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January 9, 2007

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

Re: Shareholder Proposal Submitted to AT&T Inc. for 2007 Proxy Statement

Dear Sir/Madam:

I have been asked by As You Sow Foundation, Jeremy Kagan, Jeffery Hersh, Calvert Asset Management Company, Inc., Larry Fahn, The Adrian Dominican Sisters, and Camilla Madden Charitable Trust (hereinafter referred to as "Proponents"), whom are beneficial owners of shares of common stock of AT&T Inc. (hereinafter referred to as "AT&T" or the "Company"), and who have jointly submitted a shareholder proposal (hereinafter referred to as "Proposal") to AT&T, to respond to the letter dated December 11, 2006 sent to the Office of Chief Counsel by the Company, in which AT&T contends that the Proposal may be excluded from the Company's 2007 proxy statement by virtue of Rules 14a-8(i)(2), 14a-8(i)(3), 14a-8(i)(6) and 14a-8(i)(7).

I have reviewed the Proponents' shareholder proposal, as well as the Company's letter and supporting materials, and based upon the foregoing, as well as upon a review of Rule 14a-8, it is my opinion that the Proponents' shareholder proposal must be included in AT&T's 2007 proxy statement, since (1) the Proposal, if implemented, would not cause the Company to violate the law; (2) it transcends the ordinary business of the Company by focusing on a significant social policy issue, (3) will have no substantive affect on any pending or contemplated litigation, and (4) contrary to the Company's argument, is in no way vague or indefinite. Therefore, it is respectfully requested that the Staff not issue the no-action letter sought by the Company.

Pursuant to Rule 14a-8(k), enclosed are six copies of this letter and exhibits. A copy of these materials is being mailed concurrently to AT&T Inc. Assistant General Counsel Wayne A Wirtz.

Summary Response

Based upon a review of the actual text of the Proposal and the conclusions of the Hon. Judge Vaughn R. Walker, of the U.S. District Court for the Northern District of California, in *Hepting v. AT&T* it is evident that the Proposal, if implemented, would not cause the Company to violate the law. Furthermore, the widespread concern over the allegations that AT&T is participating in the Government's surveillance the Terrorist Surveillance Program and the Calling Records Program (the "Programs") and the resulting

lawsuits demonstrate that the issues raised in the Proposal are significant social policy issues that transcend the ordinary business of the Company. Finally, the Proposal has been drafted with respect for the needs of confidentiality and in light of the disclosures about the Programs that have been made by the Government. Consequently, the Proposal is not impossible to implement. In contrast, the Proposal raises legitimate shareholder concerns about the Company's role in protecting individual rights to privacy in a balanced and reasonable fashion.

The Proposal

RESOLVED: That shareholders request that the Board of Directors issue a report to shareholders in six months, at reasonable cost and excluding confidential and proprietary information, which describes the following:

- The overarching technical, legal and ethical policy issues surrounding (a) disclosure of the content of customer communications and records to the Federal Bureau of Investigation, NSA and other government agencies without a warrant and its effect on the privacy rights of AT&T's customers and (b) notifying customers whose information has been shared with such agencies;

- Any additional policies, procedures or technologies AT&T could implement to further ensure (a) the integrity of customers' privacy rights and the confidentiality of customer information, and (b) that customer information is only released when required by law; and

- AT&T's past expenditures on attorney's fees, experts fees, operations, lobbying and public relations/media expenses, relating to this alleged program.

Background

In December 2005, media reports alleged that President George W. Bush issued an executive order in 2001 (and repeatedly thereafter) that authorized the National Security Agency (NSA) to conduct surveillance of certain telephone calls of individuals in the United States without obtaining a warrant from a "FISA court" either before or after the surveillance. The existence of this program was confirmed by President Bush soon after it was described in the press.

In May, 2006, it was reported in the press that AT&T had provided the NSA and/or other government agencies direct access to its telecommunications facilities and databases, thereby disclosing to the government the contents of its customers' communications as well as detailed communications records about millions of its American customers.

Public knowledge of these two Programs immediately resulted in a major national controversy directly involving AT&T over significant social policy issues including the right to privacy and the legality of warrantless and/or mass electronic surveillance of American citizens. (See below for documentation of the widespread nature of the controversy).

It also resulted in more that two-dozen lawsuits seeking damages that could run to billions of dollars. AT&T is a defendant in at least 9 of these suits and in our opinion the cases represent a significant financial risk to the Company.

Due to considerable, and justifiable, concern about the significant social policy and financial implications

of the Programs, this group of shareholders has decided to file a shareholder resolution with the Company. This Proposal seeks to focus the attention of management on the implications of the Programs on American citizens and the long-term wellbeing of the Company.

Furthermore, the goal of this Proposal is, as is the purpose of Rule 14a-8,[1] to facilitate a discussion between shareholders and management; and amongst shareholders about the significant policy issues facing the Company related to privacy concerns. When a company is faced with questions of such importance, shareholders have a right to communicate with management and other shareholders through the proxy statement. This group of shareholders is exercising that right through this Proposal.

What the Proposal emphatically does not do is attempt to illicit information from the Company that will compromise national security or law enforcement. Rather it seeks a report from the Company that can serve as basis for discussions about the role the Company will take, in broad general policy terms, in its pivotal position of control over customer communication data and content.

ANALYSIS

I. The Proposal, if Implemented, Would Not Cause the Company to Violate Federal Law

II. The Proposal is Focused on a Significant Policy Issue that Transcends the Ordinary Business of the Company and Therefore must be Included in the Company's Proxy.

A. The Proposal Focuses on a Significant Social Policy Issue.

B. The Proposal Does Not Focus on the Ordinary Business of the Company.

1. Litigation: The Proposal does not implicate the ordinary business litigation exclusion because it does not seek to dictate the results of any litigation.

2. Customer Privacy: It is permissible for the Proposal to focus on the freedom of expression and privacy.

3. Legal Compliance: the Proposal appropriately requests that the Company consider additional policies within the Company's existing compliance structure.

4. Micro-management: the Proposal is permissible because it strikes the

1 The purpose of Rule 14a-8 "is to provide and regulate a channel of communication among shareholders and public companies." Exchange Act Release No. 34-40018 (May 21, 1998). "The SEC continues to implement Congress's goals by providing shareholders with the right to communicate with other shareholders and with management through the dissemination of proxy material on matters of broad social import such as plant closings, tobacco production, cigarette advertising and executive compensation." A*malgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877 (S.D.N.Y. 1993). "In so far as the shareholder has contributed an asset of value to the corporate venture, in so far as he has handed over his goods and property and money for use and increase, he has not only the clear right, but more to the point, perhaps, he has the stringent duty to exercise control over that asset for which he must keep care, guard, guide, and in general be held seriously responsible. As much as one may surrender the immediate disposition of (his) goods, he can never shirk a supervisory and secondary duty (not just a right) to make sure these goods are used justly, morally and beneficially." *Medical Committee for Human Rights v. SEC*, 432 F. 2d. 659, 680-681 (1970), vacated and dismissed as moot, 404 U.S. 402 (1972).

appropriate balance between an overly specific and excessively general request.

5. Political process: the Proposal is proper because it does not seek an evaluation of a specific legislative proposal.

6. "Touches" on a Significant Policy Issue: The Proposal must appear on the Company proxy because it directly and fully raises a Significant Policy Issue.

III. Vagueness: The Proposal does not violate the law and has struck the proper balance between specificity and generality, therefore the Company has the power and authority to implement it.

I. The Proposal, if Implemented, Would Not Cause the Company to Violate Federal Law

The Company argues that the Proposal, if implemented, would cause AT&T to violate a number of Federal laws and therefore is excludable pursuant to Rule 14a-8(i)(2). It is my opinion, after a review of the Company letter, the Sidley memorandum and the relevant law, that the Proposal, if implemented, would not cause the Company to violate the law. Specifically, we assert that (1) the state secrets privilege does not apply to this case; (2) the Hon. Judge Vaugh R. Walker has concluded that AT&T and the Government have for all intents and purposes admitted the existence of the Programs and the Company's involvement and (3) the Company has misread the Proposal and therefore has misapplied Rule 14a-8(i)(2). Consequently, we respectfully request that the Staff not concur with the Company and instead conclude that the Proposal is permissible under Rule 14a-8(i)(2).

The Company argues that the Proposal would cause AT&T to violate a number of Federal laws including 18 U.S.C. § 798(a). In essence, they are arguing that they cannot discuss any of these matters because of the state secrets privilege. This argument is misplaced, however, because the state secrets privilege is not the Company's to assert. The United States Supreme Court has ruled that the state secrets "privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *United States v. Reynolds* 345 U.S. 1, 7-8 (1953); see also *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). Furthermore, the rules governing the assertion of the privilege require a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id*. Neither of these conditions have been met in this case[2] and consequently, this claim by the Company does not succeed. If such a claim is to the be the basis of the exclusion, the Government, the holder of the privilege, would need to assert it.

Second, even assuming that the state secrets privilege has been properly petitioned for, it is false to argue that the Company can say no more than it can neither confirm nor deny its participation in the program. This issue was discussed at length by the Hon. Judge Vaughn Walker, the judge assigned by the Judicial Panel on Multidistrict Litigation to hear the consolidated lawsuits related to claims against the telecommunications companies. Specifically, the Hon. Judge Walker concluded,

> ***AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content.*** As noted earlier, the government has publicly admitted the existence of a "terrorist surveillance program," which the government

2 We note that the Company has included documentation related to the assertion of the privilege in *Terkel v. AT&T Inc.*, No. 06C-2837 (N.D. Ill.), but that assertion has not been made in *this* case with an analysis or declaration by the government of its application to the Proposal.

insists is completely legal.

The Hon. Judge Vaugh R. Walker's July 20, 2006 Order in Hepting v. AT&T Corporation at p. 29 (emphasis added) Exhibit 1. The court goes on to state that "[c]onsidering the ubiquity of AT&T telecommunications services, it is unclear whether this program could even exist without AT&T's acquiescence and cooperation." *Id* at p. 30. Therefore, "AT&T's assistance in national security surveillance is hardly the kind of "secret" that the . . . state secrets privilege were intended to protect . . ." *Id* at p. 3. Finally, the Hon. Judge Walker observed that "[w]hile this case has been pending, the government and telecommunications companies have made substantial public disclosures on the alleged NSA programs." *Id* at p. 42. Please see pages 28 – 42 of The Hon. Judge Walker's Order for a fuller discussion of his findings.

The Hon. Judge Walker also made the following point:

> Based on these public disclosures, the court cannot conclude that the existence of a certification regarding the "communication content" program is a state secret. If the government's public disclosures have been truthful, revealing whether AT&T has received a certification to assist in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security. And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements. In short, the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.

Id at pages 39 – 40.

Consequently, the issue whether or not the Company provided customer telephone records to the Government can hardly be called a state secret and at the very least the Company has not met its burden under Rule 14a-8(i)(2)[3] of demonstrating that implementing the Proposal would violate the law. Rather the contrary is true. After extensive briefing and hearings on the issue, the judge overseeing the consolidated suits against AT&T has found that the Company and the Government have for all intents and purposes confirmed the existence of the Programs and AT&T's participation.

Despite the length of the material provided by the Company on Rule 14a-8(i)(2), most of their argument is actually a generalized assertion that a violation of the law would occur. Nevertheless, the Company does make a few specific arguments, the first of which is an attack on the first bullet of the proposal which asks for a report on the overarching technical, legal and ethical policy issues surrounding . . . (b) notifying customers whose information has been shared with such agencies. Specifically, the Company contends that:

> notifying customers that their information had been shared as a part of a Program would (1) confirm the existence of one or both Programs, (2) confirm AT&T's participation in one or both Programs, and (3) apprise targets of federal intelligence activities that they were the subject of surveillance by federal national security agencies.

Sidley letter at page 6. First as explained above, the Hon. Judge Walker has concluded that "AT&T and

3 In *The Quaker Oats Company* (April 6, 1999) the Staff wrote "neither counsel for you nor the proponent has opined as to any *compelling state law precedent*. In view of *the lack of any decided legal authority* we have determined not to express any view with respect to the application of rules 14a-8(i)(1) and 14a-8(i)(2) to the revised proposal." (emphasis added).

the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content." *Walker Order* at page 29. Consequently, points (1) and (2) fail and cannot be the basis for excluding the proposal.

Second, ***the Proposal never asks the Company to notify customers that their information had been shared as a part of a Program***. To state otherwise is disingenuous at best. What the Proposal does do is "request . . . a report . . . *which describes . . . The overarching technical, legal and ethical policy issues surrounding* . . . (b) notifying customers whose information has been shared with such agencies (the FBI, NSA and other government agencies)." This is a request for a generalized policy discussion about what could or would be involved in notifying customers whose information has been shared with the FBI, NSA or other government agencies. It also is not limited to the Programs. Undoubtedly, AT&T regularly shares customer information with the FBI and other government agencies (state or federal) in the course of routine criminal law enforcement. Consequently, a policy discussion about the Company's involvement in law enforcement is not a de facto confirmation of participation in the Programs. Furthermore, to the extent that a portion of the discussion implicates confidential (i.e. classified) matters, the Proposal provides for excluding that information.

Next the Company argues that a request "detailing the expenditures made by the Company for the 'operations' associated with these Programs would confirm their existence, confirm AT&T's participation in them, and furnish information concerning their scope." Sidley letter at page 6. Once again, this assertion does not succeed because, as the Hon. Judge Walker found, "AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content." *Walker Order* at p. 29. The Government and the Company have, for all intents and purposes already confirmed their existence and confirmed AT&T's participation in them, so to now claim the Proposal is excludable because it would allegedly cause this confirmation is to deny judicially established facts.

As for the third contention regarding scope, it is worth repeating that there is nothing in this Proposal that requires them to disclose confidential information, because the Proposal specifically provides for "excluding confidential information." In this case the Company could simply do the following in a report:

> AT&T's past expenditures on operations relating to the alleged Programs
>
> Due to federal laws on classified information, the Company is unable to furnish information concerning the alleged scope of the Programs and therefore is unable to detail AT&T's past expenditures on operations relating to the alleged Programs. However, certain general statements can be made in this regard . . .

Furthermore, this portion of the Proposal *only requires a "description" of the expenses - not an accounting*. This is not to say the Proposal is meaningless, as discussed elsewhere in this letter the Proposal covers (1) material that extends beyond the Programs, (2) allows for excluding confidential information, and, most importantly, (3) focuses on the broad social policy issues the Company faces as it addresses the privacy concerns of its customers, shareholders and policy makers.

Simply stated, in keeping with the findings and reasoning of the court, the Proposal, if implemented, does not require the disclosure of any state secrets. The Company's primary argument has been that any discussion is prohibited because the existence of the Programs and the Company's participation in the Programs is a state secret. Clearly it does not constitute a state secret and therefore cannot be the basis for

exclusion.

In addition, it is evident that the Company is capable of discussing the issues raised in the Proposal in a public forum. In fact, this very proceeding before the Commission is a discussion of the legal issues surrounding AT&T's alleged cooperation with government agencies. The Sidley memo provides a perfect template for how such a discussion could take place even assuming the Company cannot confirm nor deny participation in the Programs. The fifth paragraph (pg. 2) reads as follows:

> AT&T cannot confirm or deny any reports alleging participation in federal intelligence activities, including the Programs. For purposes of responding to your request only, we accept at face value the asserted facts reported in the newspapers and targeted by the Proposal. No inference can or should be drawn from these assumptions made only for the purposes of this analysis regarding the truth or falsity or [sic] any such allegations, and nothing herein should be construed as an admission or denial of any allegation relating to such Programs.

It is assumed that any report to shareholders would contain the same or similar language making clear that the Company cannot (absent permission from the government) discuss the *details* of an intelligence program or disclose its existence. However, the parameters of such a discussion – the importance of privacy versus national security and the responsible role of a corporation in weighing those two values – is clear. A report could be written that discusses these issues in the abstract without revealing classified information.[4] There is nothing confidential about the law surrounding the sharing of telephone information.

The Company could also readily have a portion of the report be devoted to discussing the ethical issues that the Company should consider in light of the public media reports of law enforcement requests for information. This discussion could include the constitutional principles at issue, historical examples, the costs and benefits to society of different Company policies on how to respond to law enforcement requests for cooperation as described in media stories, in short in can be a generalized discussion of the policy issues that the Company is facing when privacy issues are raised.

Furthermore, AT&T could discuss these issues in the *hypothetical* event that AT&T is asked in the future to disclose confidential customer information pursuant to a secret government program. Even assuming that the Company cannot describe what has *happened*, it is not prohibited from describing how the Company would or could in the *future* apply the known structures of federal law to government requests for otherwise private information.[5]

Also, we note that other telecommunications companies, specifically Qwest, BellSouth and Verizon, have all made public declarations denying any involvement in the Programs. See John O'Neil and Eric Lichtblau, *Qwest's Refusal of N.S.A. Query Is Explained*, New York Times, May 12, 2006 (Exhibit 2) and FoxNews: *Verizon- We Didn't Give Customers' Call Records to NSA Either*, May 16, 2006

4 We note that the Company has cited *People for the American Way Foundation v. NSA et al*., Civil Action No. 06-206 (ESH) (Nov. 20, 2006) for the proposition that basic numerical or statistical information about the Terrorist Surveillance Program is classified. That case does not apply to the Proposal for a number of reasons including, the defendant in that case was the NSA (not AT&T or another telecom company); the law at issue was FOIA (not Rule 14a8); it was a motion for summary judgment; and it only applied to one of the two Programs (the Terrorist Surveillance Program). Consequently, it does not constitute compelling or decided legal authority and cannot be a basis for exclusion. Second, the Proposal does not seek numerical or statistical information about either program and therefore the two cases are not analogous.

5 This is also the reasoning adopted in the Vermont Public Service Board's denial of AT&T's motion to dismiss. See *Petition of Vermont Department of Public Service* Docket No. 7193, Order on Motion to Dismiss at p. 18. Exhibit 9.

<http://www.foxnews.com/printer_friendly_story/0,3566,195745,00.html>. Exhibit 3.

As the Hon. Judge Walker observed

> BellSouth, Verizon and Qwest have publicly denied participating in the alleged communication records program . . . . Importantly, the public denials by these telecommunications companies undercut the government and AT&T's contention that revealing AT&T's involvement or lack thereof in the program would disclose a state secret.

Walker Order at page 41. Given that these companies apparently do not believe there is any reason they cannot deny their involvement it is unclear why AT&T would feel compelled to make the argument in its no-action request letter other than to obfuscate the true validity of the Proposal.

Going beyond those points, however, we also maintain that the Company's claims are erroneously based on a mis-characterization of what the Proposal actually is requesting of the Company - thereby allowing them to construct a straw-man that they can knock down. The Sidley letter, in particular, has tried to respond by reading the word "confidential" out of the Proposal. In addition, the Sidley letter fails to acknowledge that the Proposal is focused on a broad set of policy issues that reach beyond the particulars of the Terrorist Surveillance Program or the Calling Records Program. A full third of the whereas clauses do not address the Programs, but rather are focused on the general, overarching issue of privacy. The following three whereas clauses are a clear demonstration of the focus on the Proposal being not limited to the Programs.

> WHEREAS: The right to privacy is a long established value, enshrined in the Constitution and decades of U.S. jurisprudence, and cherished by people of all political persuasions; and
>
> WHEREAS: Privacy protections serve many important societal purposes: encouraging development of science and knowledge; preventing fraud; and allowing individuals to communicate sensitive information (i.e. health care providers, clergy, brokers); and
>
> WHEREAS: In light of the potentially negative uses of today's technology, we believe it is important that AT&T re-examine the steps it takes to protect the values embodied in an individual's right to privacy.

Furthermore, the actual resolve clause makes only one reference to the Programs and for the overwhelming majority of its text focuses on the privacy of customer communications and records regardless of any relationship to the Programs. It almost goes without saying that AT&T is regularly asked to confront privacy issues as they relate to subjects such as criminal matters, identity theft and pretexting. This proposal clearly is concerned with the Programs, but to say that it is limited to the Programs is a disingenuous attempt to ignore half of the language in the Proposal.

As noted earlier, in *The Quaker Oats Company* (April 6, 1999) the Staff wrote "neither counsel for you nor the proponent has opined as to any ***compelling*** state law precedent. In view of the lack of any ***decided legal authority*** we have determined not to express any view with respect to the application of rules 14a-8(i)(1) and 14a-8(i)(2) to the revised proposal." (emphasis added). We observe that the Company has not cited to any example of the state secrets privilege or any other national security law being applied to shareholder proposals or other provisions of the proxy rules. Furthermore, they have not established any decided legal authority on this issue. In fact, the Hon. Judge Walker's Order indicates that

the Company's assertions of the law are misplaced and that the decided legal authority runs contrary to their position. Consequently, the Company has not met its burden and we respectfully request the Staff conclude that Rule 14a-8(i)(2) does not apply to the Proposal. In the alternative, and in light of *The Quaker Oats Company*, we request that the Staff not express any view with the respect to the application of Rule 14a-8(i)(2).

In conclusion, it is abundantly clear that the Company would be able to implement the Proposal without violating the law. Whether it be the compelling conclusions of the Hon. Judge Walker or the accurate reading of the Proposal, in both cases it is apparent that the Proposal is asking the Company to discuss the privacy issues facing the Company at an appropriately general level that will not violate the law. These issues are being discussed already in public and in the courts and they rightfully should be discussed by the Company with its shareholders as well.

II. The Proposal is Focused on a Significant Policy Issue that Transcends the Ordinary Business of the Company and Therefore must be Included in the Company's Proxy.

Rule 14a-8(i)(7), the ordinary business exclusion, is based on the corporate law principle that particular decisions are best left to management because they are in a better position than shareholders to make those day-to-day decisions. *However*, when a company encounters issues of significant social policy importance, it is no longer the case that management is in a better position than shareholders to evaluate how the company should address the issue. Rather when the Company is facing a significant social policy issue, the shareholders have an appropriate and legitimate role to play. Consequently, under the ordinary business exclusion, management's role must yield to the rights of shareholders to raise, consider and opine on those matters which have significant social consequences.

A. The Proposal Focuses on a Significant Social Policy Issue.

A proposal cannot be excluded by Rule 14a-8(i)(7) if it focuses on significant policy issues. As explained in *Roosevelt v. E.I. DuPont de Nemours & Company*, 958 F. 2d 416 (DC Cir. 1992) a proposal may not be excluded if it has "significant policy, economic or other implications". *Id. at 426*. Interpreting that standard, the court spoke of actions which are "extraordinary, i.e., one involving 'fundamental business strategy' or 'long term goals.'" *Id. at 427*.

Earlier courts have pointed out that the overriding purpose of Section 14a-8 "is to assure to corporate shareholders the ability to exercise their right – some would say their duty – to control the important decisions which affect them in their capacity as stockholders." *Medical Committee for Human Rights v. SEC,* 432 F. 2d. 659, 680-681 (1970), vacated and dismissed as moot, 404 U.S. 402 (1972).

Accordingly, for decades, the SEC has held that "where proposals involve business matters that are mundane in nature and ***do not involve any substantial policy or other considerations***, the subparagraph may be relied upon to omit them." *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 891 (S.D.N.Y. 1993) quoting Exchange Act Release No. 12999, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976) ("1976 Interpretive Release") (emphasis added).

It has been also been pointed out that the 1976 Interpretive Release explicitly recognizes "that all proposals could be seen as involving some aspect of day-to-day business operations. That recognition

underlays the Release's statement that the SEC's determination of whether a company may exclude a proposal should not depend on whether the proposal could be characterized as involving some day-to-day business matter. Rather, ***the proposal may be excluded only after the proposal is also found to raise no substantial policy consideration***." *Id*.

Most recently, the SEC clarified in Exchange Act Release No. 34-40018 (May 21, 1998) ("1998 Interpretive Release") that "Ordinary Business" determinations would hinge on two factors.

> Subject Matter of the Proposal: "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 hiring, promotion, and termination of employees, decisions on the 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." 1998 Interpretive Release (emphasis added)
>
> "Micro-Managing" the Company: The Commission indicated that shareholders, as a group, will not be in a position to make an informed judgment if the "proposal seeks to `micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Such micro-management may occur where the proposal "seeks intricate detail, or seeks specific time-frames or methods for implementing complex policies." However, "timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations."

It is vitally important to observe that the company bears the burden of persuasion on this question. Rule 14a-8(g). The SEC has made it clear that under the Rule "***the burden is on the company to demonstrate that it is entitled to exclude a proposal.***" *Id*. (emphasis added).

We also note that recently the Second Circuit has ruled on a Rule 14a-8 matter in *AFSCME v. AIG*. One of the principles supporting that decision is the following:

> Although the SEC has substantial discretion to adopt new interpretations of its own regulations in light of, for example, changes in the capital markets or even simply because of a shift in the Commission's regulatory approach, it nevertheless has a "duty to explain its departure from prior norms." *Atchison, T. & S. F. Ry. Co v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (citing *Sec. of Agric. v. United States*, 347 U.S. 645, 652-53 (1954)); cf. *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994) (stating that "an agency may alter its interpretation of a statute so long as the new rule is consistent with the statute, applies to all litigants, and is supported by a 'reasoned analysis'"). *Id.*

Therefore it is apparent that the Second Circuit, noting the lack of "reasoned analysis", has reaffirmed the importance of the SEC staff adhering to the 1976 and 1998 Interpretive Releases.

Consequently, when analyzing this case, it is incumbent on the Company to demonstrate that the Proposal does not involve any substantial policy or other considerations. Therefore, it is only when the Company is

able to show that the Proposal raises ***no*** substantial policy consideration that it may exclude the Proposal. Clearly, this is a very high threshold that gives the benefit of the doubt to the Proponents and tends towards allowing, rather than excluding, the Proposal.

Examples of how significant of a social policy issue consumers' telephone and communications privacy has become are abundant:

- A May 2006 Gallup Poll found that 67% of Americans say that they are very closely or somewhat closely following reports that "a federal government agency obtained records from three of the largest U.S. telephone companies in order to create a database of billions of telephone numbers dialed by Americans" http://www.galluppoll.com/content/default.aspx?ci=5263. Exhibit 4. This is consistent with a December 2005 poll by the Rasmussen Report which concluded that "Sixty-eight percent (68%) of Americans say they are following the NSA story somewhat or very closely." http://www.rasmussenreports.com/2005/NSA.htm. Exhibit 5. This clearly demonstrates that the issue has persistent and widespread interest in American society.

- The issue has resulted in numerous reports by print, radio, television and Internet media. Attached in Exhibit 6 is a partial list of more than 40 stories on the issue from media outlets including the New York Times, USA Today, Wired Magazine, CBS, CNN and National Public Radio.

- The issue has been the subject of substantial interest by politicians and regulators. During the 109th Congress, the Senate Judiciary Committee subpoenaed the heads of several telecommunications companies to testify about the program and it was only at the behest of the Vice President of the United States that hearings on this issue were temporarily halted. John Diamond, *Specter: Cheney put pressure on panel*, USA Today, June 7, 2006; John Diamond, *Senators won't grill phone companies*, USA Today, June 7, 2006.

- Senator Patrick Leahy, (D-VT), the incoming chairman of the Senate Judiciary Committee, has expressed concern about the need for the companies allegedly involved to be held accountable if wrongdoing is found. "These companies may have violated the privacy rights of millions of Americans," Leahy said. "Immunity as a general rule in any industry can be a dangerous proposition for it promotes less accountability." Rebecca Carr, *Bush is seeking immunity for telecom industry*, Cox News, November 15, 2006.

- Several key national politicians and regulators have called for investigation into the scandal including Federal Communications Commissioner Michael Copps (Exhibit 7) and Representative Edward Markey (D- MA) (Exhibit 8), the then ranking minority member of the House Subcommittee on Telecommunications and the Internet.

- State utility regulators have also devoted substantial time and attention to the issue. Investigations of the telecommunications companies phone record sharing have been instituted in Vermont, Maine, New Jersey, Connecticut, and Missouri. Exhibit 9. Hearings on the issue have been held in a number of other states including Washington, Delaware, Nebraska, and Pennsylvania. Exhibit 10.

- Local officials have also expressed concerns. San Francisco Mayor Gavin Newsom has indicated that he will perform a full review of all of AT&T's contracts with the city in light of their alleged participation in this scandal. Scott Lindlaw, *SF Reviews Contracts with AT&T Over Domestic*

Spying, Associated Press, July 11, 2006. http://sfgate.com/cgi-bin/article.cgi?f=/news/archive/2006/07/11/financial/f140225D55.DTL Exhibit 11.

- The possibility that AT&T has shared phone records has also exposed the company to substantial potential liability. More that two-dozen lawsuits have been filed seeking damages that could run to billions of dollars. Ryan Singel, *AT&T Sued Over NSA Eavesdropping*, Wired, January 31, 2006. (http://www.wired.com/news/technology/0,70126-0.html Exhibit 12. AT&T is a defendant in at least 9 of these suits and in our opinion the cases represent a significant financial risk to the Company.

- A May 2006 Newsweek Poll indicated that "53 percent of Americans think the NSA's surveillance program 'goes too far in invading people's privacy,'" The report on the poll specifically discussed the allegation that the "NSA has collected tens of millions of customer phone records from AT&T Inc." http://www.msnbc.msn.com/id/12771821 Exhibit 13.

- At Cisco Systems, Inc.'s November 2006 Annual Meeting, a shareholder proposal asking the company to address "steps the company could reasonably take to reduce the likelihood that its business practices might enable or encourage the violation of human rights, including freedom of expression and privacy . . ." received a noteworthy ***29% of the vote***. http://www.bostoncommonasset.com/news/cisco-agm-111506.html Exhibit 14. This vote is a clear expression of considerable shareholder concern about the role that technology and communications companies play in the freedom of expression and privacy.

In short, it is evident that the issue has become significant in a wide spectrum of venues including polling, media, congressional leadership and hearings, federal and state administrative investigations, locally and in the courts.

It is also evident that the issue of telecommunications privacy has already been well established as a significant social policy issue. See, *Cisco Systems Inc.* (July 13, 2002). In *Cisco*, the proposal focused on the freedom of expression, association and privacy – specifically requesting that Cisco report to shareholders on the capabilities of its hardware and software products that allow monitoring and/or recording of Internet traffic. The company attacked the proposal on various grounds including that it did not focus on a significant policy issue. That argument was rejected by the SEC staff in its conclusion that these issues were in fact significant policy issues. It is also interesting to note the following statements made by Cisco in its ordinary business argument:

> The capabilities which Proponent is addressing meet fundamental and legitimate needs to protect the integrity of Internet communications networks against theft, sabotage, viruses, unlawful intrusion and other unlawful activities. For example, Cisco products used by its customers, whether a private business, a telecommunications service provider or the Securities and Exchange Commission, have these capabilities, as do the products of its competitors. Proponent argues that the use of these capabilities by governments for monitoring is a threat to freedom of speech for all world-wide users. However, such capabilities are legitimately used by governments for the foregoing purposes and are also used by the United States and other countries for law enforcement and national security purposes and to protect their citizens against the threat of terrorism. ***Of course, in the United States and other countries whose systems are based upon the rule of law, the exercise of these powers is subject to constitutional and legal protections and respect for individual rights.*** The report required by the Second Proposal would address

none of ***these significant social policy issues.*** (emphasis added)

We believe that Cisco had it right when it stated that the the balance between national security/law enforcement and the constitutional and legal protections for individual rights is a significant social policy issue that is properly addressed in a shareholder proposal like the one submitted by the Proponents.

The issues raised by the alleged participation of AT&T in the Programs and the resulting controversy and financial risks transcend the day-to-day affairs of the Company. These are issues that shareholders are appropriately concerned about and as a result we have the right to raise these issues at AT&T's annual meeting and express our opinion about how the Company should explore its role in protecting the privacy of American citizens. These issues are beyond a doubt significant social policy issues that have captured the attention of millions of Americans; federal, state and local politicians; and are clearly of concern to other investors. We respectfully believe the Staff should reach the same conclusion and notify the Company that it cannot exclude the Proposal as merely focusing on the day-to-day business of AT&T.

B. The Proposal Does Not Focus on the Ordinary Business of the Company.

As discussed at length above, all shareholder proposals can be seen as involving some aspect of a company's day-to-day business operations. So while it is important to consider the issues raised by the Company, ultimately, "the proposal may be excluded only after the proposal is also found to raise no substantial policy consideration."

1. Litigation: The Proposal does not implicate the ordinary business litigation exclusion because it does not seek to dictate the results of any litigation.

The Company also asserts that the Proposal is excludible as affecting its litigation strategy and the discovery process of numerous proceedings. First, it should be noted once again that the Proposal allows the Company to exclude "confidential information," which ncludes matters of litigation strategy and discovery related issues. Nowhere does the Proposal, expressly or implicitly, require a report on how the Company plans to argue the procedural or substantive aspects of any legal case or how it expects to resolve the cases. Instead what is contemplated by the Proponents is reporting on the overarching policy issues, descriptions of alternative future policies, and general descriptions of past expenditures. Finally, we note that the Company does very little to flesh out its general assertions that the Proposal interferes with litigation and essentially does little more than make the bald assertion and cite cases that support the general rule without making an effort to analogize those cases to the Proposal.

Reynolds American Inc. (February 10, 2006). In that case, the proposal requested the company "undertake a campaign aimed at African Americans apprising them of the unique health hazards to them associated with smoking menthol cigarettes" while at the same time the company was a defendant in a lawsuit in which the Company was disputing " the use of menthol cigarettes by the African American community poses unique health risks to this community." In other words, if the proposal was enacted, the Company would have directly conceded the central point of the litigation and essentially mooted the litigation. Examining the Proposal in light of this case, an analogy would exist only if the Proposal sought the Company make some sort of statement that it has (as it characterizes the lawsuits) "violated consumer privacy rights". This is not what the Proposal does. Our Proposal requests an overarching policy discussion of the issues surrounding privacy rights and does not request the Company come to any particular conclusion regarding those rights and does not seek thereby to

dictate the results of the lawsuits. Consequently, *Reynolds* cannot provide a basis for exclusion.

R.J. Reynolds Tobacco Holdings, Inc. (February 6, 2004). In this example, the proposal asked:

> RJR stop all advertising, marketing and sale of cigarettes using the terms "light," "ultralight," "mild" and similar words and/or colors and images until shareholders can be assured through independent research that light and ultralight brands actually do reduce the risk of smoking-related diseases, including cancer and heart disease

At the same time the Company was arguing that it was entitled to advertise and market cigarettes using the terms "light," "ultralight," "mild" and similar words. That is, if the proposal had passed the result would have been to moot the litigation because the litigation would have been resolved. Consequently, it is evident that *R.J. Reynolds Tobacco Holdings, Inc.* (February 6, 2004) is not dispositive in this case because there is nothing in our Proposal that would resolve the litigation that the Company refers to. For the Company argument to be valid, the Proposal would need to some how result in the litigation being resolved. Clearly a request for an overarching policy discussion of privacy issues as they relate to cooperating with local, state and federal authorities and a request for a description (not an accounting) of past expenses does not directly or indirectly dispose of any litigation the Company is engaged in.

R.J. Reynolds Tobacco Holdings, Inc. (March 6, 2003). Here, the resolution was designed to resolve the pending litigation against the company regarding its smuggling practices. In particular, the resolution required the company to "determine the extent of our Company's past or present involvement directly or indirectly in any smuggling of its cigarettes throughout the world." The litigation pending against the company was seeking precisely these outcomes. So implementation of the resolution could have effectively meant resolving the litigation. In other words, this resolution fit into the ordinary business precedents "when the subject matter of the proposal is the same or similar to that which is at the heart of litigation in which a registrant is then involved." That is far from the situation in our resolution. The Proposal does not request, directly or even indirectly, any assessment about the litigation nor require any outcome to the litigation.

Similar conclusions must also be reached upon thorough review and analysis of the five other cases cited by the Company on the bottom of page five of its letter. As the Company made very clear in its brief descriptions of the cases, they were all examples of proposals requesting certain actions to be taken by the company that were expressly and directly linked to specific actions in specific pending or contemplated litigation. *NetCurrent, Inc.* (May 8, 2001) (requiring the company ***to bring an action in court***); *Microsoft Corporation* (September 15, 2000) (asking the company ***to sue the federal government***); *Exxon Mobil Corporation* (March 21, 2000) (requesting the company ***to make settlement payments***); *Philip Morris Companies* (February 4, 1997) (recommending the company ***to implement regulations that it was challenging in court***); and *Exxon Corporation* (December 20, 1995) (asking the company ***to forgo appellate rights***).

The Proposal does not expressly, let alone impliedly, request the Company to bring an action in court, to sue anyone, to make settlement payments, to implement regulations, forgo appellate rights or do anything that could be said to involve whether or how the Company will litigate the cases.

In essence the Company is arguing that if there is a lawsuit on the matter then the Company is per se allowed to exclude any shareholder proposals on the matter. Clearly that is not the case. Consider for example the following examples which are more analogous to the Proposal:

In *RJ Reynolds* (March 7, 2000) the company had to include a resolution that called for the company to create

an independent committee to investigate retail placement of tobacco products, in an effort to prevent theft by minors. The company argued that due to two current lawsuits (against FDA and the state of Massachusetts) the Proposal, if implemented, would interfere with litigation strategy by asking the company to take voluntary action in opposition to its position in the lawsuits. The proponent prevailed by arguing that it addressed a significant policy issue (tobacco and children) and that the Proposal is unrelated to litigation. "[L]itigation strategy has been interpreted to encompass matters ranging from the decision whether to institute legal proceedings, to the conduct of a lawsuit, to the decision whether to settle a claim or appeal a judgment." That proposal, as the present one now being considered, deals with none of the above.

In *Philip Morris* (February 14, 2000), the proposal called for management to develop a report for shareholders describing how Philip Morris intends to address "sicknesses" caused by the company's products and correct the defects in the products that cause these sicknesses. The company argued that the proposal requested the company to issue a report on matters that are prominently at issue in numerous lawsuits. The proponent prevailed by arguing that the proposal neither requests information about litigation nor tells the company how to handle the litigation. Due to statements on the company's web site, essentially admitting to cigarettes causing "sickness," the proposal asking how the company will address that "sickness" would not likely interfere with any litigation strategy. Similarly, because the Company has already engaged in some general discussions of the Programs, our Proposal will not interfere with any litigation strategy.

In *Bristol-Myers Squibb Company* (February 21, 2000), the resolution called for implementation of a policy of price restraint on pharmaceutical products for individual customers and institutional purchasers to keep drug prices at reasonable levels and report to shareholders on any changes in its current pricing policy by September 2000. The company argued that the Proposal sought to have the company take action in an area of its business currently subject to litigation: its pricing practices. The proponent prevailed -- arguing that as a matter of good public policy a proposal raising a broad policy issue should not be automatically excluded if the company has at sometime, somewhere, been sued in connection with a related matter. Our Proposal is analogous to this case because it raises a broad policy issue that happens to be implicated in a number of settings, including litigation.

Further, the mere mention of lawsuit in a shareholder resolution does not render the resolution excludible as ordinary business. In *RJR Nabisco* (February 13, 1998), the resolution called for the company to implement in developing countries the same programs for prevention of smoking by youths as voluntarily proposed and adopted in US. The company mentioned that proponents refer to lawsuits against subsidiaries in France and Philippines dealing with alleged violations of marketing regulations as a basis for extending the US policy abroad. The proponent prevailed by pointing out that the company has already implemented these programs in the US and therefore has nothing to do with lobbying/litigation strategies.

In sum, this analysis demonstrates that the Proposal does not interfere with any litigation the Company is, or may be, engaged in. It does not direct any particular result nor does it require the Company to divulge its strategies. Rather it is properly focused on the broad yet very significant social policy issues confronting the Company at this time.

2. Customer Privacy: It is permissible for the Proposal to focus on the freedom of expression and privacy.

The Company further argues that the Proposal should be excluded because it improperly relates to customer privacy. In support of this contention the Company cites two cases: *Bank of America Corp.* (February 21, 2006) and *Applied Digital Solutions, Inc.* (March 25, 2006).

Addressing *Applied Digital Solutions, Inc.* first, it is important to observe that the Company erroneously stated that this proposal was excluded as relating to "procedures for protecting customer information". Rather a review of the Staff letter on this proposal shows that the proposal was excluded because it related to "product development" - a very different reason. Consequently, *Applied Digital Solutions, Inc.* is not relevant to this discussion and cannot be a basis for exclusion.

With respect to *Bank of America Corp.* (February 21, 2006), that proposal stated:

> Therefore, be it resolved that the Board of Directors report to shareholders no later than July 2006 on the company's policies and procedures for ensuring that all personal and private information pertaining to all Bank of America customers will remain confidential in all business operations. This report should also cover policies relating to those employees of contractors and subcontractors hired by the company.

Contrary to the assertion of the Company, that proposal is quite distinct from our Proposal. *Bank of America Corp.* simply requested a mere cataloging of existing policies and procedures for ensuring confidentiality not unlike the "general conduct of a legal compliance program" exclusion discussed below in subsection 3. The Proposal, in contrast, goes far beyond a day-to-day issue in that it requests a description of overarching policy issues, past expenditures and ***additional policies.*** Our Proposal does not simply focus on a mundane matter like describing existing policies or mere procedural issues, but rather focuses on the significant policy issues of the societal and business concerns facing the Company as the result of the allegations relating to the Programs.[6]

Instead of looking to *Bank of America*, it is more instructive to review the Proposal in light of *Cisco Systems Inc.* (July 13, 2002) cited earlier. In *Cisco*, the proposal focused on the freedom of expression, association and privacy – specifically requesting a report:

> which describes the capabilities of Cisco hardware and software that is sold, leased, licensed, or otherwise provided to any government agency or state-owned communications/information technology entity(ies) in any country (a) which could allow monitoring, interception, keyword searches, and/or recording of internet traffic . . .

Both the Cisco proposal and the Proposal seek to address the same significant policy issue – privacy rights. Further, both proposals address issues surrounding the implications of monitoring, intercepting and recording telecommunications data and content; and the use of that information by the government. In these ways, the Proposal is completely analogous to *Cisco* and therefore it should be treated by the SEC as permissible.

3. Legal Compliance: the Proposal appropriately requests that the Company consider additional policies within the Company's existing compliance structure.

The Company further asserts that the Proposal is excludible because it improperly relates to legal compliance matters. This analysis is incorrect, however, because it is clear that proposals are permitted to

6 We also observe that in *Bank of America* the proponent did not offer any discussion of analysis of Rule 14a-8(i)(7), but made a few conclusory statements in response to the no-action request. Consequently, that proposal does not represent a full consideration of the issues.

addresses ***additional measures*** that can be analyzed and taken within the ***existing legal compliance structures.*** Upon further examination, it is clear that none of the cases cited by the Company apply and that there are analogous examples of permissible proposals.

In, *Allstate Corporation* (February 16, 1999) the proponents sought to create an entirely new committee that would hire experts in "the fields of: Criminal Law, Mc Carran Ferguson Act, Bad Faith Insurance Actions, Shareholders Derivative Actions and a Financial Management firm be organized for the purpose of investigating the issues raised". This proposal is distinct in two ways from the Proposal. First, *Allstate* sought to create a whole new compliance structure for the company. The Proposal, in contrast, does not do that – it simply requests a discussion, within the existing compliance mechanisms, of potential future policies that could be implemented. Second, the *Allstate* proposal achieved a comparatively high level of micro-management that the Proposal does not. That proposal sought to dictate how the compliance program would occur with specifics about certain fields of law and the need to hire specific personnel to staff the committee. The Proposal in contrast appropriately leaves those questions, ultimately management issues, within the discretion of the Board and simply focuses on the significant social policy issues facing the Company.

Similarly, the *Monsanto Company* (November 3, 2005) proposal requested the creation of an ethics oversight committee to "insure compliance with the Monsanto Code of Conduct, the Monsanto Pledge, and applicable laws, rules and regulations of federal, state, provincial and local governments, including the Foreign Corrupt Practices Act." While falling short of the micro-managing staffing requirements, the *Monsanto* proposal is flawed in the same ways as *Allstate*. In contrast to the Proposal, *Monsanto* tried to create a separate compliance structure and mechanism and sought to dictate the precise statutes to be considered. Our Proposal is distinct from *Monsanto* in that it works within the existing compliance structures of the Company and therefore *Monsanto* cannot be grounds for exclusion.

The *Halliburton Company* (March 10, 2006) proposal, cited by the Company, requested a report "on the policies and procedures adopted and implemented to reduce or eliminate the reoccurrence of such [criminal] violations and investigations." This proposal was excluded as addressing "general conduct of a legal compliance program." What is distinct about *Halliburton* is that the proposal simply sought *a mere recitation* of policies – a request that can fairly be described as relating to the "general conduct of a legal compliance program." Where *Monsanto* and *Allstate* went too far, *Halliburton* was too vague and general. In contrast, our Proposal strikes the correct balance and requests the Company, within its existing *mechanisms*, conduct an analysis and discussion of ***additional*** measures that could be taken in the ***future***. Consequently, *Halliburton* does not apply to this case.

Finally, in *Duke Power Company* (February 16, 1999) the shareholder sought what can only be described as extremely detailed information on the technical aspects of a highly regulated portion of the company's business. In fact the resolve clause ran almost 300 words and included a list of very specific technical information on particular facilities. It is erroneous to analogize our Proposal to *Duke* for the very simple reason that the *Duke* proposal achieved a extraordinary level of micro-management in a very highly regulated and technical aspect of pollution controls. The Proposal in contrast raises, at a general level, questions of *additional* policies, procedures or technologies to protect customers *constitutional* rights to privacy, freedom and association.

In contrast to the cases cited by the Company, consider for example the proposal in *Dow Chemical Company* (February 28, 2005) which sought an analysis of the adequacy and effectiveness of the "company's internal controls related to potential adverse impacts associated with genetically engineered

organisms" which the Staff concluded was permissible. The allowed *Dow* proposal is analogous to our Proposal in two ways. First, both proposals seek a discussion about how the company is addressing a significant policy issue – adverse impacts associated with genetically engineered organisms on the one hand and privacy rights on the other. Both also seek a discussion of additional measures – improved effectiveness of the company's internal controls in one case and additional policies in the Proposal.

Also, consider *Bank of America Corp.* (February 23, 2006) in which the Staff denied a no-action request for a shareholder proposal, which requested that this company's board "*develop higher standards* for the securitization of subprime loans to preclude the securitization of loans involving predatory practices" (an illegal practice). The company challenged the proposal on the grounds that the proposal dealt with "a general compliance program" because it sought to ensure that the company did not engage in an illegal practice. The Staff rejected that reasoning and we respectfully submit that the Staff should do so again. In both our Proposal and the *Bank of America Corp.* proposal, the resolutions focus on improving policies and taking further steps to ensure that the company appropriately addresses a significant policy issue within the existing compliance system. It is clear from this case that it is proper for proposals to focus on *additional steps* that a company can take to improve its policies.

In conclusion, we respectfully request the Staff conclude that the Proposal appropriately touches on improvements to the existing compliance structures and does not seek to micro-manage the Company or otherwise create new compliance mechanisms.

4. Micro-management: the Proposal is permissible because it strikes the appropriate balance between an overly specific and excessively general request.

The Company also asserts that the Proposal seeks to micro-manage the company by addressing complex matters. While the appropriateness of this Proposal for shareholder consideration is addressed throughout this letter it is important to briefly respond to the charge of micro-management. As discussed earlier, the Commission has indicated that shareholders, as a group, will not be in a position to make an informed judgment if a "proposal seeks to `micro-manage' the company by ***probing too deeply*** into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Such micro-management may occur where the proposal "***seeks intricate detail***, or seeks specific time-frames or methods for implementing complex policies." However, "timing questions, for instance, could involve significant policy where large differences are at stake, and ***proposals may seek a reasonable level of detail*** without running afoul of these considerations." 1998 Interpretive Release.

In light of this standard, it would be false to conclude that a proposal that seeks a general report on "overarching" issues and policies is seeking "intricate detail". Furthermore, there is a long line of precedents that support a request for information on past expenditures. See *Chevron Corporation* (February 28, 2006) (seeking "annual expenditures by category for each year from 1993 to 2005, for attorneys' fees, expert fees, lobbying, and public relations/media expenses, relating in any way to the health and environmental consequences of hydrocarbon exposures and Chevron's remediation of Texaco drilling sites in Ecuador and (b) expenditures on the remediation of the Ecuador sites."); *E.I. du Pont de Nemours and Company* (February 28, 2005) (virtually identical language); and *General Electric Company* (February 2, 2004) (virtually identical language).

This Proposal in fact strikes the appropriate balance between being specific enough not to be vague or indefinite and general enough not to be micro-managing the Company. We also note that in the

Company's vagueness argument that is addressed more fully below in section 3, the Company does not claim that the proposal is vague in the sense that particular words are not sufficiently specific or are too ambiguous, but rather that the proposal on the whole is contradictory. Consequently, given the brevity of the micro-management argument and the implicit concession on vagueness, it appears that there is no serious argument the Proposal improperly "probes too deeply". Rather the correct conclusion is that the Proposal in fact seeks a "reasonable level of detail" such that shareholders are in a position to make an informed judgment.

5. Political process: the Proposal is proper because it does not seek an evaluation of a specific legislative proposal.

Finally, the Company makes a brief argument that the Proposal involves the Company in the political or legislative process by asking the Company to evaluate the impact that the Programs would have on the company's business operations. To support this contention the Company points to three cases *International Business Machines Corp.* (March 2, 2000); *Electronic Data Systems Corp.* (March 24, 2000) and *Niagara Mohawk Holding, Inc.* (March 5, 2001). One does not need to go any farther than looking at the text of these proposals to see that they do not apply to this case. The proposal in *International Business Machines Corp.* (which is reflective of the other two) requests:

> the Board of Directors to establish a committee of outside directors to prepare a report at reasonable expense to shareholders on the potential impact on the Company of pension-related proposals now being considered by national policy makers, including issues under review by federal regulators about the legality of cash balance pension plan conversions under federal anti-discrimination laws, as well as legislative proposals affecting cash balance plan conversions and related issues.

As this makes clear, that proposal expressly sought a direct evaluation of specific legislative and regulatory proposals concerning cash balance plan conversions. The Proposal is quite distinct from the *International Business Machines Corp.* type proposal because it does not seek an evaluation, expressly or implicitly, of *any* legislative or regulatory proposals let alone a specific proposal comparable to "cash balance pension plan conversions under federal anti-discrimination laws".

It is also evident that some proposals which *do* involve companies in the political or legislative process are in fact permissible. Consider, *Coca-Cola Company* (February 2, 2000), in which the SEC staff denied a no-action request. In that case, the resolution asked the company to promote the retention and development of bottle deposit systems and laws. It also requested the company cease any efforts to replace existing deposit and return systems with one-way containers in developing countries or countries that do not have an effective and comprehensive municipal trash collection and disposal system. And in *Johnson and Johnson* (January 13, 2005) the shareholder requested the company to, inter alia, "Petition the relevant regulatory agencies requiring safety testing for the Company's products to accept as total replacements for animal-based methods, those approved non-animal methods described above, along with any others currently used and accepted by the Organization for Economic Cooperation and Development (OECD) and other developed countries." That proposal was deemed permissible in the face of a "political process" objection. See also, *RJR Nabisco Holdings Corp* (February 13, 1998) (proposal requesting "management to implement the same programs that we have voluntarily proposed and adopted in the United States to prevent youth from smoking and buying our cigarettes in developing countries." was permissible.)

Finally, we note that significant social policy issues inherently have a political aspect to them. Because such issues are important to society and have a high public profile, they attract the attention of politicians and legislators. Consequently, any ordinary business analysis must take this inherently political characteristic of significant policy issues into account. Thus when we see that the privacy of customer telephone records and communication content is, not surprisingly, a political issue we should recognize that it is not fatal to our Proposal. Therefore, we urge the Staff not to conclude the Proposal is excludable as ordinary business.

6. "Touches" on a Significant Policy Issue: The Proposal must appear on the Company proxy because it directly and fully raises a Significant Policy Issue.

In the last section of its letter, the Company seems to have forgotten two seminal cases in Rule 14a-8 law - *Roosevelt v. E.I. DuPont de Nemours & Company*, 958 F. 2d 416 (DC Cir. 1992) and *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877 (S.D.N.Y. 1993). These cases make it abundantly clear that "***the proposal may be excluded only after the proposal is also found to raise no substantial policy consideration***." *Id* at 891. First, to argue that the proposal can be excluded, as stated by the Company, "regardless of whether or not it touches upon a significant social policy issue" is directly contrary to this rule.

Second, as was discussed at length earlier, it is clear that AT&T is currently facing a significant social policy issue in the form of its alleged participation in the Programs and widespread concerns about privacy. To imply that the Proposal merely touches on a significant policy issue is misplaced and cannot provide sufficient reasons to overcome the Company's significant burden of persuasion to exclude the Proposal.

III. Vagueness: The Proposal does not violate the law and has struck the proper balance between specificity and generality, therefore the Company has the power and authority to implement it.

The Company's final argument is that the Proposal is vague and indefinite and, therefore, the Company would lack the power or authority to implement it. Essentially, they contend that if the Company issued the requested report that "it would issue a report excluding substantially all of the information sought for by the Proposal." They also claim that this makes the Proposal internally self-conflicting and therefore so vague and ambiguous that it is beyond the Company's "power to effectuate" in violation of Rule 14a-8(i)(6). Both claims are built upon the premise that the state secrets privilege makes any discussion of the overarching issues forbidden and therefore the Proposal has irreconcilable conflicts within its requests that would result in a meaningless or empty report.

First, as discussed at the beginning of this letter the state secrets objection does not make the Proposal excludable. Therefore, it is inaccurate to say that the essential portion of the information requested by the Proposal would be identified by a court as classified information and therefore must be treated as confidential. As explained above, the existence of the Programs and the Company's participation has already been established in court and requesting an overarching discussion of these issues does not violate the law. Therefore, if the Proposal were implemented it would contain information that is useful and relevant for shareholders. As such, shareholders are not being misled by the language of the Proposal nor does it promise more information than can be delivered. The Proposal seeks a general discussion of

the privacy issues confronting the Company and the Company will be able to have such a discussion.

Furthermore, to suggest that shareholders can not understand the confidentiality requirements that would be necessary to implement the Proposal is to vastly underestimate the intelligence of shareholders. Many of AT&T's shareholders are large institutional investors who receive the counsel of professional proxy advisors and are more than familiar with the demands of confidentiality requirements. In addition, the Proposal makes clear, in the face of the Company's vigorous attempts to find to the contrary, that it is not seeking a high level of specificity or intricate detail. In fact, shareholders will be able understand that the Proposal requests a general discussion of the issues and does not seek to illicit confidential information.

Turning to the cases cited by the Company, it is evident that, once again, they do not apply to the Proposal and simply document the general proposition that proposals may not be vague, indefinite or beyond the power of the company to effectuate. In *Philadelphia Electric Co.* (July 30, 1992) the proposal sought a plan "that will in some measure equate with the gratuities bestowed on Management". It is self-evident why that proposal was excluded as vague and we observe that, as the Staff concluded, reading the full proposal did not shed sufficient light on the meaning of the proposal.

Faqua Industries (March 12, 1991) presents a different case in which the "meaning and application of [specific] terms and conditions . . . would be subject to differing interpretations." If the argument being made by the Company that this Proposal contains terms that are subject to differing interpretations, it has not made the argument beyond the unsupported and unexplained statement that "the terms of the Proposal are vague and ambiguous." The Company has not argued, for example, that the meaning of the words "communications" or "privacy" need to be defined. Consequently, the facts in *Faqua* is not analogous to the Proposal.

As the Company rightly pointed out, the proposal in *International Business Machines Corporation* (January 14, 1992) was properly excluded because its resolve clause, in its entirety, stated "It is now apparent that the need for representation has become a necessity". This is a clear example of an excessively vague proposal because it only contains conclusory language and does not ask the company to do anything in particular. In contrast, the Proposal, sets forth a series of topics we would like to see the Company address. The topics (the overarching issues surrounding disclosure of customer communications; additional policies to protect customer communications; and past costs associated with the allegations) are described with a reasonable, but not excessive, level of detail that gives shareholders a clear sense of what is being asked. Because our Proposal is distinct from the *International Business Machines Corporation* proposal, this case does not provide a basis for exclusion.

Similar to *Faqua*, the company's argument in *The Southern Company* (February 23, 1995) was that the "proposal is replete with vague and indefinite terms, such as "essential steps", "highest standards", "positive steps", "reliable information", and "grave deficiencies". Once, again that argument and, in this case, *The Southern Company* is not applicable to the Proposal.

In contrast there are numerous analogous cases in which proposals were not excluded as being so vague as to make implementation impossible.

In *Microsoft Corporation* (September 14, 2000) the proposal requested the board "to make all possible lawful efforts to implement and/or increase activity on each of the (human rights) principles named above in the People's Republic of China." The company argued that the proposal was too vague to implement since it was merely a broad statement of values with no discussion of concrete implementation methods.

The Staff rejected this argument and concluded that the company could not exclude the proposal. Like *Microsoft*, the Proposal is focused on asking the Company to address questions of how the Company's activities impact fundamental individual rights and liberties. Similarly, the Proposal provides a reasonable level of specificity regarding those rights and is therefore permissible.

The *Kroger Co.* (April 12, 2000) proposal called for the company to adopt a policy of removing "genetically engineered" products from its private label products, labeling and identifying products that may contain a genetically engineered organism, and reporting to shareholders. The company challenged the proposal on many grounds including the argument that the term "genetically engineered" was not defined in the proposal and was the subject of competing definitions. Despite the lack of a definition or a consensus on the meaning of the terms, the Staff rejected the lack of definition argument and concluded that the proposal was permissible. The company also claimed that because state law required that labeling not be untrue, deceptive or misleading that if it labeled its products as sought by the proposal it could be subject to potential liability due to the fact that company did not have the basic information that might be required on the label. The proponent in that case argued that the labeling issue could be overcome by placing a label stating that a product did — or did not — contain any genetically engineered material.

In our Proposal we are confronted with a similar argument. First, even in the context of a heated debate about the meaning of the words "genetically engineered", the Staff did not require a definition of the term, but allowed common sense to guide shareholders. Second, as explained in length earlier, it is evident from court proceedings and the plain language of the Proposal that the Company will be able to provide a general level discussion of the privacy issues raised by the media reports and lawsuits without violating the law. We have pointed to language already used by the Company and have provided our own suggestions about how to strike a reasonable balance between confidentiality concerns and the needs of shareholders to engage management on this significant social policy issue.

Finally, in *Bristol-Myers Squibb Company* (April 3, 2000) the proposal asked the board to implement a policy of price restraint on pharmaceutical products for individual customers and institutional purchasers to keep drug prices at reasonable levels and prepare a report to shareholders on any changes in its current pricing policy. The company argued that it was unable to implement the proposal because the proposal did not define the term "reasonable levels". It also claimed that even if the company implemented the proposal, it could not determine when a "reasonable level" would be reached. The proponent responded by arguing that the proposal simply sought a policy of price restraint, and that such a concept was readily understandable. The Staff concurred with the proponent concluding that Rule 14a-8(i)(3) could not be a basis for exclusion. As in *Bristol-Myers Squibb Company*, the Proponents have addressed the issue in a reasonable fashion. There is no need to create ambiguities where none exist.

Returning to the basic premise of the Company's argument that the state secrets privilege will make the Proposal impossible to implement, as was made very clear earlier in this letter, the Company is in a position to speak about the issues raised in the Proposal in general terms. The Hon. Judge Walker has concluded that the existence of the Programs and AT&T's participation is not a secret. As such, the Company can implement the Proposal and respect the needs on confidentiality without misleading shareholders, violating the law or creating a meaningless report. As such, Rules 14a-8(i)(3) and 14a-8(i)(6) do not apply and cannot be a basis for excluding the Proposal.

Conclusion

In conclusion, I respectfully request the Staff to inform the Company that Rule 14a-8 requires denial of

the Company's no-action request. As demonstrated above, the Proposal is not excludible under any of the criteria of Rule 14a-8. Not only does the Proposal raise a critical social policy issue facing the nation and the Company, but it raises that issue in a manner that does not cause the Company to violate the law nor does it mislead shareholders. In the event that the Staff should decide to concur with the Company and issue a no-action letter, I respectfully request the opportunity to speak with the Staff and, as did the Company, ask that the decision be immediately appealed to the full Commission.

Please call me at (971) 222-3366 with any questions in connection with this matter, or if the Staff wishes any further information.

Sincerely,

Jonas Kron
Attorney at Law

Enclosures

cc: Wayne A. Wirtz, Assistant General Counsel, Legal Department, AT&T Inc.