



November 6, 2023
Via certified mail
Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

**RE: Shareholder Proposal of American Family Association at Apple Inc.
under Securities Exchange Act of 1934—Rule 14a-8**

Ladies and Gentlemen:

I am writing on behalf of the American Family Association (“AFA”) to defend its shareholder proposal to Apple Inc. (“Apple” or the “Company”). Ronald O. Mueller wrote to you on behalf of Apple Inc. on October 23, 2023 to ask you to concur with Apple’s view that it can exclude AFA’s shareholder proposal from its 2024 Annual Meeting of Shareholders. Apple has the burden of demonstrating it is entitled to exclude the Proposal. *See* Rule 14a-8(g). But it cannot bear this burden.

The Proposal asks Apple to investigate and report on how it is protecting the free speech and freedom of religion of its users from government interference in light of its stated commitment to international human rights standards and the significant reputational and regulatory risks of appearing to censor speech based on viewpoint. Apple says it has already substantially implemented this proposal because it clearly lays out its terms of use and has internal reporting standards on its Commitment to Human Rights. But the terms of use are inherently subjective and vague and are exactly what the Proposal seeks transparency on. And Apple’s assurances that its Board has internal reporting and oversight are not a substitute—and do not substantially implement—reporting to the shareholders.

The Proposal

The Proposal provides as follows:

Resolved: Shareholders request the Board of Directors conduct an investigation and issue a report within the next 12 months, at reasonable cost and excluding proprietary information and disclosure of anything that would constitute an admission of pending litigation, evaluating the standards and procedures Apple Inc. (“Apple” or “the Company”) uses to curate app content

on its various platforms, and procedures by which the Company manages disputes between government interests and user rights.

The Supporting Statement explains that these rights include an obligation for tech companies “to use their influence to protect such inherent human rights as ‘freedom of thought, conscience, and religion.’” But it appears that Apple is “limiting content access within its online services” based on viewpoint and that it does so based on vague and subjective terms of use. The Supporting Statement also explains that Apple is apparently “leveraging its corporate reputation and funds to support groups hostile to freedom of expression.” This conflicts with Apple’s stated “Commitment to Human Rights” and creates “significant reputational risk and risk of political backlash, threatening shareholder value.”

Discussion

A. Legal standard

To meet its burden of proving substantial implementation under Rule 14a-8(i)(10), a company must show that its activities meet the guidelines and essential purpose of the proposal. The Staff has noted that a determination that a company has substantially implemented a proposal depends upon whether a company’s particular policies, practices, and procedures compare favorably with the guidelines of the proposal. *Texaco, Inc.* (Mar. 28, 1991). This means the company must have already satisfactorily addressed the proposal’s guidelines and its essential objective. *See, e.g., Exelon Corp.* (Feb. 26, 2010).

For transparency reports, a company cannot satisfy this standard simply by citing broad commitments to address the topic at issue or by completing only some of the elements of the requested report. For example, the Staff in *Nike, Inc.* (Aug. 2, 2021) denied no-action relief on a proposal asking the company to report and evaluate the effectiveness of its DEI programs. Although the company proffered ample data *about* its DEI programs, this was not an evaluation of the DEI programs and did not meet the substantially implemented ground for exclusion.

Similarly, a company was asked to report on the extent to which its business plans with respect to electric vehicles may involve, rely on, or depend on child labor outside the United States. Although the company had publicly disclosed in its supplier code a zero-tolerance policy regarding the use of child labor, and had publicly disclosed in a sustainability report that it monitored ethical behavior of its suppliers, especially around issues such as child labor and forced or slave labor, the Staff wrote that those public disclosures had not in fact substantially implemented the proposal. *General Motors Company* (Apr. 18, 2022).

Contrast this with no-action decisions Apple relies on:

- In *Alliant Energy Corp.* (Mar. 30, 2023), the proposal asked for a report “about the company’s actual progress toward . . . net-zero carbon dioxide (CO₂) emissions.” There, the company had already been reporting extensively on its “actual progress on its carbon dioxide emissions levels,” its “annual direct carbon dioxide emissions from its electricity generation,” its “progress in phasing out the company’s owned and operated coal generation,” and its Scope 1 and Scope 2 greenhouse gas emissions for its two utility subsidiary companies. (p.7).¹
- In *Comcast Corp.* (Apr. 9, 2021), the proposal asked for a report “assessing the Company’s diversity and inclusion efforts,” including an assessment of its effectiveness with relevant personnel metrics. In contrast to Nike in *Nike Inc.* (Aug. 2, 2021), Comcast had long been *publicly* reporting on and evaluating its DEI efforts: “Every year since [2014], the Company has continued to publish a report on its DEI Efforts that includes ‘quantitative, comparable data’ assessing its diversity and inclusion plans.” (p.12).
- In *The Wendy’s Co.* (Apr. 10, 2019), the proposal asked for a report “identifying and analyzing potential and actual human rights risks of operation and supply chain” with a focus on forced labor and migrant workers. The company provided not only a code of conduct and business ethics, but had already “partner[ed] with an independent third-party to conduct a risk assessment specific to supply chain human rights and labor practices” and had many “public disclosures describ[ing] the frequency and methodology of human rights risk assessments,” among other public disclosures. (pp.15–16).
- The Company also cites *Apple Inc. (Sum of Us)* (Dec. 17, 2020), but there is no no-action letter with that date. There is one from December 6 by that shareholder group, though. *Apple Inc. (David Adams et al., aka Sum of Us)* (Dec. 6, 2019). But there, Apple argued that the proposal was substantially similar to a prior proposal, not that it had substantially implemented the proposal. And in any event, the Staff denied no-action relief.

¹ Page numbers refer to the pdf page number of the collected no-action briefing available on the SEC’s website at <https://www.sec.gov/corpfin/shareholder-proposals-no-action?>

B. Apple’s proffered actions do not substantially implement the proposal.

Apple states that it has already substantially implemented the requested report because it reports on its app store standards and procedures and reports on the board’s oversight of its Human Rights Policy. But neither comes close to the requested report.

1. Apple’s proffered terms of use and reports only underscore how vague its terms of use are.

Apple says that it is already transparent about the procedures and standards used to review app content and government takedown requests. As an initial matter, Apple construes the request too narrowly. The proposal asks for transparency on disputes between government and user rights. This is broader than a government’s formal takedown requests. It also includes problematic policies and practices that can be used as a foothold for government actors (whether acting directly or indirectly) and requires transparency on Apple’s apparent support of groups like the Chinese Communist Party.

Apple is also wrong on the rest. It relies on its App Store Review Guidelines, Developer Guide, and the App Store Transparency Report. All this does is admit that Apple exercises unfettered discretion over so-called problematic content or viewpoints. This is exactly what shareholders need more transparency on.

Apple’s App Store Review Guidelines—which are terms of use—say Apple “will reject apps for any content or behavior that we believe is over the line. What line, you ask? Well, as a Supreme Court Justice once said, ‘I’ll know it when I see it.’”² The Guidelines also do not allow any apps with “content that is offensive, insensitive, upsetting, intended to disgust, in exceptionally poor taste, or just plain creepy. . . . particularly if the app is likely to humiliate, intimidate, or harm a targeted individual or group.”³ While protecting vulnerable groups is laudable, these kinds of terms are inherently vague and subjective and therefore easy to use for viewpoint discrimination.

Because of this, they are antithetical to free speech. In *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294 (2019), the Supreme Court invalidated Lanham Act’s “disparagement ban” because it “violated the bedrock First Amendment principle

² Introduction under App Store Review Guidelines, available at the Developer Apple Website <https://developer.apple.com/app-store/review/guidelines/>.

³ Ibid. Section 1, <https://developer.apple.com/app-store/review/guidelines/>.

that the government cannot discriminate against ideas that offend.” *Id.* at 2299. And in *New York Times v. O’Sullivan*, 376 U.S. 254 (1964), the Court recognized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.” *Id.* at 270.

Apple provides no clarity on how it will interpret the above terms of use, so they remain rife for abuse by Apple itself or third-party activists or governments who may want to coerce Apple to restrict user speech or religious freedom.

And while Apple provides some transparency in its Transparency Report about app takedowns, it still fails to address *how* the above vague policies (or other unnamed policies) apply, which is the root of the issue and the primary focus of this Proposal. Rather, it stands simply as data *about* potential censorship, not an evaluation of and report on *censorship*, including risk areas, forward-looking solutions, explanations, guidance on the terms of use, and other helpful evaluations from Apple’s Board. This is just like the argument Staff rejected in *Nike Inc.*, explicated above. *Nike, Inc.* (Aug. 2, 2021).

2. Telling shareholders that Apple is overseeing its Human Rights Policy is not remotely similar to actually reporting to shareholders on the issue.

Apple also contends that it has substantially implemented the requirement to report on how it complies with its Human Rights Policy. But the vast majority of its proffered reports are made internally to the Board, not shareholders. Apple says it does report this information to the shareholders. But it cites only a brief opposition to a prior shareholder proposal and short recitals in proxy statements that various Board Committees are overseeing the Policy. This is just like the situation in *General Motors Company* (Apr. 18, 2022) where Staff rejected the company’s argument that publicly disclosing a code of conduct and telling shareholders it was monitoring compliance with that policy sufficed for a transparency report to shareholders.

Apple has not been publicly issuing reports on its speech and religious liberty impacts or government interference with those rights, *Comcast Corp.* (Apr. 9, 2021), has not commissioned a third-party auditor to do the same, *The Wendy’s Co.* (Apr. 10, 2019), has not issued a full report in its proxy statement, *Amazon.com, Inc.* (*Sisters of the Order of St. Dominic of Grand Rapids et al.*) (Mar. 27, 2020), *see also*

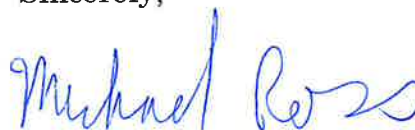
*Amazon 2019 Proxy Statement*⁴ at pp.42–45 (“Leadership Development and Compensation Committee Report”), and has in fact provided no detail on the substance of the oversight on its human rights commitments, *Alliant Energy Corp.* (Mar. 30, 2023). So it has no leg to stand on.

Assuring shareholders that Apple’s Board and its various Committees are overseeing and complying with its Human Rights Policy is not a substitute for actually reporting to shareholders how it is overseeing and complying with the Policy. Nor does it come close to substantially implementing the same.

Conclusion

For the foregoing reasons, I respectfully request that the Staff reject the Company’s request for relief from the Proposal. A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to contact me.

Sincerely,



Michael Ross
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
(571) 707-4655

Cc: Ronald O. Mueller

⁴ https://s2.q4cdn.com/299287126/files/doc_financials/proxy/2019-Proxy-Statement.pdf.