

U.S. SECURITIES AND EXCHANGE COMMISSION
COMPLAINT AGAINST APPLE INC.
OCT 26 2021 MEMO

SUMMARY

The statements made by Apple Inc. to response to the Shareholder Resolution introduced by Nia Impact Capital includes false & misleading statements of material importance. With the SEC’s recent prioritization of enforcing ESG commitments and verifying disclosures, Apple Inc must be investigated for making false statements to its shareholders and the Securities and Exchange Commission.

[As the SEC itself noted in September of last year](#), that allowing companies to decide what information is material to disclosures related to diversity often results in “woke-washing where companies attempt to portray themselves in a light they believe will be advantageous for them on issues like diversity. A disclosure regime that allows companies to decide if or what to disclose in this area can certainly exacerbate that problem.” Herren Lee argues that SEC disclosures get investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value.

Here, Apple Inc not only made clearly false and misleading statements about it’s employee policies, but it is fighting to even allow a shareholder vote that would simply require a public report to be published about the risks of employee policies which prohibit or chill employee ability to discuss unlawful acts in the workplace. Apple is fighting its own shareholders to vote on a request for them to publish a policy explaining the risks of prohibiting employees from reporting crimes while Apple is under numerous investigations for labor violations and subject to multiple civil lawsuits over employment law violations, and only a few years after a [DOJ anti-trust finding](#) against it for a [conspiracy](#) to suppress wages. Apple’s response & corporate behavior are completely unacceptable for a publicly traded company.

1. NIA IMPACT CAPITAL SHAREHOLDER RESOLUTION

On September 7th, 2021 Apple, Inc shareholder “Nia Impact Capital” submitted the following resolution for the 2022 Annual Apple Inc Shareholder Meeting.

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021

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APPLE DRAFT RESOLUTION

RESOLVED:

Shareholders of Apple Inc. (“Apple”) ask that the Board of Directors prepare a public report assessing the potential risks to the company associated with its use of concealment clauses in the context of harassment, discrimination and other unlawful acts. The report should be prepared at reasonable cost and omit proprietary and personal information.

SUPPORTING STATEMENT: Concealment clauses are defined as any employment or post-employment agreement, such as arbitration, non-disclosure or non-disparagement agreements, that Apple asks employees or contractors to sign which would limit their ability to discuss unlawful acts in the workplace, including harassment and discrimination.

WHEREAS:

Apple wisely uses concealment clauses in employment agreements to protect corporate information, such as intellectual capital and trade secrets. However, Apple has not excluded from these clauses their workers' rights to speak openly about harassment, discrimination and other unlawful acts. Given this, investors cannot be confident in their knowledge of Apple's workplace culture.

A healthy workplace culture is linked to strong returns. McKinsey found that companies in the top quartile for workplace culture post a return to shareholders 60 percent higher than median companies and 200 percent higher than organizations in the bottom quartile.¹ A study by the Wall Street Journal found that over a five-year period, the 20 most diverse companies in the S&P 500 had an average annual stock return that was almost six percentage points higher than the 20 least diverse companies.²

A workplace that tolerates harassment invites legal, brand, financial and human capital risk. Companies may experience reduced morale, lost productivity, absenteeism and challenges in attracting and retaining talent.³ Employees who engage in harmful behavior may also be shielded from accountability.

In California, forthcoming⁴ and existing legislation prohibit concealment clauses in employment agreements involving recognized forms of discrimination and unlawful activity. Apple works under a patchwork of state laws related to the use of concealment clauses and may benefit from consistent practices across all employees and contractors.

As hundreds of employees stopped work in protest^{5,6} and after years of binding employees who settled discrimination claims to concealment agreements,⁷ Pinterest paid \$22.5 million to settle a gender discrimination lawsuit brought by a former executive. Shareholders ultimately sued Pinterest executives alleging a breach of fiduciary duty by “perpetrating or knowingly ignoring the long-standing and systemic culture of discrimination and retaliation.”⁸ Similarly, in 2020, as part of a \$300 million settlement of shareholder lawsuits alleging the company created a toxic work environment, Alphabet agreed to limit confidentiality restrictions associated with harassment and discrimination cases.⁹

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Investors have reason to be concerned with Apple, where allegations that the company retaliated against employees complaining of discrimination and potential labor law violations¹⁰ have led workers to organize under the banner #AppleToo.^{11,12}
<https://www.niaimpactcapital.com/apple-resolution>

2. MISREPRESENTATIONS AND FRAUD IN APPLE’S RESPONSE TO SHAREHOLDERS

Apple’s response to the Nia Impact Capital shareholder resolution contains multiple material misrepresentations and possible fraud. Apple continues to deny its now well-known and public issues with discrimination, retaliation, work conditions, labor compliance, and intimidation of employees. Apple’s response ignored the numerous open government investigations into its labor practices and the active use of overbroad confidentiality agreement to terminate employees speaking out about labor conditions and/or reporting unlawful activity by Apple to authorities.

A. Apple falsely stated that it does limit employee’s ability to speak freely about “harassment, discrimination, and other unlawful acts in the workplace.”

See Apple’s statement to shareholders and the SEC below:

Apple does not limit employees’ and contractors’ ability to speak freely about harassment, discrimination, and other unlawful acts in the workplace. Apple’s existing policies and practices demonstrate its support of the rights of its employees and contractors to speak freely about unlawful acts in the workplace, including harassment and discrimination.

On the contrary, Apple’s policies and practices clearly show a pattern of prohibiting employees from speaking about these topics and even reporting unlawful activity to the government. See sections III & IV of this memo.

B. Apple falsely stated that none of its employee policies contradict with the Business Conduct policy.

See Apple’s statement to shareholders and the SEC below:

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The Company has a large, global workforce and uses various forms of agreements around the world. But the Company is not aware of any such agreements that would conflict with the Company’s Business Conduct Policy, which applies worldwide. For example, Apple’s standard form of Intellectual Property Agreement for employees in the U.S. does not contain “concealment clauses” as defined by the Proposal.

On the contrary, Apple has dozens of internal policies – most of which are under investigation by the NLRB for unlawful content. This also includes the actual employment agreements. These policies contain contradictions with both the Business Conduct policy and Apple’s statements in its response to the SEC. Further even Apple’s “public” Business Conduct policy contradicts with Apple’s internal Business Conduct policy – for one, the internal policies on the Business Conduct intranet not only contain some different wording and content, but they also note “Apple Internal” on the bottom of the page implying they should not be shared outside Apple. So even the policy Apple current points to as its example of fully sufficient policy is full of internal contradictions, unlawful terms, and a chilling effect on employees.

- C. Apple falsely stated that it clearly defines what it believes to be confidential information. Even the false definition is overbroad but the real definition and practices are overbroad, chilling, and unlawful.**

See Apple’s statement to shareholders and the SEC below:

Apple’s Business Conduct Policy sets out Apple’s expectations regarding confidentiality of unreleased products and non-public business information and provides that “nothing in this Policy should be interpreted as being restrictive of your right to speak freely about your wages, hours, or working conditions.”

On the contrary, Apple has numerous policies under investigation by the NLRB for overbroad and overly restrictive terms that chill or even prohibit employee organizing and speech about work conditions. Further, the NLRB is also investigating a memo sent by Tim Cook which said that even internal meetings where work conditions are discussed are “Confidential.”

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Even this note from Apple saying non-public business information is overbroad. There is no definition of “business information” and could be easily interpreted as applying to work conditions.

Further this is not the same definition that Apple provides its employees. For example, the Business Conduct intranet defines Confidential information as “Apple Confidential information is anything not explicitly, publicly, or purposefully disclosed by Apple. Examples of Apple Confidential information include unannounced products (including their release dates, pricing, and specifications), unannounced sales promotions, certain AppleWeb announcements, organizational charts, financial forecasts, and customer information.” Further, the same page says “Never disclose confidential, operational, financial, trade- secret, or other business information without verifying with your manager whether such disclosure is appropriate. We are very selective when disclosing this type of information to vendors, suppliers, or other third parties, and only do so once a non- disclosure agreement is in place. Even within Apple, confidential information should only be shared on a need-to-know basis.” This could easily be interpreted by employees as implying that they cannot discuss work conditions with the press, friends, lawyers, etc without manager approval, or even without an NDA in place – which has a chilling effect at least.

Note, while there is a quote about not restricting speaking about working conditions – I see it on a Business Conduct Social Media page in the Business Conduct intranet that says “Internal Only” thus restricting employees from speaking out about the policy term about work conditions. Thus that policy states not to tell anyone outside Apple that Apple would never restrict employees from speaking out on work conditions... that that is only the tip of the iceberg. (See attached NLRB filings).

D. Apple made misleading statements about separation agreements.

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See Apple's statement to shareholders and the SEC below:

The vast majority of Apple employees leave Apple without any type of separation agreement.

On the contrary, Apple apparently sends all employees a memo upon termination ("Confidentiality Obligations Upon Termination of Employment") adding additional restrictions and requirements related to "confidential information" and telling ex-employees that all these existing and new requirements will continue potentially for the rest of their lives.

Further, Apple's response uses California specific examples while it is an international company. Apple also cites non-binding no-action letters like they are a primary legal source. One letter cited to defining "business operations" (*United Technologies Co., SEC No-Action Letter, 1993 SEC No-Act. Feb. 19, 1993*) was only noted in one actual case in the 2nd Circuit, which has since been distinguished by later cases casting doubt on Apple's interpretation of the 28 year old non-binding letter. This would easily have been caught if Apple bothered to run Shepard notes before sending their response.

In fact one of the cases, *EMC Corp v Chevedden (2014)* noted that prohibiting shareholders from presenting their proposal to other shareholders for another year may constitute "irreparable harm."

Apple was not only misrepresenting material statements but they were also misrepresenting the law.

3. NLRB CHARGES

On October 12th, 2021 two charges were filed by an ex-employee (Ashley Gjovik, myself) challenging Apple's internal employee policies and a recent memo sent by CEO Tim Cook as unlawful. There was significant press coverage of the filings that day including Bloomberg, Harvard On Labor, and quotes noting legal issues with the policies from ex-NLRB chairs.

Apple CEO's Anti-Leak Edict Broke Law, Ex-Employee Alleges

<https://www.bloomberg.com/news/articles/2021-10-12/apple-ceo-s-anti-leak-edict-broke-the-law-ex-employee-alleges>

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[Apple Inc.](#)'s restrictive employee handbook rules and Chief Executive Officer Tim Cook's recent pledge to punish leakers both violate U.S. law, according to new complaints that a fired activist filed with the National Labor Relations Board.

In filings Tuesday, former Apple employee Ashley Gjovik alleged that a September all-staff email from Cook, saying that "people who leak confidential information do not belong here," violated the National Labor Relations Act, which protects U.S. workers' right to communicate with one another and engage in collective action about workplace issues.

Cook wrote that Apple was "doing everything in our power to identify those who leaked," and "we do not tolerate disclosures of confidential information, whether it's product IP or the details of a confidential meeting." His email followed media reports about a companywide internal meeting the prior week at which management fielded questions about topics such as pay equity and Texas' anti-abortion law.

Gjovik's filings also challenge what she says are several policies in Apple's employee handbook that illegally interfere with workers' rights, including restrictions on disclosing "business information," talking to reporters, revealing co-workers' compensation or posting impolite tweets.

Apple didn't immediately respond to requests for comment.

Gjovik, a senior engineering program manager, was fired by Apple in September after filing complaints with state and federal agencies, including the U.S. Occupational Safety and Health Administration and U.S. Equal Employment Opportunity Commission, as well as the NLRB.

In documents shared by Gjovik, Apple claimed she was terminated for violating policies such as the disclosure of confidential product information. Gjovik [has said](#) she was fired in retaliation for her prior complaints, which alleged that -- after voicing fears about workplace health hazards -- she was harassed, humiliated and asked not to tell co-workers about her concerns.

Claims filed with the NLRB are investigated by regional officials, who if they find merit in the allegations and can't secure a settlement, then issue a complaint on behalf of the labor board's general counsel. That is then considered by an agency judge. Those judges' rulings can be appealed to the NLRB members in Washington, and then to federal court. The agency has the authority to order companies to change illegal policies and inform employees about their rights, but generally can't hold executives personally liable for alleged wrongdoing or issue any punitive damages.

Complaints like Gjovik's stand a stronger chance of success now that Democratic appointees with union backgrounds run the NLRB's general counsel office and make up the majority of the labor board's members, thanks to President Joe Biden's appointments this year. Employee handbook rules are one of many issues where the agency's new general counsel, Jennifer Abruzzo, has [signaled](#) she's interested in challenging Trump-era precedent.

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In a precedent-setting 2017 case involving [Boeing Co.](#), the NLRB's Republican majority at the time ruled that some company policies' potential negative impact on employees' rights could be outweighed by legitimate business rationales. One of the members who dissented in that case, Lauren McFerran, is now the [NLRB's chair](#) and part of the new Democratic majority there that could overturn such precedents.

The rule described in Cook's memo and the policies cited in Gjovik's complaint might be deemed legitimate under the Trump-era Boeing standard, but "most if not all" of them would probably be illegal under earlier, more pro-labor precedents, said University of Wyoming law professor and former NLRB attorney Michael Duff. A case like Gjovik's offers the Biden appointees "an attractive vehicle" to establish a precedent more like the pre-Trump ones, which prohibited rules that workers could "reasonably construe" as banning legally protected activism, Duff said in an email.

The current labor board is very likely to deem statements in Cook's memo illegal, said former NLRB member Wilma Liebman, who chaired the agency under President Barack Obama.

"What he's saying here goes too far" by limiting discussion about meetings where workplace issues are addressed, rather than only leaks about intellectual property, Liebman said in an interview. "It's restrictive of people's ability to talk about employment policies." Gjovik, who's in law school, said in an interview that she's hopeful her case could help Biden's NLRB appointees establish a new more pro-labor precedent, as well as advancing workplace organizing at Apple by disrupting the company's culture of secrecy.

"Ultimately," she said, "we're never going to see any systemic change at Apple without empowering the employees to feel comfortable speaking out as they are legally protected to."

Harvard On Labor: Today's News & Commentary — October 13, 2021

<https://onlabor.org/todays-news-commentary-october-13-2021/>

On Tuesday, [former](#) Apple employee Ashley Gjovik [filed](#) a complaint with the National Labor Relations Board (NLRB) alleging that certain company policies and statements from management that restrict disclosure of internal company information violate federal labor laws. At issue are several provisions in Apple's employee handbook that allegedly bar disclosing "business information," speaking to reporters, revealing co-workers' compensation, and using "vulgar" language on social media. Moreover, in an all-staff [memo](#) circulated last September, Apple Chief Executive Officer (CEO) Tim Cook doubled down on the company's strict no-disclosure rules, going so far as to say that "we do not tolerate disclosures of confidential information, whether it's product IP or the details of a confidential meeting." Although Gjovik's complaint would likely be unavailing under [NLRB precedent](#) set by the Board's Trump-era Republican majority, her case now charts a path for President Biden's NLRB appointees to displace such precedent in favor of a more prolabor standard.

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Twitter: Mark Gaston Pearce
Former Chairman [@NLRB](#). Executive Director Workers' Rights Institute,
[@GeorgetownLaw](#)



4. OTHER PUBLIC LABOR CONCERNS

I had previously also filed two other NLRB charges against Apple, as well as OSHA Whistleblower complaint, SEC Whistleblower complaint, California Department of Labor complaint, and received an EEOC Right to Sue letter. All of these were filed and known and Apple still terminated me in retaliation. The NLRB is investigating all four charges and the state Department of Labor opened an investigation into Apple's retaliation of me in violation of state labor laws.

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Former Apple Employee Alleges Workplace Violations and Wrongful Termination
<https://news.justia.com/former-apple-employee-alleges-workplace-violations-and-wrongful-termination/>

Multiple federal agencies are investigating complaints by a former Apple employee. The tech giant recently fired senior manager Ashley Gjovik after she reported alleged workplace issues at Apple. Since the spring, Gjovik had spoken out about perceived patterns of harassment, bullying, sexism, and retaliation. She reported these concerns to authorities within the company, while also publicly tweeting about them. Some of her tweets contained emails and other media, which may have frustrated her employer, although she redacted certain information.

Apple put Gjovik on administrative leave in August and [fired her](#) in September. The notice of her termination alleged that she leaked confidential information related to Apple products, without providing details. Gjovik believes that she was fired as illegal retaliation for her whistleblowing efforts.

The former senior manager filed a complaint with the National Labor Relations Board, which will determine whether her allegations are legitimate. If the NLRB finds that they are, the agency will bring a complaint against Apple. In addition, Gjovik has filed a complaint with the federal Occupational Safety and Health Administration. She alleged that her office is located on a Superfund site, which is an area contaminated by hazardous waste. OSHA will review this complaint as well.

Meanwhile, the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing have granted permission to Gjovik to file a civil lawsuit against her former employer. These agencies respond to complaints of discrimination and harassment in the workplace.

Even if the NLRB does not take action against Apple, Gjovik still may pursue a claim for compensation if she can prove that she was wrongfully terminated. Employment in California and most other states is generally at-will, meaning that either the employer or the employee can terminate the relationship at any time and for any reason. However, an employer may not fire an employee in retaliation for engaging in certain protected activities. These include reporting discrimination, harassment, or other illegal conduct in the workplace.

If her lawsuit moves forward, Apple likely will cite the intellectual property concerns stated in the termination notice as the reason for firing Gjovik. The former senior manager would need to prove that this reason was a pretext for an illegal retaliatory motive.

Apple's only explanations for my termination so far are clearly pre-text, and bizarre pre-text at that.

Apple Wanted Her Fired. It Settled on an Absurd Excuse

<https://gizmodo.com/apple-wanted-her-fired-it-settled-on-an-absurd-excuse-1847868789>

Apple Fires Program Manager Who Accused Bosses of Harassment, Intimidation

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<https://gizmodo.com/apple-fires-program-manager-who-accused-bosses-of-haras-1847649269>

After I started speaking publicly about my concerns about work conditions & Apple’s labor practices, a group of Apple employees formed “AppleToo.” As NIC mentioned in their resolution, there is a large group of employees concerned about discrimination and retaliation.

#AppleToo: employees organize and allege harassment and discrimination

<https://www.theguardian.com/technology/2021/sep/03/appletoo-apple-employees-organize-allege-harassment-discrimination>

A group of [Apple](#) workers is organizing to fight against what it says are patterns of discrimination, racism and sexism within the company and management’s failure to address them, in a rare public display of dissent within the notoriously secretive company. Last week, a group of employees launched #AppleToo, a campaign to gather and share current and past employees’ experiences of inequity, intimidation and abuse. The group hopes to mobilize workers at a time when workers across the tech industry are calling for greater accountability from their employers, and to push Apple to more effectively address such complaints.

“For too long, Apple has evaded public scrutiny,” the workers said in a public statement. “When we press for accountability and redress to the persistent injustices we witness or experience in our workplace, we are faced with a pattern of isolation, degradation, and gaslighting,” they added.

The initiative on Monday [released five accounts](#) from employees who say they were subjected to discrimination and sexual harassment at work, allegations they say they shared with management but were left unaddressed. The accounts were anonymous, and did not share what department or city the employees worked in.

“There was [an] employee, who was actually someone in an elevated position, who was constantly predatory. Constantly sexually harassing our team members, and nothing was done about it until it became impossible to ignore,” one of the five employees wrote.

“There were several instances where leadership would not let certain employees of color interview for positions that they were very deserving of,” they added.

The initiative comes after workers tried to address complaints with Apple leadership internally, organizers say, to little avail. Apple reportedly has put a stop to surveys from employees that sought to gather data related to pay. Earlier this week, it barred workers from creating a channel on the communication platform Slack to discuss pay equity, [the Verge reported](#), claiming the topic didn’t meet Slack’s terms of use, though it allows channels dedicated to dogs, cats and gaming.

Since launching, organizers say, the initiative has received hundreds of stories from workers across the company. Seventy-five per cent of them involved discrimination of some sort, and almost half involved sexism, retaliation and dismissed HR reports.

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The effort has also prompted an outpouring of response on social media from former Apple employees detailing their experiences with discrimination and retaliation. Cher Scarlett, an Apple security engineer and #AppleToo organizer, said hundreds of people have come to her looking for support. “I can’t even keep track anymore of the number of people who’ve shared their stories with me. These are people’s lives. They are human beings,” Scarlett told [Protocol](#). “What else do you do when hundreds of people you don’t know are coming to you with all of these different issues?”

Scarlett said she had filed a complaint with the National Labor Relations Board alleging the company stopped her effort to conduct pay transparency surveys. She said she had been [doxxed by a colleague](#) for pushing for pay transparency, and had been told she was “ruining the company”.

The initiative marks a new phase of employee organizing at Apple. Until recently, the company had largely escaped some of the increased scrutiny faced by other major tech companies. Employees of [Activision Blizzard](#), the video game company behind Call of Duty, [staged a walkout](#) in July to call for better working conditions amid allegations of a “frat boy” culture at the company and severe harassment and discrimination against [female workers](#).

Google in 2018 faced global protests from workers over claims of sexual harassment, gender inequality and systemic racism.

Timnit Gebru, a former Apple employee and [AI scientist at Google](#) who was fired from Google after the company attempted to suppress her research and she criticized its diversity efforts, has offered her support to those sharing their stories.

“Apple HR and lawyers have the sickest retaliatory tactics I have seen so far,” she said [on Twitter](#). “[Apple] how long do you think you can keep doing these horrible things to people under the radar?”

In response to the workers’ claims, Apple said: “We are and have always been deeply committed to creating and maintaining a positive and inclusive workplace. We take all concerns seriously and we thoroughly investigate whenever a concern is raised and, out of respect for the privacy of any individuals involved, we do not discuss specific employee matters.”

Further, after Tim Cook sent the unlawful memo now subject to NLRB investigation, Apple terminated one of the leaders of the AppleToo employee group for apparent pre-textual reasons, again.

Leader of Apple activism movement says she was fired

<https://www.nytimes.com/2021/10/15/technology/appletoo-apple-janneke-parrish.html>

A leader of an activist movement within Apple said she was fired by the company on Thursday.

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Janneke Parrish, who was a program manager for Apple Maps based in Austin, Texas, and one of the two leaders of a group that called itself #AppleToo, had been on suspension for several days while [Apple](#) investigated her activities. On Thursday, she said, an Apple lawyer and a human resources worker told her on a phone call that she was being fired.

The reason, Ms. Parrish said she was told, was that she had deleted files from her company computer and phone before handing them over to be examined. She said she had deleted files that contained personal and financial information.

Ms. Parrish, 30, said she believed Apple was retaliating against her for helping to organize the activist group. In recent months, [Apple employees have uncharacteristically spoken out](#) and said the company's culture of secrecy — meant to prevent product leaks — pervaded other aspects of the company and discouraged workers from coming forward about issues like sexual harassment and wage disparities.

"I knew from the moment that I started speaking that this was a risk, and a significant one," Ms. Parrish said. "If me getting fired helps bring justice to people who have been seeking it, then it's a sacrifice I'm happy to make," she added. Ms. Parrish's firing was [reported earlier by The Verge](#).

Apple did not directly address Ms. Parrish's status with the company. "We are and have always been deeply committed to creating and maintaining a positive and inclusive workplace," said Josh Rosenstock, an Apple spokesman, in a statement. "We take all concerns seriously and we thoroughly investigate whenever a concern is raised and, out of respect for the privacy of any individuals involved, we do not discuss specific employee matters."

An accompanying email notifying her of her termination, viewed by The New York Times, said Apple had "determined that you engaged in conduct in violation of Apple policies including, but not limited to, interfering with an investigation by deleting files on your company provided equipment after being specifically instructed not to do so."

Ms. Parrish said she had deleted innocuous screenshots of things like programming bugs she was working to fix off her computer desktop before handing it over. She said she also deleted the Robinhood stock trading app because she did not want Apple to see "how much money I lost investing in GameStop" and the Pokemon Go gaming app because "I feel a little embarrassed I played Pokemon Go."

She said she was investigated because company officials thought she had leaked a recording of an Apple staff meeting to the media, which she said she did not do.

Ms. Parrish had also been publishing a weekly digest of accounts of workplace problems shared anonymously with her by Apple employees. She said she had received hundreds of the stories over the last few months, though she could not confirm that everyone who submitted a story was an Apple worker.

Being fired, Ms. Parrish said, would not make her end her activism. "I don't intend to stop until there's justice," she said.

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Despite all of the employee concerns, whistleblowing, and negative press about Apple’s corporate labor practices -- when the coalition approached Apple before the shareholder resolution was introduced, Apple refused to consider adopting the proposal.

Ifeoma Ozoma, Founder & Principal, Earthseed: “I know first-hand that many employment agreements are designed to keep workers quiet about issues of discrimination and harassment. But when our coalition encouraged Apple to take a leadership role and adopt a policy that enables people to speak freely about unlawful activity, the company declined, citing their existing policy. It’s hard to believe their existing policy is sufficient when their own employees say the company is using that same policy handbook to silence workers. With this shareholder resolution, investors are giving Apple a second chance to make the right move — we’ll be curious to see how they respond.

<https://www.openmic.org/news/2021/9/16/shareholders-tell-apple-using-employment-agreements-as-gag-orders-to-hide-discrimination-and-harassment-is-bad-for-workers-and-bad-for-business>

5. LEGAL & POLICY BACKGROUND

I. U.S. Securities and Exchange Commission. Environmental, Social, and Governance (ESG) Risk Alert, April 9 2021

<https://www.sec.gov/files/esg-risk-alert.pdf>

Staff Observations

During examinations of investment advisers, registered investment companies, and private funds engaged in ESG investing, the staff observed some instances of potentially misleading statements regarding ESG investing processes and representations regarding the adherence to global ESG frameworks. The staff noted, despite claims to have formal processes in place for ESG investing, a lack of policies and procedures related to ESG investing; policies and procedures that did not appear to be reasonably designed to prevent violations of law, or that were not implemented; documentation of ESG-related investment decisions that was weak or unclear; and compliance programs that did not appear to be reasonably designed to guard against inaccurate ESG-related disclosures and marketing materials. Below is additional information regarding these observations.

Inadequate controls to ensure that ESG-related disclosures and marketing are consistent with the firm’s practices.

The staff observed inconsistencies between actual firm practices and ESG-related disclosures and marketing materials because of a weakness in controls over public disclosures and client/investor-facing

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statements. For example, the staff observed a lack of adherence to global ESG frameworks despite claims to the contrary, unsubstantiated claims regarding investment practices (e.g., only investing in companies with “high employee satisfaction”), and a lack of documentation of ESG investing decisions and issuer engagement efforts. In addition, the staff observed failures to update marketing materials timely (e.g., an adviser continuing to advertise an ESG investment product or service it no longer offered).

II. U.S. Securities and Exchange Commission. Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference

<https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922>

Disclosure Works

There are many different approaches to promoting diversity. Some countries and states have mandated certain levels of representation on boards.[20] Pending legislative efforts would require disclosure of the diversity characteristics of board members and senior executives [21] and consideration of diverse candidates for certain positions, along the lines of the NFL’s Rooney Rule.[22] Still other efforts have focused on board refreshment to encourage diversity.[23]

The most obvious tool in the SEC’s toolkit is disclosure. This gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value. Importantly, it can also drive corporate behavior. For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the “what gets measured, gets managed” phenomenon.[24] Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company.[25] The Commission has long-recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that “disclosure may, depending on determinations made by a company’s management, directors and shareholders, influence corporate conduct” and that “[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws.”[26]

It is often argued that, if information, including with respect to diversity, is material, it must be disclosed under our broad, principles-based regime. We should, therefore, leave it to companies to determine whether diversity information is material, and, if so, what specifically to disclose. This approach, however, has led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. In addition, I hear complaints about so-called “woke-washing” where companies attempt to portray themselves in a light they believe will be advantageous for them on issues like diversity. A disclosure regime that allows companies to decide if or what to disclose in this area can certainly exacerbate that problem.

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021

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III. U.S. Securities and Exchange Commission, “SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K,” (Aug. 26, 2020)

<https://www.sec.gov/news/public-statement/clayton-regulation-s-k-2020-08-26>

We have seen disclosures shift to emphasize matters such as liquidity, cash needs, supply chain risks, and the health and safety of employees and customers. This has served as a reminder that our rigorous, principles-based, flexible disclosure system, where companies are required to communicate regularly and consistently with market participants, provides countless benefits to our markets, our investors and our economy more generally.

One improvement in today’s rules I want to highlight is the topic of human capital. I fully support the requirement in today’s rules that companies must describe their human capital resources, including any human capital measures or objectives they focus on in managing the business, to the extent material to an understanding of the company’s business as a whole. From a modernization standpoint, today, human capital accounts for and drives long-term business value in many companies much more so than it did 30 years ago. Today’s rules reflect that important and multifaceted shift in our domestic and global economy.

As I noted, today’s rules require that, in crafting their human capital disclosure, companies must incorporate the key human capital metrics, if any, that they focus on in managing the business, again to the extent material to an understanding of the company’s business as a whole.

IV. U.S. Securities and Exchange Commission, Shareholder Proposals: Staff Legal Bulletin No. 14K (CF) (2019)

<https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals>

Rule 14a-8(i)(7), the “ordinary business” exception, permits a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.” The purpose of the exception is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.”[1] The Commission has stated that the policy underlying the “ordinary business” exception rests on two central considerations.[2] The first relates to the proposal’s subject matter; the second relates to the degree to which the proposal “micromanages” the company.

3. Board analysis

In SLB Nos. 14I and 14J, we noted that evaluating whether a proposal transcends ordinary business matters often raises difficult judgment calls that we believe are matters that the board of directors generally is well-situated to analyze. In this regard, we continue to believe that a well-developed discussion of the board’s analysis of whether the particular policy issue raised by the proposal is

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021

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sufficiently significant in relation to the company can assist the staff in evaluating a company's no-action request and, in turn, assist the company in demonstrating that it may exclude the proposal.

In SLB No. 14J, we noted our view that a well-developed discussion of the board's analysis will describe in sufficient detail the specific substantive factors the board considered in arriving at its conclusion, and set forth a non-exclusive list of such factors. Overall, we found during the most recent proxy season that the no-action requests that included a discussion of the board's analysis were more helpful in determining whether the proposal was significant to the company's business. We also found the analysis helpful even in instances where we granted relief under Rule 14a-8(i)(7) but did not explicitly reference the board's analysis in our response letter. The improvement in the board analyses provided was largely attributable to a greater proportion of requests discussing in detail the specific substantive factors, such as those set forth in SLB No. 14J, that the board considered in arriving at its conclusion that an issue was not significant in relation to the company's business.

Additionally, in a number of instances, we were unable to agree with exclusion where a board analysis was not provided, which was especially likely where the significance of a particular issue to a particular company and its shareholders may depend on factors that are not self-evident.[8] If a request where significance is at issue does not include a robust analysis substantiating the board's determination that the policy issue raised by the proposal is not significant to the company, our analysis and ability to state a view regarding exclusion may be impacted. While we do not necessarily expect the board, or a board committee, to prepare the significance analysis that is included in the company's no-action request, we do believe it is important that the appropriate body with fiduciary duties to shareholders give due consideration as to whether the policy issue presented by a proposal is of significance to the company.

a. Delta analysis

In SLB No. 14J, the staff explained that a board analysis could address, among other substantive factors, whether the company has already addressed in some manner the policy issue raised by the proposal, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the specific manner in which the proposal addresses the issue presents a significant policy issue for the company. A delta analysis could be useful for companies that have already addressed the policy issue in some manner but may not have substantially implemented the proposal's specific request for purposes of exclusion under Rule 14a-8(i)(10) (e.g., by addressing the issue in a manner not contemplated by the proposal). In these cases, it would be helpful if the delta analysis identifies, for example, the differences between the actions that the company has already taken to address the issue and the proposal's specific request. It also is helpful when the board's analysis explains whether the difference between the company's actions and the proposal's request represents a significant policy issue to the company. In other words, have the company's prior actions diminished the significance of the policy issue to such an extent that the proposal does not present a policy issue that is significant to the company?

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021

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For example, if a shareholder proposal sought greater disclosure of a telecommunications company’s customer information privacy policy, under appropriate circumstances, the company’s board analysis could highlight, if it is the case, how its cybersecurity policy addresses the issues covered by the proposal and how the difference – or delta – between the two approaches would not raise a significant policy issue for the company.

Based on our evaluation of no-action requests this past season, a delta analysis is most helpful where it clearly identifies the differences between the manner in which the company has addressed an issue and the manner in which a proposal seeks to address the issue and explains in detail why those differences do not represent a significant policy issue to the company. By contrast, conclusory statements about the differences that fail to explain why the board believes that the issue is no longer significant are less helpful.

4. Micromanagement

Under the Commission’s second consideration, a proposal may be excludable under the “ordinary business” exception if it “micromanages” the company. This prong of the Rule 14a-8(i)(7) analysis rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself. As illustrated below, two proposals focusing on the same subject matter may warrant different outcomes based solely on the level of prescriptiveness with which the proposals approach that subject matter.

In considering arguments for exclusion based on micromanagement, and consistent with the Commission’s views,[9] we look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board. Thus, a proposal framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue generally would not be viewed as micromanaging matters of a complex nature. However, a proposal, regardless of its precatory nature, that prescribes specific timeframes or methods for implementing complex policies, consistent with the Commission’s guidance,[10] may run afoul of micromanagement. In our view, the precatory nature of a proposal does not bear on the degree to which a proposal micromanages.[11] Following a successful vote on a shareholder proposal, management and the board generally consider whether and how to implement the proposal. Notwithstanding the precatory nature of a proposal, if the method or strategy for implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company.

For example, this past season we agreed that a proposal seeking annual reporting on “short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement to keep the increase in global average temperature to well below 2 degrees Celsius and to pursue efforts to limit the increase to 1.5 degrees Celsius” was excludable on the basis of micromanagement.[12] In our view, the proposal micromanaged the company by prescribing the method

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021

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for addressing reduction of greenhouse gas emissions. We viewed the proposal as effectively requiring the adoption of time-bound targets (short, medium and long) that the company would measure itself against and changes in operations to meet those goals, thereby imposing a specific method for implementing a complex policy.

In contrast, we did not concur with the excludability of a proposal seeking a report “describing if, and how, [a company] plans to reduce its total contribution to climate change and align its operations and investments with the Paris [Climate] Agreement’s goal of maintaining global temperatures well below 2 degrees Celsius.” The proposal was not excludable because the proposal transcended ordinary business matters and did not seek to micromanage the company to such a degree that exclusion would be appropriate.[13] In our view, the proposal did not seek to micromanage the company because it deferred to management’s discretion to consider if and how the company plans to reduce its carbon footprint and asked the company to consider the relative benefits and drawbacks of several actions.

When analyzing a proposal to determine the underlying concern or central purpose of any proposal, we look not only to the resolved clause but to the proposal in its entirety. Thus, if a supporting statement modifies or re-focuses the intent of the resolved clause, or effectively requires some action in order to achieve the proposal’s central purpose as set forth in the resolved clause, we take that into account in determining whether the proposal seeks to micromanage the company.

This past season, where we concurred with a company’s micromanagement argument, it was not because we viewed the proposal as presenting issues that are too complex for shareholders to understand. Rather, it was based on our assessment of the level of prescriptiveness of the proposal. When a proposal prescribes specific actions that the company’s management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted. For example, a proposal urging the board to adopt a policy prohibiting adjusting financial performance metrics to exclude compliance costs when determining executive compensation would be excludable on micromanagement grounds because such proposal prohibits any such adjustments without regard to specific circumstances or the possibility of reasonable exceptions.[14] When a company asserts the micromanagement prong as a reason to exclude a proposal, we would expect it to include in its analysis how the proposal may unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill their fiduciary duties to shareholders.

V. U.S. Securities and Exchange Commission, “SEC Adopts Amendments to Modernize Shareholder Proposal Rule,” (Sept. 23, 2020)

<https://www.sec.gov/news/press-release/2020-220>
<https://www.sec.gov/rules/final/2020/33-10825.pdf>

The Securities and Exchange Commission today announced that it voted to adopt amendments to

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021

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modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosures (Item 105) that registrants are required to make pursuant to Regulation S-K. These disclosure requirements have not undergone significant revisions in over 30 years. The amendments the Commission is adopting today update these items to reflect the many changes in our capital markets and the domestic and global economy in recent decades.

"Today we modernized our public company business disclosure rules for essentially the first time in over 30 years," said SEC Chairman Jay Clayton. "Building on our time-tested, principles-based disclosure framework, the rules we adopt today are rooted in materiality and seek to elicit information that will allow today's investors to make more informed investment decisions. I am particularly supportive of the increased focus on human capital disclosures, which for various industries and companies can be an important driver of long-term value. I applaud the staff for their dedication and thoughtful approach to modernizing and improving these rules and adding efficiency and flexibility to our disclosure framework."

ASHLEY M. GJØVIK

Juris Doctor Candidate & Public International Law Certificate Candidate, Santa Clara University
Ex-Apple Sr. Engineering Program Manager from February 2015 to September 2021