in violation of the proxy rules;

3. The Proposal may be omitted pursuant to Rule 14a-8(i)(2) because the Proposal, if implemented, would cause the Company to violate applicable state law, including the Delaware General Corporation Law ("DGCL"); and

4. The Proposal may be omitted pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations.

The first three of these arguments are all different forms of an anachronistic attempt to argue that proposals to amend a company's certificate of incorporation are excludable, an argument that the Staff rejected long ago; indeed, hundreds of proposals to declassify boards, reduce supermajority votes and provide shareholders with a written consent right have been voted on in the twenty-first century, clearly establishing the right of shareholders to request the initiation of an amendment process.

The fourth argument is that because the Proposal would change the fundamental purpose of the Company, it would have ripple effects throughout the Company's ordinary business operations. But that is not how Rule 14a-8(i)(7) works; the purpose of that exception is to prevent proposals that dictate ordinary business decisions that should be left to management. Nothing in the Proposal dictates specific outcomes of business decisions; in stark contrast, the Proposal addresses the ultimate purpose behind those decisions, which are left completely in the hands of management and the Board. Moreover, the Proposal advances an extraordinary transaction, namely, an amendment of the Company's constitutional documents that would fundamentally alter the arrangement of rights and interests of shareholders and directors in the Company. 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.

BACKGROUND

The request to exclude the Proposal under Rule 14a-8 is based on a series of misunderstandings of the provisions of the Delaware General Corporation Law that authorize PBCs. 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 2013, 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]

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 it was a violation of the directors' fiduciary duties to make decisions primarily for the benefit of users of the corporation's platform:

> *Having chosen a for-profit corporate form, the craigslist*

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

> *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 . . . 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 those of shareholders. Beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests; a statute has now been adopted in 39 U.S. jurisdictions, one Canadian province and four other countries.[11]

Delaware's version, the PBC, was adopted in 2013. 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

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[8] *Id*. at 34-35 (referring to corporate justification for a shareholder rights plan meant to forestall a change in control that might threaten platform users' interests).
[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 https://socentlawtracker.org/#/map.
[12] 8 Del. C. §362.
[13] Id.

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] Thus, a PBC does not only serve shareholders and 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 and its obligations are thus 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 and then present that amendment to its shareholders for a vote.[16] In other words, the change is considered so fundamental that both director and 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, it is given responsibility to consider a broad range of stakeholder interests as ends in themselves, rather than only as means by which to satisfy shareholder interests.[17] Shareholders also gain new rights to bring lawsuits for relief in the event the board breaches its duties regarding stakeholders or the corporation's public purpose.

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[14] 8 Del. C. §362.
[15] 8 Del. C. §365.
[16] 8 Del. C. §242. At the same time, the statute is quite clear that even an amendment may be abandoned, even if both approvals are obtained, allowing the effectuation of an amendment to be made contingent on further conditions, even if both board and shareholder approval are obtained:

> *The resolution authorizing a proposed amendment to the certificate of incorporation may provide that at any time prior to the effectiveness of the filing of the amendment with the Secretary of State, notwithstanding authorization of the proposed amendment by the stockholders of the corporation or by the members of a nonstock corporation, the board of directors or governing body may abandon such proposed amendment without further action by the stockholders or members.*

Id.
[17] 8 Del. C. §365(b). This means that the traditionally broad discretion with respect to decisions remains 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/.

C. The Proposal Would Implement a Fundamental Change

The list of core business matters and constituencies in the Company Letter that may be affected by the Proposal does not change a fundamental truth: for a conventional corporation like the Company, those matters and constituencies must be considered through the lens of serving shareholder interests. *The Proposal would eliminate this priority.* As the author of the Delaware opinion has advised in a memorandum to its clients:

> *Unlike directors of a conventional Delaware corporation, directors of a PBC are required to balance the pecuniary interests of stockholders, the best interests of those materially affected by the PBC's conduct and the public benefit identified in the PBC's charter. . . .*
>
> *Delaware case law makes clear that the primary purpose of a conventional corporation is to generate long-term stockholder value, except under certain limited circumstances (e.g., in the context of a sale of the company). As a result, directors of conventional corporations may consider other constituencies but only to the extent the interests of such other constituencies align with the long-term wealth maximization of the corporation's primary stakeholder – its stockholders. See, e.g., eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("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").*[18]

Another leading Delaware law firm made exactly this point in a recent memorandum to another issuer: JPMorgan Chase & Co. had received a shareholder proposal asking the board to evaluate the issue of becoming a PBC. JPMorgan immediately implemented the proposal by obtaining a report (the "Richards Report"), which 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*

[18] *Delaware Makes it Easier for Corporations to Become Public Benefit Corporations*, Potter, Anderson & Corroon, LLP Client Alert (July 20, 2021), available at https://www.potteranderson.com/newsroom-news-Delaware-Makes-it-Easier-for-Corporations-to-Become-Public-Benefit-Corporations.html, last visited February 21, 2021.

> *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]

ANALYSIS

A. The Proposal Does Not Ask the Company to Take Any Actions That Would Violate Delaware Law, It Is Clear on Its Face and Fully within the Company's Power and Authority to Implement, and Therefore Should Not Be Excluded under Rules 14a-8(i)(2, 3 or 6).

The Company Letter and Delaware Opinion cast a number of interrelated arguments under these different exclusions, and they can best be addressed by treating the arguments together.

1. The Proposal cannot be excluded simply because it is contingent on shareholder action.

The Company Letter asserts that because the requested Amendment to certificate of incorporation (the "Amendment") requires shareholder approval after the Board's recommendation, the "Proposal may be excluded under Rule 14a-8(i)(6) because it cannot be implemented without shareholder approval, which is outside of the Company's control to ensure it will occur." Of course, this is not the Staff position; if it were, then all Proposals to amend certificates of incorporation could be excluded, which is far from the case. Instead, the Staff simply requires that proposals make it clear that further steps beyond board approval are necessary: specifically, such proposals must ask the board to take "necessary steps" or a similar formulation.[20] Indeed, from 2000-2018, 699 proposals to declassify boards were submitted to companies, most of which should have been excluded under the logic of the Company Letter, since such a change generally requires shareholder approval.[21]

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[19] Richards, Layton and Finger, *Report to the Board of Directors of JPMorgan Chase & Co. Regarding Public Benefit Corporations.* Available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/harringtonjpmorgan011121-14a8-incoming.pdf, last visited February 21, 2021.

[20] *Frequently Asked Questions about the Shareholder Proposal Process,* Morrison & Forrester ("the Staff has allowed companies to exclude proposals that would require a board to declassify a staggered board, while the Staff has permitted proposals requesting company 'take the steps necessary' to declassify a staggered board"), available at https://media2.mofo.com/documents/frequently-asked-questions-about-shareholder-proposals-and-proxy-access.pdf, last visited February 20, 2021.

[21] *ISS Discusses Role of Shareholder Proposals in Shaping U.S. Governance Practices,* Kosmas Papadopoulos (February 15, 2019) available at https://clsbluesky.law.columbia.edu/2019/02/15/iss-discusses-role-of-shareholder-proposals-in-shaping-u-s-governance-practices/, last visited February 21, 2021.

It is telling that although the Company Letter purports to rely on the Delaware Opinion in reaching its conclusion, the Delaware Opinion is quite careful only to say that "if the Proposal would require the board to unilaterally approve an amendment to the Charter in violation of Delaware law, it is also our opinion that the Company does not have the power and authority to implement the Proposal." (Emphasis added.) Of course, the Proposal does *not* call for *unilateral* approval—it expressly calls for presentation of the Amendment to shareholders, so that Delaware counsel actually declined to join in the contention that the need for shareholder approval put the proposal beyond the Company's power and authority.

Similarly, the fact that the Proposal asks that the Amendment only become effective if the holders of Class B shares convert a certain number of shares to low-vote shares does not put the Proposal outside of the Company's power and authority. As noted above, Delaware law authorizes the approval of amendments that can be abandoned after approval, thus clearly permitting contingencies that must be met beyond shareholder approval.[22] Moreover, the contingency is not only legal and within the Company's authority, but also closely tied to its purpose: namely, redesigning the Company to create shareholder value without relying on externalizing social and environmental costs. That change requires two elements: first, fiduciary duties that permit the prioritization of stakeholder interests and second, control by equity owners whose financial interests are not entirely concentrated at the Company. This requires both the shareholder vote to approve the transaction and the conversion to low-vote shares. While the Company cannot force either to happen, it is completely within the power and authority of the Board to approve the change, contingent on those two events occurring.

The precedent cited in the Company Letter confirms that an event's contingency on shareholder action does not remove it from a company's power and authority for the purposes of Section 14a-8(i)(6), because it shows that proposals "that merely request that a company ask for the cooperation of a third party" are not excludable. In contrast, the examples that the Company cites where the Staff permitted exclusion involved situations where the subject matter of the proposal itself was an act of a third party in which the company was a minority investor. Here, in contrast, the Proposal asks the Company itself to take a specific action that is clearly within its power: conversion to a PBC. The fact that the Proposal asks the Company to voluntarily submit the Amendment to an additional condition does not change the power of the Company to file the Amendment.[23]

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[22] *See supra*, n.16. The Company also seems to argue that the contingency that the Class B shareholders convert enough shares to allow 60% of the vote to be held by other shareholders is insufficient because (1) the Class B shareholders may acquire more shares after the conversion in order to reassert control or (2) the Company may have difficulty determining that the condition is met (although it is not clear why, unless those shareholders are hiding ownership from the Company, as the Company presumably has a list of its shareholders.) 8 Del. C. Section 218. Each of these complaints seems to suggest that the Proposal is flawed and will not fully support its purpose of converting to a PBC without a control group. But the quality of the Proposal is not an argument for exclusion. Proponent is certainly ready and willing to discuss the Proposal, but the Company has not proposed any changes or alternatives that would improve it. And, of course, the Company may recommend against the Proposal and argue these points in its proxy statement. In any event, they are not bases for exclusion.

[23] The Company Letter and Delaware Opinion both note that the certificate of incorporation expressly allows the holders of Class B stock to convert to Class A stock but does not mention conversion to Class C stock. This in no way affects the validity of the

Finally, the Delaware Opinion makes the argument that because the Amendment requires board approval, it is improper under Delaware law, since the directors might violate their fiduciary duties if they determined that the Amendment was not in the best interests of the Company's shareholders, but they nevertheless approved the Amendment. As noted above, the Staff long ago determined that companies could not exclude proposals that asked companies to take the steps necessary to approve amendments to certificates of incorporation. Under this peculiar theory, any proposal to amend a certificate of incorporation, including to declassify a board, permit action by written consent, reduce supermajority votes, or impose any other governance rule requiring an amendment could never be pursued by shareholders under Rule 14a-8. As shown above, such proposals are permissible as long as they are precatory and ask only that "necessary steps" be taken.[24]

2. The Proposal cannot be excluded merely because it requires the Company to draft the public benefit.

The Company Letter and Delaware Opinion also claim that the Proposal violates Delaware law because it does not prescribe the public benefit that should be included in the Amendment. Of course, nothing about that violates Delaware law, since the Board is the appropriate body to draft the public benefit in the first instance. Indeed, in order to manufacture a Delaware law violation, the Delaware Law Opinion must mischaracterize the Proposal, stating that "[i]f the Company were to implement the Proposal as drafted, the Company would be omitting from its certificate of incorporation a provision required by Delaware law, in violation of Section 362(a)(1) of the DGCL." But nothing in the Proposal asks the Company to adopt an amendment that fails to identify one or more public benefits; in fact, the Proposal does not include any text of the proposed Amendment; instead, it requests the board to take "all steps" required to convert to a PBC, which necessarily includes drafting a legal version of the Amendment, just as it includes all the other steps to become a PBC that are not expressly identified.[25]

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

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Proposal, since the owners of Class B stock could clearly meet the contingency by converting only to Class A stock, because the certificate of incorporation requires the Company to reserve sufficient Class A shares for such a conversion. Moreover, the owners of the Class B stock and the Company could always agree to a voluntary conversion to Class C. While the term "conversion" may be used in the Delaware corporate statute to refer to an exchange pursuant to a provision in the certificate of incorporation, that does not mean the term is limited to such transactions in normal discourse. *See* "Convert," *Merriam-Webster Dictionary* ("to exchange for an equivalent //*convert* foreign currency into dollars.") available at https://www.merriam-webster.com/dictionary/convert, last visited February 21, 2021.

[24] We note that this argument is not actually included in the Company Letter, demonstrating that even the Company did not believe it was meaningful to the 14a-8 analysis.

[25] 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 the absurdity of the argument.

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. As discussed (and refuted) below, the Company argues that the Proposal should be excluded because it is related to the Company's ordinary business. In making that argument, the Company Letter argues that conversion to a PBC "necessitates large-scale and long-term changes" to the Company's "functions to ensure compliance with the Company's public benefit purpose(s)." For this very reason, it is more appropriate to allow the Board, with the assistance of management, to draft the precise public benefits that the Company would undertake.

Nor is the absence of a public benefit either vague or misleading under 14a-8(i)(3). Neither the board nor the shareholders would have difficulty comprehending what is requested. The characterization of the public benefit corporation law is not misleading in the Proposal: the 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.

As described above, 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, 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.

Somewhat confusingly, the Company Letter lists a number of efforts the Company has previously made to assist stakeholders and seems to imply that the content of the public benefit included in the Amendment will determine whether those efforts can continue. That is simply a misreading of the law: even if those activities are not covered by the public benefit, the Company will be able to pursue them as part of enhancing the shareholders' pecuniary interest (as they presumably have been doing to date[26]) or as part of the broad mandate of PBCs to account for the "best interests of those materially affected by the corporation's conduct." In other words, the Company Letter implies that that the stakeholder interests that can be balanced by a PBC are limited to those included in the stated public benefit or benefits; in fact, Section 362 requires that all stakeholders' interests be accounted for, regardless of the content of the public benefit provisions. This is why the Company Letter misses the mark when it complains that the examples of stakeholder harm that the Company could remedy as a PBC are not included as public benefits in the Proposal: listing out all those interests is not required.

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[26] Under current law, all of these actions are presumably undertaken with a view towards enhancing shareholder value. *See supra, nn.*18 & 19 and accompanying text.

As discussed in this Section A, the Proposal is clear and not misleading and the subject matter of the Proposal conforms to Delaware law and is fully within the power and authority of the Company, and thus should not be excluded under Rule 14a-8(i)(2,3 and 6).

B. The Proposal Cannot Be Excluded as Ordinary Business Under Rule 14a-8(i)(7)

1. The Proposal Seeks an Extraordinary Transaction, Not 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 reserved to the discretion of the board or considered ordinary business.

Staff positions on prior proposals are clear on this: for example, proposals requesting that a company reincorporate in a more investor-friendly state—proposals that would similarly require board approval followed by a shareholder vote in order to change important rights—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 business strategies, and therefore to 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. 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 priority to shared priority among 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.*[27]

2. The Proposal Transcends Ordinary Business

In addition to addressing an extraordinary transaction, the Proposal transcends ordinary business because it addresses a significant policy issue, as the prior quote from Chief Justice Strine makes clear. The recent Business Roundtable Statement on the Purpose of a Corporation (the "Statement"),[28] signed by more than 180 of the nation's largest corporations, highlights this issue by acknowledging 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."*[29]

The Company Letter follows a similar path: it highlights activities the Company has chosen to pursue that benefit shareholders and stakeholders together, but not its failure to adopt the PBC legal structure, which would permit it to do "do no evil," even if that meant not maximizing shareholder value. Indeed, the Company Letter itself warns that if PBC status were adopted, the resulting requirement to balance shareholder and stakeholder interests might require shareholders to "sacrifice" some portion of the "immense returns" they receive by subordinating any stakeholder interests that conflict with maximizing shareholder value.

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."[30] 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.*[31]

Other commentators were worried not that the Statement failed to go far enough, but

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[27] Leo Strine, *Forward*, in Alexander, *supra*, n.3
[28] https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans, last visited February 21, 2021.
[29] *Id.*
[30] Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).
[31] Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don't believe the Business Roundtable has changed until its CEOs' actions match their words*, FAST COMPANY (August 22, 2019).

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.*[32]

The author of the articles is referring to 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.*[33]

The outpouring of commentary around the Statement[34] raises two related but distinct significant policy issues: first, should corporations focus more on stakeholders' interests and if so, is a legal change to reject shareholder primacy necessary or desirable? In a conventional corporation, stakeholders' interests are subordinate to the interests of shareholders—the board of directors or management can consider stakeholder interests only to the degree that they serve shareholder interests.[35] Many commentators on the Statement believe it is necessary but insufficient on its own because attaining a fair and durable prosperity will sometimes demand that companies 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, Rwanda, 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

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[32] Karl Smith *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).
[33] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (magazine).
[34] One more recent event has unleashed a second rush of commentary around the shareholders v. stakeholders question: the 2020 recognition of 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).
[35] *See supra,* nn.18 & 19 and accompanying text.

duties on the directors of all billion-dollar companies.[36] The issue even surfaced in the most recent U.S. presidential election, as one candidate decried "the era of shareholder capitalism.[37] 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.*[38]

Shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives.[39] A Proposal to end shareholder primacy at a corporation meets that test. Shareholder primacy is clearly an issue of great policy significance being addressed in legislatures around the country and the world, and even in the latest race for the U.S. presidency.

Moreover, the Company's decision not to address its legal strictures matters deeply. In a recent study, asset manager 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.[40] 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 above all stakeholder concerns, corporations harm those very shareholders, the vast majority of whom are diversified.[41] Such shareholders and beneficial owners suffer when companies follow the shareholder primacy model and impose costs on the economy that lower GDP, which reduces overall equity value.[42] 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

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[36] Copies of the legislation are available here: https://www.congress.gov/bill/116th-congress/senate-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), sites last visited February 21, 2021.

[37] *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, last visited February 21, 2021.

[38] 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.

[39] JD Supra, *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) ("In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.)

[40] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf. Last visited February 21, 2021.

[41] Indeed, as of the September 2020, the top five holders of the Company's shares were mutual fund companies with indexed or otherwise broadly diversified portfolios.

[42] 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), last visited February 21, 2021.

shareholders would benefit from corporate governance that enabled corporations to prioritize the stakeholders to whom the Statement refers.

Thus, the Proposal addresses a significant policy issue that is not excludable for purposes of Rule 14a-8(i)(7). Consistent with the foregoing analysis, questions around duties to stakeholders have not been excluded under 14a-8(i)(7) in recent staff decisions in Bank of America Corporation (February 12, 2020), Goldman Sachs Inc. (February 25, 2020), and Citigroup Inc. (February 25, 2020).

3. The Proposal Does Not Micromanage

Finally, the Proposal does not micromanage the Company but rather 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, so that all of the matters mentioned in the Company Letter would remain entirely in the hands of the Board and management under the business judgment rule.[43] Indeed, if the Company went forward with the Proposal and became a PBC, directors would have *increased* discretion with respect to matters that implicate stakeholder interests, and granting increased discretion is the precise opposite of micromanaging.

The Company Letter is based on a basic misapprehension of Delaware law, arguing as follows:

> *The Proposal requires that the Company amend its certificate of incorporation, and if necessary, amend its bylaws to convert the Company from a for-profit Delaware corporation to a PBC. Corporate structures are chosen via informed decisions by management, which take into account a variety of factors such as tax and liability implications, effects on talent searches and hiring decisions, requirements of various regulatory regimes and potential impacts of public perception, all of which are impacted by the various jurisdictions in which a company operates. . . [T]his Proposal requests the Company reorganize the Company's corporate structure, an act that is a matter of ordinary business operations and should be left to management, with oversight from the Board of Directors, to consider and make decisions.*

[43] 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.

But as explained above, the decision whether to change its corporate structure in order to extricate itself from shareholder primacy—the sole focus of the Proposal—is decidedly *not* to "be left to management." Conversion to a PBC *requires* shareholder action so that without such action, management would have to violate Delaware law in order to effect the Proposal.

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 Company Letter lists 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, without dictating any particular outcome.

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.'"[44]

Effecting the Proposal will leave problem-solving firmly in the hands of the Board and management. Indeed, the enactment of the suggested Amendment 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 be addressed. The Proposal would thus give the Company's directors and executives greater leeway on every matter listed in the Company Letter, rather than in any way confining or dictating such decisions.

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The Proposal is thus not excludable under Rule 14a-8(i)(7).

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

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

Frederick Alexander

cc: Jeffrey D. Karpf
James McRitchie
Myra K. Young

PROPOSAL

RESOLVED: 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"), contingent on Class B stockholders converting sufficient Class B shares to Class A or Class C to ensure that at least 60% of the Company's voting power is not beneficially owned or controlled by the holders of Class B Shares.

SUPPORTING STATEMENT: Estimates state that the Company has more than 4 billion users.[1] It has eight applications with more than one billion users.[2] This reach creates unique power, and power demands accountability. But our governance is structured to produce profits without accountability.

As a conventional corporation, the duties of Company directors emphasize shareholders, not stakeholders (except to the extent they create value for shareholders). In contrast, PBC directors must "balance" interests of shareholders, stakeholders, and specified benefits,[3] allowing the corporation to protect communities, even when it reduces financial return to shareholders in the long run.

This distinction is critical. The Company's capacity to link people around the globe provides potential to contribute to religious persecution,[4] put democracy at risk,[5] and undermine vaccination.[6] Threats to freedom, democratic principles, and public health could be prioritized at a PBC, even if it sacrifices return.

These threats matter to the vast majority of our diversified shareholders: as of September 2020, the top five holders of the Company's shares were mutual fund companies with indexed or otherwise broadly diversified portfolios. Diversified shareholders lose when companies harm the economy, because the value of diversified portfolios rises and falls with GDP.[7] While the

[1] https://review42.com/google-statistics-and-facts/#:~:text=Google's%20search%20engine%20market%20share,over%20one%20billion%20active%20users
[2] https://www.sec.gov/ix?doc=/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.htm#s8845EA78D2E95963AFCF7E636F3B28E0
[3] 8 Del C, §365.
[4] https://www.businessinsider.com/china-likely-laid-out-how-google-can-help-persecute-uighur-minority-2018-10
[5] https://www.thedailybeast.com/cheats/2016/11/16/google-ceo-fake-news-could-ve-swung-election
[6] https://www.thedailybeast.com/you-wont-believe-how-easy-it-is-to-buy-anti-vaxx-ads-on-google-and-twitter
[7] See *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors*, Appendix IV (demonstrating linear relationship between GDP and a diversified portfolio) available at https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; cf. 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).

Company may profit by ignoring costs it inflicts on society, its diversified shareholders ultimately internalize those costs. (They may also be personally at risk from them.)

The shareholders deserve an opportunity to vote on an amendment that will align our governance with shareholder interests and the global community in order to create meaningful accountability.

However, our multiclass structure, which vests control in individuals with wealth concentrated in our stock, could limit the efficacy of PBC status, because their concentrated ownership means they benefit when the company sacrifices social good for its own profit. Thus, the board resolution should provide that the amendment will only be effected if these individuals convert a number of high vote shares to low or no vote shares sufficient to provide meaningful accountability to diversified shareholders.