The Shareholder Commons
PO Box 7545
Wilmington, DE 19803

Frederick H. Alexander
rick@theshareholdercommons.com
302-593-0917

February 8, 2021
Via electronic mail

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

Re: Marriott International, Inc.; Shareholder Proposal of Myra K. Young (John Chevedden)
Securities Exchange Act of 1934 ("Exchange Act")—Rule 14a-8

Ladies and Gentlemen:

Myra K. Young (the "Proponent") is beneficial owner of common stock of Marriott International, Inc. (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 January 13, 2020 ("Company Letter") sent to the Securities and Exchange Commission (the "SEC") by Elizabeth Ising ("Company Counsel"). In that 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.

Based on the Proposal, as well as the letter sent by the Company, 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 a study of the external social costs created by the Company's compensation policy, and the manner in which such costs affect the vast majority of its shareholders who rely on overall market returns. The Company asserts that the Proposal is excludable either as relating to ordinary business (Rule 14a-8(i)(7)), or for being vague and misleading (Rule 14a-8(i)(3)).

The Proposal is not excludable pursuant to Rule 14a-8(i)(7) because it is solely directed to a significant policy issue posed by the Company's ongoing business, namely *the question of how a corporation accounts for the costs it imposes on stakeholders when it prioritizes the interests of its shareholders*. The Company Letter fails to acknowledge that this policy issue is at the heart of the Proposal, and therefore fails to address the key question of whether that issue transcends the ordinary business question upon which the Proposal (like all proposals) touches.

The Company itself has recognized the importance of the question, recently signing on to the Business Roundtable's Statement of the Purpose of a Corporation (the "Statement"), which purports to make significant commitments to stakeholders.[1] This issue has been the focus of legislative action, policy debate, and the Company's own communications strategy. The Proposal relates solely to this critical policy issue and contains no specific direction with respect to particular products and services or any other ordinary business of the Company—the scope of the Proposal does not stray into ordinary business matters.

The Company asserts that the Proposal is vague, yet reading the language of the Proposal, neither the Company nor shareholders would have difficulty in ascertaining the core question at issue in the Proposal, even if the Board would have to exercise discretion and judgment in implementing it; thus, the Proposal is not vague within the meaning of Rule 14a-8(i)(3).

ANALYSIS

1. <u>The Proposal Is Not Excludable Under Rule 14a-8(i)(7)</u>

A. Background

The Staff has indicated that a shareholder proposal that might otherwise be excludable as relating to ordinary business under Rule 14a-8(i)(7) may not be excludable if it raises significant social policy issues. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, (May 21, 1998). In explaining ordinary business, the Release noted:

---

[1] https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

> *Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*
>
> ***
>
> *The determination as to whether a proposal deals with a matter relating to a company's ordinary business operations is made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.*

Shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives. Staff Legal Bulletin 14E (October 27, 2009) addressed considerations relevant to the present matter as well, since the Proposal implicates certain risks to investors. Under the guidance of the bulletin, a proposal that requests analysis of risks to investors does not necessarily render the proposal excludable. Instead, the Staff suggested that a key question is whether the particular risk that is being analyzed involves a significant policy issue:

> *On a going-forward basis, rather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk. The fact that a proposal would require an evaluation of risk will not be dispositive of whether the proposal may be excluded under Rule 14a-8(i)(7). Instead, similar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document — where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business — we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company. In those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy*

> *issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company. Conversely, in those cases in which a proposal's underlying subject matter involves an ordinary business matter to the company, the proposal generally will be excludable under Rule 14a-8(i)(7). In determining whether the subject matter raises significant policy issues and has a sufficient nexus to the company, as described above, we will apply the same standards that we apply to other types of proposals under Rule 14a-8(i)(7).*

As we will discuss below, in the present matter, the reporting on risks and costs requested by the Proposal relates to an underlying significant policy issue: the appropriate manner of accounting for the divergent interests of shareholders and stakeholders when profitable activity creates external social costs.

B. Significant policy issue: externalizing costs to stakeholders

The Company's argument to exclude the Proposal under Rule 14a-8(i)(7) is based on a failure to acknowledge the underlying significant policy issue addressed by the Proposal, which is clear on its face: corporate financial returns to shareholders that cause harm to other stakeholders. The Proposal refers to the Statement, Delaware corporate law (the Company's domicile), and the conflict between the two; it cites a specific study that quantifies the social harm that corporate-induced inequality can cause, and even cites a famous investor for how that harm can reduce the return of most investors. Yet in arguing that that the Proposal does not address a transcendent policy issue, the Company Letter fails even to acknowledge this critical issue of the debate over shareholder primacy and stakeholder values. Below, we explain how this issue has become a central feature of the policy debate in the U.S. and beyond.

i. <u>Corporate Law and Shareholder Primacy</u>

The directors of U.S. corporations have long focused their efforts on improving the financial return of their corporations to their shareholders. While there has been a fierce, ongoing debate as to whether corporations should in fact be managed for the benefit of only shareholders or for a broader group of stakeholders,[2] the concept of shareholder primacy has dominated corporate law. This doctrine eschews consideration of the external costs of a business unless those costs affect the corporation's own financial return to its shareholders. A series of decisions by the Delaware courts cemented the place of shareholder primacy in the United States.[3]

[2] Frederick Alexander, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2018) at 21-26.
[3] 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.[4] Other Delaware authority has established that corporations exist primarily to generate shareholder value.[5] *eBay Domestic Holdings, Inc. v. Newmark*[6] is a more recent example of the 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 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.*[7]

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."[8] Toward the end of the twentieth century, many jurisdictions in the United States adopted "constituency statutes," fully or partially opting out of shareholder primacy.[9] None of those states mandates consideration of stakeholder interests, however.[10] North Carolina has not adopted a constituency statute.

Shareholder primacy has caused great consternation regarding the harm that it poses to stakeholders and the public.[11] In response, the benefit corporation option was created to provide

---

[4] *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).

[5] *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.")

[6] 16 A.3d 1 (Del. Ch. 2010).

[7] *Id*. at 34-35 (referring to corporate justification for shareholder rights plan meant to forestall a change in control that might threaten platform users' interests).

[8] 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).

[9] Alexander, *supra* n.2, at 135–148.

[10] *Id.*

[11] *See generally,* Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012).

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.

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.*[12]

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.[13] The issue even surfaced in the most recent U.S. presidential election, as one candidate decried "the era of shareholder capitalism."[14] 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.*[15]

ii. Trust Law

This policy issue has also appeared in recent regulatory and legislative activity relating to trustees for retirement plans and other investment advisors. The Department of Labor recently proposed a Rule that would have made it more difficult for trustees to account for environmental and social costs, but, after receiving public comments, revised the final rule in a manner that gives trustees the ability to address corporate activity that imposes the type of social costs described in the Proposal when the trustees believed that those costs would affect their diversified portfolios—exactly the type of costs on which the Proposal seeks a report:

---

[12] Leo Strine, *Forward,* in Alexander, *supra,* n.2.

[13] 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)

[14] *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.

[15] 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.

> *In addition, Final Rules should also permit stewardship that discourages portfolio companies from engaging in behaviour that harms society and the environment, and consequently the value of shareholders' diversified portfolios (For example, plan fiduciaries might vote to encourage all companies to lower their carbon footprint, not because it will necessarily increase return at each and every company, but because it will promote a strong economy and thus increase the return of their diversified portfolio).*[16]

Moreover, in 2020, a bill was introduced in the U.S. House of Representatives that included an express finding that plan fiduciaries should consider the costs that corporations in their portfolios impose on the financial system:

> *The Congress finds the following:*
>
> *(1) Fiduciaries for retirement plans should*
> . . . .
> *(D) consider the impact of plan investments on the stability and resilience of the financial* system; . . .[17]

While the bill related to costs to the financial system, rather than public health, it was clearly focused on the same policy concern: costs that a company's profit-seeking activities impose on stakeholders.[18]

iii. The Statement

In addition to the activity noted in the prior section regarding political and legislative activity around the issue of external costs to stakeholders, the business community, including the Company itself, has noted the importance of the consideration of stakeholder interests other than those of shareholders. Here we quote the Statement, as its eloquence is perhaps the best evidence for the critical nature of the policy issue raised by the Proposal:

> *Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all. . . .*

---

[16] Frederick Alexander, *The Final DOL Rules Confirm That Fiduciary Duty Includes 'Beta Activism,'* RESPONSIBLE INVESTOR (December 15, 2020) available at https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-beta-activism.

[17] H.R. 8959 (116th): Retirees Sustainable Investment Policies Act of 2020

[18] *See also* Frederick Alexander, Holly Ensign-Barstow, Lenore Palladino, and Andrew Kassoy, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (arguing that fiduciary duties of trustees should incorporate external costs of individual companies that harm portfolios).

> *While each of our individual companies serves its own corporate purpose, we share a fundamental <u>commitment</u> to all of our stakeholders. <u>We commit to</u>:*
>
> - *<u>Delivering value to our customers</u>. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations. . . .*
> - *Supporting the communities in which we work. <u>We respect the people in our communities</u> and protect the environment by embracing sustainable practices across our businesses. . . .*
> - *Each of our stakeholders is essential. We commit to deliver value to all of them, <u>for the future success of our companies, our communities and our country</u>.*[19]

Thus, the Statement, *onto which the Company itself signed,* explains exactly why the Proposal is a critical policy question: it asks the Company to report on public health costs of its business, which fall upon "Americans," "customers," "people in our community," and "our country," the very stakeholders to whom the Company publicly committed less than two years ago.

The importance of the issue to the Company was highlighted when an article in the New York Times featured it as an example of the tension between the Statement and the Company's actions as it laid off employees while the CEO pursued increased compensation for himself:

> *Take, for example, Marriott International, the world's largest hotel chain, which last year earned $1.2 billion. It has begun furloughing most of its American workers, jeopardizing their access to health care, even as the company paid out more than $160 million in quarterly dividends and pursued a raise for its chief executive, Arne M. Sorenson.*[20]

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 external costs. One dubious commentator noted that "For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business."[21] 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*

---

[19] *Supra,* n. 1 (emphasis added).
[20] *Big Business Pledged Gentler Capitalism. It's Not Happening in a Pandemic,* NEW YORK TIMES (April 13, 2020).
[21] Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).

> *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.*[22]

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.*[23]

Another writer agreed, 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.*[24]

While exploring the commitments to corporate social responsibility, the authors of the latter two articles each returned 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*

---

[22] 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).
[23] Karl Smith *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).
[24] Christopher Carosa *Did Business Roundtable Just Break A Fiduciary Oath?*, FiduciaryNews.com. August 27, 2019 available at http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/.

competition without deception or fraud.[25]

Showing that the controversy is long-lived, the 50th anniversary of the essay in 2020 set off another round of commentary.[26]

C. The Proposal Addresses the Policy Issue of Stakeholder Interests

The outpouring of legislative activity around benefit corporations, regulatory and legislative activity around trustee obligations to consider external corporate costs, and commentary around the Statement raise two related but distinct significant policy issues: first, should corporations focus more on stakeholders interests and if so, how? The Proposal addresses these issues. As a conventional corporation, the Company must subordinate stakeholders' interests to those of shareholders—the board of directors or management can consider stakeholder interests only to the degree that they serve shareholder interests. As shown above, however, many commentators believe the Statement is necessary but insufficient on its own because attaining a fair and durable prosperity will sometimes demand that companies put the interests of stakeholders above those of shareholders.

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, Company actions that prioritize shareholders matter deeply to all of us. In a recent study (the "Schroders Report"), a leading asset manager 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.[27] 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. The travel and leisure industry creates negative social value equal to more than 15% of its market capitalization, meaning that the industry destroys the amount of value its shareholders attribute to it more than once every seven years.[28] This is a horrific statistic that represents a burning problem that far transcends the Company's ordinary business.

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.[29] 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.[30] Thus, while corporations may increase their isolated

---

[25] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (magazine).
[26] 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).
[27] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf
[28] *Id.* at Figure 1.
[29] Indeed, the top three holders of Company shares are mutual fund companies Vanguard, State Street, and BlackRock, whose clients are generally indexed or otherwise broadly diversified investors.
[30] See, e.g., https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-

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 (along with the world's population and economy) would benefit from corporate governance that enabled corporations to prioritize the stakeholders to whom the Statement refers.

The Proposal will address this issue by asking the Company to describe certain external costs that it imposes on stakeholders, providing context to its shareholders, and permitting them to understand whether the value proposition of the Company is truly sustainable, or whether its profits rely on the exploitation of common resources and vulnerable populations. The Company itself has repeatedly recognized the critical nature of the relationship between corporations and stakeholders, including by executing the Statement along with another 180 large corporations. But while the Company recognized the issue, it also sidestepped it, because under the doctrine of shareholder primacy, the commitment expressed in the Statement is an empty promise. As one commentator on the Statement put it:

> *About shareholder primacy, the less said, the better. The concept has been distorted beyond all reality and has been often used to justify actions that hurt people, communities, and the environment and to enable lobbying that prioritizes short-term benefits over lasting investments needed for businesses to succeed and for a competitive economy.*[31]

Thus, the Proposal's request for a report on how the Company externalizes social costs addresses the significant policy issue of whether corporations should account for stakeholder interests and is therefore not excludable for purposes of Rule 14a-8(i)(7).

D. The Proposal concerns a significant policy issue and should not be excluded because it touches on products and services

The Company Letter argues for an exclusion under Rule 14a-8(i)(7) because the Proposal relates to products and services offered to customers. Where the focus of the Proposal is clearly on a significant policy issue, the fact that it may touch on issues related to products and services does not cause it to be excludable. This was made clear in the Staff Legal Bulletin 14H, October 22, 2015:

> *[T]he Commission has stated that proposals focusing on a significant policy issue are not excludable under the ordinary business exception "because the proposals would transcend the day-to-day business matters and raise policy issues so significant*

---

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

[31] *Business Roundtable Aims High, But Misses,* BSR Blog (August 22, 2019) available at https://www.bsr.org/en/our-insights/blog-view/business-roundtable-aims-high-but-misses.

> *that it would be appropriate for a shareholder vote." [Release No. 34-40018] Thus**, a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the "nitty-gritty of its core business**." (emphasis added)*

The Company Letter cites prior Staff decisions where, generally, the proposal focused on products and services and lacked an overriding significant policy issue, or where the proposal sought to dictate outcomes at the company in the offering of particular products or services. This is not an instance in which the proposal focuses on attempting to limit or prescribe the sale of particular products or services. Instead, it asks the company to study the impacts that it has already acknowledged in a manner that will allow its investors to understand the true costs of its entire business more clearly.

In this instance, the distinction comes down to two key factors: first, the focus of the Proposal is on a significant policy issue rather than merely on particular modes of business, and second, it does not actually require any changes to products or services sold, but only an assessment relative to the significant policy issue. This distinction is illustrated by *Merrill Lynch & Co.* (February 25, 2000), where the proposal requested that the board issue a report reviewing the underwriting, investing, and lending criteria of Merrill Lynch with a view to incorporating criteria related to a transaction's impact on the environment, human rights, and risk to the company's reputation. The proposal was found not excludable under Rule 14a-8(i)(7).

Similarly, proposals addressing climate change have been found not excludable under Rule 14a-8(i)(7) despite addressing a financial company's lending and investment portfolio, i.e., its products and services. The Staff has long determined that proposals addressing climate risk are appropriate for financial services companies so long as such proposals do not delve into the individual application of such policies to customers. For instance, in *PNC Financial Services Group, Inc.* (February 13, 2013) the Proposal requested that the Board report to shareholders PNC's assessment of the greenhouse gas emissions resulting from its lending portfolio and its exposure to climate change risk in lending, investing, and financing activities. The Staff determined that the Proposal was not excludable because it addressed the significant policy issue of climate change. PNC had argued, as the Company does here, that the Proposal micromanaged the business. The Staff rejected the claim. The present proposal is analogous, because it looks to specific impacts on the economy and investors of the Company's compensation policy, much as the PNC Financial Services proposal looked to quantify the greenhouse gas impact.

In short, there is no basis for an assertion that a proposal is excludable simply because it touches upon the Company's products. The key question demonstrated by prior Staff decisions is whether the subject matter requiring a focus on the business is limited to a significant policy issue and whether the proposal is written in a manner that does not micromanage. The Proposal is compliant and not excludable under Rule 14a-8(i)(7).

Far from addressing ordinary business—focusing on any particular activity or operation—the disclosure asks the Company to describe a critical consequence of its compensation policy in light of the fact that the Company has publicly committed to stakeholders under the Statement but is bound by shareholder primacy under Delaware law.

Moreover, the Company letter argues that because the report of external costs relates to the broad compensation issues, it is excludable as ordinary business. This misconceives the purpose of the exception. As the Staff has explained, "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.'"[32] Here, the Proposal clearly transcends ordinary business by going to the heart of a public policy issue: how does the business account for the harms it passes on to stakeholders through the social costs of its compensation policy, such as leaving employees unable to pay rent, despite seeking a pay raise for its CEO?

> *"They just say: 'We don't need you. You are on your own,'" said William Gonzalez, 47, who was laid off last month from his job at an employee cafeteria at a Marriott hotel in San Francisco, leaving his family unable to pay rent.*[33]

Effecting the Proposal will leave problem-solving firmly in the hands of the board and management—it does not address any particular product, service, or decision. Instead, it asks the Company, through disclosure, to address a significant policy issue by providing its shareholders with sufficient context to understand how the Company's business fits into the policy debate around corporate responsibility to stakeholders. As the 1998 Release quoted above says:

> *However, proposals relating to such [day-to-day] matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*

The Company's business sits squarely in the center of that debate, as the media covers matters such as its furloughs in the pandemic,[34] the treatment of employees by its credit union,[35] questions over severance pay promises,[36] and the ways in which all of its compensation policies converge to extend racial injustice.[37] The controversy over responsibility for such social costs of

---

[32] Staff Legal Bulletin No. 14I (2017) (citing Release No. 34-40018(May 21, 1998).
[33] *Supra,* n.20.
[34] *Id.*
[35] *Marriott Workers Struggle to Pay Bills, and Credit Union Fees,* NEW YORK TIMES (October 11, 2018) available at https://www.nytimes.com/2018/10/11/business/marriott-credit-union-employee-strike.html.
[36] *Terminated Marriott workers protest job loss, low severance as hotel industry continues to suffer,* Boston 25 News (November 20, 2020) available at https://www.boston25news.com/news/health/terminated-marriott-workers-protest-job-loss-low-severance-hotel-industry-continues-suffer/UTYJSAYRRBCLBBNSB4ZJUATEHI/.
[37] *How Marriott's Corporate Practices Fuel Growing Racial Inequality in America,* DEMOS (October 17, 2018) available at https://www.demos.org/research/how-marriotts-corporate-practices-fuel-growing-racial-inequality-america.

business activity[38] surely transcends the Company's ordinary business and is not excludable under Rule 14a-8(i)(7).

2. <u>The Proposal is not excludable pursuant to Rule 14a-8(i)(3)</u>

The Company's argument that the Proposal is vague grasps at straws to try to find vagueness in a clearly written proposal. As the Company Letter correctly states: "The Staff consistently has taken the position that vague and indefinite shareholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because 'neither the [share]holders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.'"

The Proposal easily meets that test. "External social costs" are a fairly simple idea, even if the underlying calculation is complex. Indeed, the Proposal cites a recent economic study on the economic costs of inequality.[39] Indeed, the Schroders Report,[40] a recent study from a leading asset manager that uses a methodology to assign social costs externalized by publicly traded companies around the world, including many costs associated with the travel and leisure industry, found a significant negative social cost associated with the business overall.[41] That study 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. It calculated costs for issues that imposed social (i.e., external) costs, including obesity, water withdrawal, and antimicrobial resistance, all costs that might result from the Company's supply chain or products. Overall, the Schroders Report shows that the travel and leisure industry has negative social impact. Thus, the Company could use a methodology like the one used in the Schroders Report to calculate external costs, although it could of course exercise its discretion to use other methodologies.

Nor should it be difficult to explain the manner in which those costs affect diversified shareholders. As the literature cited in the margin shows, economic studies reveal how the social costs of inequality lower GDP, and there is a vast economic literature explaining how lowered GDP affects overall stock market value.[42] Finally, it is no mystery how that overall market return

---

[38] *See, e.g., Dana Peterson and Catherine Mann, Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.* (2020) (closing racial gaps could lead to $5 trillion in additional GDP over next five years) available at https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D; *Inequality is Slowing U.S. Economic Growth*, Economic Policy Institute (December 12, 2017) (Inequality reduces den=mand by 2-4% annually) available at https://www.epi.org/publication/secular-stagnation/.

[39] *Supra*, n.38; *see also* Heather Boushey, UNBOUND: HOW INEQUALITY CONSTRICTS OUR ECONOMY AND WHAT WE CAN DO ABOUT IT (2019).

[40] *Supra*, n.27.

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

[42] *See, e.g.*, <u>See</u> *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; <u>cf.</u> 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).

affects a diversified investor, for whom the most important factor determining return will not be how the companies in that portfolio perform relative to other companies ("alpha"), but rather how the market performs as a whole ("beta"). As one work describes this, "According to widely accepted research, alpha is about one-tenth as important as beta, [, which] drives some 91 percent of the average portfolio's return."[43]

Given the relatively straightforward nature of the request, the attempts to describe it as vague are not credible. For instance, the Company Letter asserts that the Proposal fails to define "shareholders who rely on overall stock market return," as if either the shareholders or board would have difficulty understanding such a self-defining concept. Indeed, the Proposal provides examples in the form of the Company's three largest shareholders.

The No-Action Request poses a series of rhetorical questions purporting to show that the Proposal is unclear with respect to "the scope" of the requested study:

> *The final phrase of the Resolved clause also renders the Proposal inherently vague. The Proposal requests that the report address "the manner in which such [external social] costs affect the vast majority of its shareholders who rely on overall market returns" (emphasis added). However, the Proposal fails to define the term "shareholders who rely on overall market returns" and neither the Proposal nor the supporting statements provide sufficient context to explain the scope of the requested assessment. For example, does the Proposal require the Company to assume that all of its stockholders "rely on overall market returns" and assess how these external social costs "affect" (whether positive, negative, tangible, or otherwise) the "vast majority" of them? Or, alternatively, is the Company required to first identify those stockholders who rely on overall market returns and then assess the "affect" of "external social costs" on the "vast majority" of that subset of stockholders? In either case, such vague and unexplained distinctions among the Company's stockholders are complicated by the fact that as a publicly-traded company, the Company's stockholders can change every day. Accordingly, without further explanation or context, it is unclear what stockholders are the focus of the requested report.*

The answer is obvious within the four corners and logic of the Proposal: No, the Company does not have to assume all of its shareholders are reliant on overall stock market return, just as it does not have to assume that every item it discloses is important to every Company shareholder. Nor does the Company have to identify which shareholders rely on overall market return, although, as the Proposal highlights, the top three shareholders of the Company are mutual or index funds, as are many others.

[43] Steven Davis, Jon Lukmonik and David Pitt-Watson, WHAT THEY DO WITH YOUR MONEY, p. 50 (2016).

But what the Proposal clearly <u>does</u> request is that the Company provide a report on how costs that are external to the Company affect the performance of the diversified portfolios of the owners of the Company. Thus, there is nothing "vague" or "unexplained;" indeed, the Proposal cites Warren Buffet, widely regarded as one of the world's most successful investors,[44] as to why those diversified shareholders would care about GDP.

Another imaginary instance of vagueness asserted in the Company Letter is that it is susceptible to "multiple and conflicting interpretations":

> *In the absence of further guidance regarding the scope and nature of the requested report, stockholders would inevitably be left to grapple with multiple and conflicting interpretations about the central ask of the Proposal. The Proposal could be interpreted as requiring the commissioning of a broad macro-economic report analyzing all manner of societal impacts, direct and indirect, whether financial, reputational, political, emotional, environmental, and otherwise, that the Company's compensation policies could conceivably create. Alternatively, the Proposal could be interpreted as narrowly focusing on the content and structure of the Company's compensation policies and their impacts on employees' overall budgets and spending (leading them to contribute more or less to the broader economy).*

There is literally nothing in the Proposal that suggests either reading of the Proposal as reasonable. While the Proposal certainly could be broadly read, it does not request specified thoroughness, and one would expect the Board to exercise its reasonable business judgment in commissioning the work. Contrariwise, the extremely narrow reading might also satisfy the letter of the proposal, but again, one would expect the board, with the assistance of management, to develop an appropriate level of detail. A proposal does not become vague simply because a company could apply an unreasonable interpretation to its execution.

There is no question that compilation of the report described in the Proposal will require discretion and business judgment on the part of the Company because it will have to make decisions as to the best methodologies to follow. But that does not make the request vague. The Proposal represents a fairly simple request: that the Company undertake to explain the cost of externalities created by the Company's compensation policies on the economy and diversified shareholders. Being asked to report on these issues may be uncomfortable for the Company's management, but it there is nothing vague about it.

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

---

[44] *Forbes* online profile ("Known as the "Oracle of Omaha," Warren Buffett is one of the most successful investors of all time") available at https://www.forbes.com/profile/warren-buffett/?sh=3d8a1a146398.

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 at rick@theshareholdercommons.com or 302-593-0917.

Sincerely,

Frederick Alexander

Frederick Alexander

cc: Elizabeth Ising
Myra K. Young

PROPOSAL

RESOLVED, shareholders ask that the board commission and disclose a report on the external social costs created by the compensation policy of our company (the "Company") and the manner in which such costs affect the vast majority of its shareholders who rely on overall market returns.

Our company recently signed the Business Roundtable Statement of the Purpose of a Corporation (the "Statement"), which reads, "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' duties emphasize the Company and its shareholders, but no one else (except to the extent they create value for shareholders). Accordingly, when the financial return of the Company to its shareholders and the interests of stakeholders such as workers or customers clash, the directors must choose shareholder return. (The Company could become a public benefit corporation[1] to prevent this.)

It has been estimated that inequality has reduced demand by 2-4% of GDP.[2] This cost devastates economic growth and productivity.[3] Yet the Company does not disclose any methodology to address the economic and social costs of a business model that relies on inequality, with its CEO receiving compensation equal to 346 times that of the Company's median compensated employee, while workers must strike in order to receive a "one job is enough" wage.[4]

Thus, shareholders have no guidance as to costs the Company externalizes through compounding inequality and consequent economic harm. This information is essential to shareholders, the majority of whom are beneficial owners with broadly diversified interests. As of September 2020, the Company's top three holders were Vanguard, BlackRock, and Price (T.Rowe) Associates, whose clients are generally indexed or otherwise broadly diversified.

Such shareholders pay a price when companies impose costs on the economy that lower GDP, which reduces equity value.[5] While the Company may profit by ignoring such costs, its diversified shareholders will ultimately pay them, and they have a right to ask what they are.

The Company's prior disclosures and prior shareholder proposals do not address this issue, because they do not address *the social costs that an inequality-heavy business model imposes on diversified investors who must fund retirement, education, and other critical needs.* This is a separate social issue of great importance. A study would help shareholders determine whether to seek a change in corporate direction, domicile, structure, or form in order to better serve their interests and to match the commitment made in the Statement.

---

[1] 8 Del. Code Section 361.
[2] https://www.epi.org/publication/secular-stagnation/
[3] Id.
[4] https://onejob.org/updates/?fwp_campaigns=marriott
[5] 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).