Securities Regulation Daily Wrap Up, AI NEWS—Apple, Disney may not exclude AI transparency proposals, (Jan 5, 2024)

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The proposals asked for reports on the companies' use of AI and to disclose any ethical guidelines on its use.

Apple and Disney may not exclude shareholder proposals about their use of artificial intelligence at their upcoming annual shareholders meetings. The AFL-CIO Equity Index Funds filed similar shareholder proposals asking that the companies prepare reports on their use of, and any ethical guidelines concerning, AI. The companies separately wrote to the SEC, arguing that the respective proposals could be excluded from their proxy materials because they relate to their ordinary business operations. In separate no-action letters, the SEC staff concluded that the proposals transcend ordinary business matters (*Apple Inc.* and *The Walt Disney Company*, January 3, 2024).

Denied. The staff of the Division of Corporation Finance concluded that the proposals could not be excluded from the respective proxy statements under Rule 14a-8(i)(7). In the staff's view, the proposals transcend ordinary business matters and do not seek to micromanage the companies.

Apple. A shareholder proposal submitted on behalf of the AFL-CIO Equity Index Funds ("AFL-CIO") asked that Apple Inc. prepare a transparency report on its use of AI in its business operations and disclose any ethical guidelines Apple adopted regarding its use of AI technology. The report, which would be available to shareholders on Apple's website, may omit any proprietary or privileged information.

The AFL-CIO's supporting statement expressed concerns about the significant social policy issues raised by business's adoption of AI technology. The use of AI to automate jobs could result in mass layoffs, for example, or the technology could be used to generate "deep fake" media content that could influence political elections. The statement said that AI should not be trained on copyrighted material or the likenesses of professional performers without transparency and the consent of the creators and rights holders. AI also should not be used to replace the creative work of professional writers, the AFL-CIO said.

In its no-action request, Apple argued that the proposal could be excluded under Rule 14a-8(i)(7) as relating to ordinary business operations. According to Apple, the staff has long held that proposals asking for reviews and reports on how a company conducts its business are excludable. Also asserted to be ordinary business matters were Apple's: choice of technologies, general adherence to ethical business practices, and workforce management considerations. In addition, the no-action request maintained that the proposal did not address a significant social policy issue in the context of a "broad request" for disclosure on the use of AI across Apple's business.

Apple argued further that the proposal was excludable because it seeks to micromanage the company. At its core, Apple contended, the proposal intrudes into the judgment of management by seeking information on all the ways the company uses AI. This level of granularity would be outside of the ability of shareholders to assess without detailed knowledge of Apple's operations.

Disney. The AFL-CIO made a very similar proposal to the Walt Disney Company ("Disney"). Here, the proposal requested a transparency report on Disney's use of AI, the board's role in overseeing its usage, and any ethical guidelines on the use of AI. As with the earlier Apple proposal, the supporting statement cited social policy concerns such as the use of copyrighted works and the voices or likenesses of performers. If Disney does not have ethical guidelines for AI, the statement says, their adoption could improve the company's performance by avoiding labor disruptions and lawsuits related to the improper use of AI.

Disney argued that the proposal was excludable from its proxy materials under Rule 14a-8(i)(7). Making similar

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arguments to those raised by Apple, Disney asserted that the proposal related to its ordinary business activities, such as its choice of technologies, ethical guidelines, and workforce management considerations. There were also no transcendent social policy issues implicated because the use of AI simply reflects progress in the development of workforce technology, Disney said.

Disney also argued that the proposal seeks to micromanage the company. Like Apple, Disney said that the proposal sought disclosure of intricate details and considerations that shareholders lack the ability to assess. Concerning the use of AI in creating artistic works, Disney maintained that this is a fundamental aspect of its business, for which there is already an internal legal process, and the proposal would involve shareholders in decisions related to complex intellectual property matters.

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