SHAREHOLDER RIGHTS GROUP

December 4, 2018

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Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Staff Roundtable on the Proxy Process – File 4-725

I am writing on behalf of the Shareholder Rights Group in response to the Proxy Process Roundtable of November 15, 2018. We previously submitted comments on September 17, 2018. This letter will respond to remarks made in the Roundtable event, and to written submittals on the docket.

Our follow-up comments are confined to issues relating to shareholder proposals filed pursuant to SEC Rule 14a-8. The Shareholder Rights Group is comprised of some of the leading proponents of shareholder proposals. [1]

1. **SEC POLICYMAKING MUST ALIGN WITH ITS CORE MISSION - THE PROTECTION OF INVESTOR RIGHTS AND INTERESTS.**

The SEC's stated mission is:

> The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust.[2]

As it stands now, Rule 14a-8 serves this core mission as a well-functioning mechanism for ensuring that smaller institutional and individual investors can engage with the companies in which they invest, often with their long-term retirement savings.

The SEC, in fulfilling this mission, must recognize the full range of benefits of the shareholder proposal process, and fend off inappropriate attempts to further limit this important engagement

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[1] The members of Shareholder Rights Group are: Arjuna Capital, As You Sow, Boston Common Asset Management, LLC, CleanYield Asset Management, First Affirmative Financial Network, LLC, Harrington Investments, Inc., Jantz Management, LLC, John Chevedden, Natural Investments LLC, Newground Social Investment, SPC, NorthStar Asset Management Inc., Pax World Funds, the Sustainability Group of Loring, Wolcott & Coolidge LLC, Trillium Asset Management, LLC and Walden Asset Management.

[2] https://www.sec.gov/about.shtml

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and governance tool.

The investor representatives in the Proxy Roundtable Panel including Jonas Kron, James McRitchie, Aeisha Mastagni, and Michael Garland provided ample demonstrations from the perspective of investors participating in the Rule 14a-8 process, regarding the risk management and governance roles of shareholder proposals. A keystone is the role of shareholder proponents of all sizes in deploying the shareholder proposal process to pursue their beneficiaries' long-term investment goals by encouraging foresight, inspiring innovation, and demanding accountability.

The shareholder proposal process is a key governance tool for reconciling the interests of management and investors, between controlling and minority investors, and between investors concerned with short-term and long-term value creation. As a largely self-executing governance mechanism, Rule 14a-8 imposes minimal costs on corporations and society and promotes dynamic self-regulation by the market to address issues that might otherwise become the burden of the courts or the executive branch of government. Some of the proposals advanced in the Roundtable by the Society of Corporate Governance, the Business Roundtable and US Chamber of Commerce could undermine this dynamic.

Facilitating dynamic engagement in the corporate ecosystem
We believe there is a misunderstanding, inherent in the narrow framing by BRT and the US Chamber during the Roundtable and in comments submitted, that the relevant metric for considering significance of shareholder proposals is whether they will achieve a majority vote. Instead, we believe a more appropriate lens for considering shareholder proposals is in its facilitation of dynamic engagement among the corporate ecosystem of investor, board, and management interests.

There are many occasions when a resolution getting 10 or 20 or 24% of the vote stimulated a board discussion, leading to a change of policy or practice. When one recognizes the heterogeneity of actors in the investment ecosystem, it becomes clear that the proposal process is pivotal to reconciling the roles, goals, and results achieved by different subgroups of investors.

The investing landscape reflects diverse strategies and players – long- and short-term, active and passive, individual and institutional, indexed and mission driven. It includes insider investors (directors and executives) who may hold a large or even controlling share of stock and votes, passive investors who typically defer to management's views, active investors, such as hedge fund "activists" who may be seeking to assume control of the company, and an array of other active and engaged subgroups, some of which have competing or conflicting investment strategies or missions.

Investors whose holdings are spread across the economy, so-called universal investors, may need to evaluate and act on cross-portfolio and systemic risks that affect investments throughout the portfolio.[3]

Notably, neither large shareholders like BlackRock, nor controlling shareholders, nor activist hedge fund shareholders typically need to avail themselves of Rule 14a-8 to effectuate their goals. In contrast, individual filers and funds with relatively small holdings do need to make use of Rule 14a-8 to address emerging issues of corporate governance and risk management.[4] These *ahead of the curve* proposals may anticipate issues facing a company and offer new models for improving corporate governance.[5]

The prescience of 5% of investors merits significance and respect: Monsanto Case Study
Even though a proposal receives only a fraction of shareholder support, it may still be the best available opportunity to bring more foresight to investors, board, and management on an issue that may eventually prove costly to a company. Only a small portion of investors may be exercising prescience on risk management or governance issues that will, in fact, prove to be material for the long-term well-being of the company.

In the roundtable discussion and correspondence, corporate representatives have been implying that 3% or 5% of investors supporting a proposal is insignificant, such that the resubmission thresholds should be altered to disallow this minority from having the ability to require continued debate and attention to an issue on the annual proxy. Yet, recent developments at Monsanto demonstrate that a subgroup of this size may be prescient in their divergent or contrarian perspective. Allowing them to bring continuing attention and debate could mean the difference between a company that succeeds, and one which fails to take in crucial input beyond the insular boardroom and executive suites.

In 2016, shareholder John Harrington, the president of Harrington Investments Inc., filed a proposal at Monsanto regarding health risks from the company's flagship weedkiller Roundup. The proposal noted "an increasing number of independent studies assessing the toxicity of glyphosate, the active ingredient in Roundup, associate it with cancer, birth defects, kidney disease, and hormone disruption, causing world-wide concern about its safety". The proposal requested that the company issue a report assessing the effectiveness and risks associated with the company's policy responses to public policy developments intended to control pollution and food contamination from glyphosate, including but not limited to the impact of recent reclassification of glyphosate as "probably carcinogenic," and quantifying potential material, financial risks or operational impacts on the Company in the event that proposed bans and

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[3] UNEP-FI, *Universal Ownership: Why Environmental Externalities Matter to Institutional investors* (UNEP-FI, 2011) at 3.

[4] That is because a single individual with knowledge or concerns, and the legal and technical know-how to file a proposal, can effectively raise an issue that they believe is being wrongly ignored.

[5] In contrast, a focus on emerging issues is more difficult at the large investment funds like Blackrock, Fidelity and Vanguard, where scale and legal limitations make turning of focus feel more like turning a ship than a motorboat.

restrictions are enacted.

The proposal highlighted that there were very high stakes for investors:

> Combined with "Roundup Ready" crops, almost our entire revenue stream is based on one product which, until recently, has enjoyed a measure of regulatory leniency. However, an October 2014 report by the U.S. Government Accountability Office reporting a lack of testing of glyphosate residues in food by the Food and Drug Administration and the March 2015 reclassification by the International Agency for Research on Cancer of the World Health Organization of glyphosate as "probably carcinogenic to humans" may substantially increase overall legal and financial risk, damaging our company's name brand and corporate reputation.

The proposal was vigorously opposed by the company, which asserted that the new World Health Organization position presented a minority view among the scientific community that the company disagreed with. On its 2016 vote, the proposal received 5.3% voting support. Refiled in 2017, it still only received 5.5% support. Because this amount is less than the current 6% threshold, the proposal would not have been eligible for resubmission in 2018. Yet, this relatively small group of shareholders had been prescient in identifying a material issue.

Only two months after Monsanto was acquired by the German pharmaceutical company Bayer in June 2018, a jury granted a $289 million award in a suit alleging public health threats and cancer of a plaintiff caused by Roundup. This news sliced billions of dollars from Bayer's valuation. Bayer's market capitalization has descended steeply in the following months, from $99.1 billion as of August 10, 2018 (the date of the jury verdict), to $64.8 billion as of November 20, 2018.

Figure 1 Bayer Market Capitalization Before and after the Jury Verdict

The litigation continues to grow. According to the Wall Street Journal, in August 2018 there were 8700 plaintiffs; by the end of October 2018 there were 9300 plaintiffs. Even though the jury award was later reduced to $40 million, the potential payouts on this litigation are capable of exceeding the entire market capitalization of Bayer.

Monsanto has employed a "circling the wagons" strategy on glyphosate by working to discredit the scientists and international scientific bodies that have found glyphosate risks. Academic reviews of the company documents released in the litigation have uncovered questionable strategies deployed by the company. This includes evidence that "independent" studies on glyphosate had been ghostwritten by the company's own staff, that the company had attempted to interfere with journal publication, and had gone to extraordinary lengths to influence the Environmental Protection Agency's regulatory analysis.[6]

One may debate why only 5% of the investors supported additional disclosure on this issue. Perhaps many were hopeful that the circle the wagons strategy would continue to work well, as it had in the past. Some may have simply believed the company's assertions. But it must be said that given the potential for 5% of investors to prove this prescient in regard to long-term material issues, it should be recognized that removing a proposal from the proxy may bury a long-term material issue that is in the best interests of all investors if it is allowed to be perpetuated on the proxy. It would not seem in the interests of investors or the capital markets for the SEC to so truncate the opportunity for the prescient investors to persuade others of real risk factors.

When a company is circling the wagons to defend against product liability litigation, the outcome often leaves the company's shareholders in the dark as to the substantial downside risks obfuscated by this approach. The shareholder proposal sought a more balanced discussion of the potential downsides and liabilities should the circle the wagons approach fail to fend off the increasing likelihood of litigation and an emerging scientific view finding greater risk. Instead of providing a balanced discussion of downside risks, the company's response was to hyper-focus on discrediting the science.

As a result,"Bayer's reputation with investors has been diminished," said Markus Mayer, an analyst with Baader Bank. "The latest increase in the number of cases highlights the challenge for Bayer to assuage investor concerns that its acquisition of Monsanto this year had burdened the pharmaceutical and chemicals company with a problem that could take years to resolve and could weigh on its share price for some."[7]. "The market doesn't know how this story will end, no one wants to get in right now."[8] The Company's former CEO has noted that the lawsuits will occupy the company beyond 2021 as they work their way through the courts.

Integrating long and short-term perspectives and metrics
The Monsanto example demonstrates that issues that we may call long-term may actually have an impact on a company or on society much earlier than expected. Nevertheless, the notion that a portion of shareholders can reflect a different perspective on risk and on long-term implications through the proposal process seems pivotal to policy consideration.

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[6] Krimsky, S. & Gillam, Roundup litigation discovery documents: implications for public health and journal ethics, C. J Public Health Pol (2018) 39: 318. https://doi.org/10.1057/s41271-018-0134-z

[7] Ruth Bender, Bayer Hit by More Lawsuits Over Safety of Roundup Weedkiller, Bloomberg, November 13, 2018.

[8] Ruth Bender, Bayer Pursued Monsanto Despite Weedkiller Suits and Executive's Concern, Bloomberg News, Nov. 25, 2018.

Despite the proliferation of reports encouraging companies and investors to take a longer term view, company managers continue to perceive pressures for short-term performance as pervasive. A recent study commissioned by the think-tank ***Focusing Capital on the Long Term*** suggested 87 per cent of executives feel pressure to deliver results within two years or less. The think tank notes:

> *Too many investors continue to seek returns on their strategies as quickly as possible. Companies are missing out on profitable investments for fear of missing quarterly earnings guidance. Corporate management significantly undervalues and underinvests in longer-term prospects. Savers are missing out on potential returns because stock markets are penalizing companies that make long-term investments. Society is missing out on long-term growth and innovation because of underinvestment.*[9]

These pressures derive both from market responses to the metrics contained in company quarterly reports, but also in response to particular subgroups of shareholders that may engage in power plays to demand actions that boost returns in the short term.

The shareholder proposal process is one of the best tools for the shareholders who have the long-term interest of America's retirement funds in mind. While quarterly financial reports provide SEC-mandated corporate metrics, the availability and significance of longer-term corporate metrics is a core issue raised in many proposals. Decades of shareholder proposals have effectively persuaded hundreds of companies to produce annual sustainability reports and other key environmental and social metrics of interest to investors.[10]

Key to long-term metrics is the term "ESG", which represents environmental social and governance issues and metrics. ESG has come to express the notion of core data regarding responses to issues that are likely to be long-term concerns and therefore relevant to long-term management. This relationship is well understood, even by investors that are not official sponsors of ESG proposals. For instance, Larry Fink, the chief executive of BlackRock, the world's largest investor, has noted in his annual letter to investors that "ESG factors relevant to a company's business can provide essential insights into management effectiveness and thus a company's long-term prospects."

Of particular note and importance recently is the role of shareholder proposals in improving ESG disclosure and performance. Investors often use shareholder proposals to shed light on emerging issues not yet on the agenda of boards and management. Many current beneficial corporate practices, such as climate change strategies, pollution prevention, board gender diversity, and

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[9] Focusing Capital on the Long Term, "A roadmap for focusing capital on the long term," March 2015, pp 2. http://www.fcltglobal.org/docs/default-source/default-document-library/a-roadmap-for-fclt.pdf?sfvrsn=7b2e258c_0

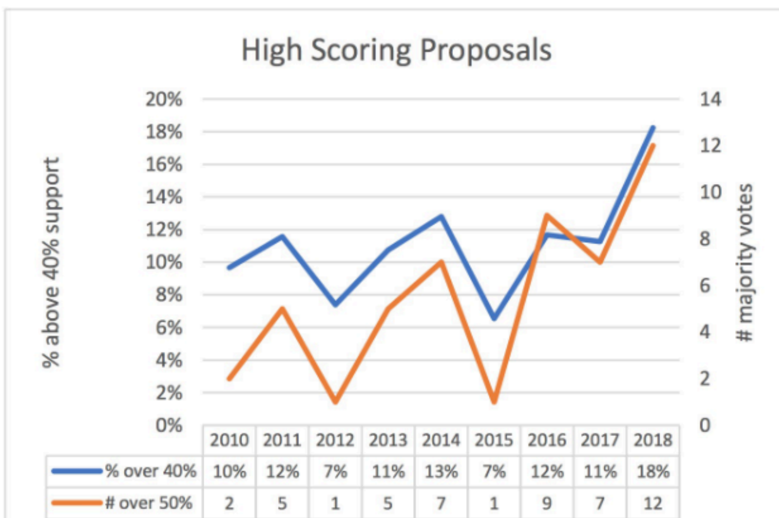
[10] In 2016, hundreds of investors wrote to the Securities and Exchange Commission urging the establishment of mandatory disclosure metrics on environmental and social issues.SASB, Blog, August 16, 2016, pp 1 https://www.sasb.org/investors-sec-sustainability-disclosure/. In 2018 a petition filed with the SEC amplified this message and asserted that the time for action has arrived.

work place inclusion have been substantially initiated and shaped by shareholder proposals and resulting shareholder engagement.

There is a rich literature documenting the costs and risks associated with poor ESG management. Companies that score lower on ESG ratings are known to be "accident-prone" and of heightened bankruptcy risk. For instance, Bank of America Merrill Lynch found that ESG metrics are a powerful tool for avoiding disaster in disaster-prone companies:

> "ESG has been a better signal of future earnings volatility more than any other measure we have observed at a market level."[11]
>
> "ESG could have helped investors avoid 90% of bankruptcies: based on our analysis of companies with ESG scores that declared bankruptcy, an investor who only held stocks with above average-ranks on both Environmental and Social scores would have avoided 15 of the 17 bankruptcies we have seen since 2008."

Any rulemaking changes that undercut ESG disclosure improvements or which silence the minority of shareholders that may be flagging a critical ESG issue must be weighed against the increased risks associated with omitting those proposals.



Source: Sustainable Investments Institute, November 2018

Figure 2 Support for ESG Proposals is growing

Proposals addressing long-term financial risk
ESG proposals, together with other financially focused proposals, have contributed to a companies' long-term prospects by helping them avoid looming liabilities or reputational harm,

[11] Equity Strategy Focus Point, ESG Part II: a deeper dive, Bank of America Merrill Lynch, June 15, 2017.

and to capitalize on unrecognized opportunities. To cite one example, the financial crisis of 2008 was brought on by short-sighted decisions that proliferated in the 1990s regarding subprime lending and securitization strategies that eventually placed the whole economy at risk. Some religious pension fund shareholders began flagging these issues back in 2000 through the shareholder proposal process, and in so doing assisted many companies that cooperated, to avoid the disastrous fate met by numerous big banks.[12]

Governance proposals and market value

As a policymaker, the SEC must recognize and value these benefits of the shareholder proposal process even though those benefits are not always subject to simple monetization or quantification. For example, governance measures that improve the ability of investors to hold management accountable, such as proxy access, separating the CEO and board chair, and special meeting thresholds proposals, significantly contribute to the better governance of corporations. There is literature demonstrating that a better governed corporation is valued by the market with increased stock value. [13] Yet, the value associated with good governance is wide-ranging and only very partially reflected in those stock studies. It includes avoided costs to corporations and government due to other forms of recourse that would become more necessary if the shareholder proposal process becomes less available, liability avoidance, reduction of externalities to society, and the value added by longer-term corporate strategies than might otherwise result if guided solely by market pressures in the absence of this essential corrective tool.

2. CURRENT FILING THRESHOLDS AND HOLDING PERIOD ARE EFFECTIVE.

Some of the corporate representatives on the Roundtable panel asserted that there is an appropriate dividing line between institutional investors who tend to treat the proposal process as a "last resort" and retail investors who may be more apt to resort to the proposal process without effective prior engagement with a company. An important point which cannot be overemphasized is that larger investors often do not need the shareholder proposal process in order to persuade companies to engage with them on their concerns. In contrast, the shareholder proposal process provides an appropriate avenue through which all shareholders, including Main Street's shareholders, as well as their chosen representatives, can raise issues and elicit consideration and

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[12] As Attorney Paul Neuhauser has noted: "The first shareholder proposals concerning predatory subprime lending were submitted in 2000 and the first asking securitizers to police the loan pool were submitted in 2003, in each case years before subprime lending became recognized as a major problem. The shareholder proposals constituted an early warning system for those who heeded them. Although these proposals were submitted to a number of companies and survived company challenges at the SEC, they never appeared on any proxy statement because the recipients in each case agreed to a change of policy with regard to predatory lending to subprime borrowers (in one case the securitizer called the proponent the day after it lost its no-action request at the SEC to request a meeting and dialogue on the matter and at the meeting agreed to alter its due diligence process with respect to loans purchased for securitization). Notably, the securitizers that received the precatory proposals and changed their practices have not been among those who have suffered during the recent unpleasantness." Paul Neuhauser, comment letter to SEC, Oct. 2, 2007, https://www.sec.gov/comments/s7-16-07/s71607-476.pdf

[13] See, eg., Sekhar Muni Amba, Corporate governance and firms' financial performance, Journal of Academic and Business Ethics, Volume 8, July 2014. http://www.aabri.com/manuscripts/131587.pdf

support from their fellow shareholders. As this support grows, boards and managers tend to be more responsive to the concerns raised.

Given the beneficial role that smaller shareholders play in leadership, governance and innovation through the proposal process, we believe it is not appropriate to elevate filing thresholds, increasing the amount of stock required to be held in order to file a proposal. There are adequate limitations in the existing exclusions of Rule 14a-8 to prevent "special interest" or frivolous proposals. [14] Further, there has been no substantiation presented to justify increasing the amount of stock required to be held in order to file a proposal.

In addition, several commenters from the issuer's perspective suggested that the SEC should require shareholders to hold their shares for longer than one year (e.g. three years) before filing a proposal. In contrast, panelist Jonas Kron suggested that in some instances a year is too long a holding period. The idea of lengthening the holding period for filing a proposal seems fundamentally out of line with the dynamic of today's market in which fewer shareholders are exercising "buy-and-hold" investment strategies that must compete with high-frequency trading and index funds. The average time an investor held a share holding a stock in the 1960s when the rule was passed was eight years, today it is between four and eight months.[15]

3. **THE SEC MUST AVOID RELIANCE ON INACCURATE AND UNSUBSTANTIATED COST ESTIMATES AND SKEWED DATA SOURCES.**

Unsubstantiated Cost Estimates

The Society of Corporate Governance and Blackrock, among others, submitted comments with a highly exaggerated and unsubstantiated cost figure advanced by the U.S. Chamber of Commerce Center for Capital Markets Competitiveness claiming a cost of $87,000 per shareholder proposal. In fact, as reported by US SIF, Ceres, and ICCR, this often cited figure originates from the misapplication of data gathered in an SEC questionnaire, and in our experience is out of line with reality.

First, the SEC asked how much it costs companies per year to determine whether or not to include shareholder proposals, including compliance with exclusion rules and procedures. Because the question was ambiguously worded, the average figure of $37,000 per year arguably applied to the total cost to companies of considering whether or not to include ***all proposals--not*** the cost per proposal. The wide range of responses to the question from $10 to $1,200,000 (a median value of $10,000) also reflects the ambiguous presentation of the issue and question. Similarly, the SEC reported survey results indicating an average cost of $50,000 to publish proposals, and as with the first question it appeared that this may be the average cost for

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[14] The exclusions are found in Rule 14a-8(i).

[15] https://www.politifact.com/virginia/statements/2016/jul/06/mark-warner/mark-warner-says-average-holding-time-stocks-has-f/ see also Jake Zamansky, The Death of the "Buy and Hold" Investor, Forbes, Jul 5, 2012 http://forbes.com/sites/jakezamansky/2012/07/05/the-death-of-the-buy-and-hold-investor/#45702d5a30b9

including all proposals in the proxy, rather than a per proposal expense. Most companies receive few, if any, shareholder proposals. [16]

It has also been suggested in some of the comments that the real cost of the proposal process is not the cost of the no action challenges to proposals, but rather the cost in ***attention*** for the board and management. We believe that such attention is not only generally appropriate, but that the shareholder proposal process provides an attention *benefit* at least as often, because it allows boards to surmount a tendency toward insularity and groupthink.

Furthermore, the Staff has recently established a mechanism whereby a Board of Directors is free to demonstrate in the no action process that a proposal raises an issue that is "insignificant" to a company. Notably, efforts by companies to utilize this new procedure have largely fallen flat. We believe this is because it is not in the interest of proponents to raise an issue that is truly not significant to the company.

Proxy Monitor focus on Fortune 250 skews analysis of proposals
Both the Business Roundtable and the US Chamber of Commerce Center for Capital Markets Competitiveness comments submitted to the Roundtable docket make use of data from Proxy Monitor. This data analyzes proposals filed at the Fortune 250, and as such presents a skewed analysis. Because many proponents file at companies outside the Fortune 250, this Proxy Monitor data yields an inaccurate sense of the frequency of filings.

The Sustainable Investments Institute (Si2)[17] analyzes a larger universe of concern than the Proxy Monitor data, and finds different outcomes. Si2's data demonstrates that the proportion of proposals leading to productive engagement is underrepresented by Proxy Monitor's data. To get a full picture of investor engagement, one must analyze all filings. This information is non-public unless a) proponent provides publicity in a press release or other announcement or b) the resolution is challenged at the SEC with a no-action letter. For instance, when it comes to analysis of engagement, Si2 finds that a high proportions of resolutions seeking sexual orientation policies, board diversity policies/reporting and sustainability reports get withdrawn at companies beyond the Fortune 250.

The Proxy Monitor data also is not normalized to SEC methods of vote counting as reflected in the resubmission thresholds, but rather rely on company specific standards and therefore do not allow effective cross comparison between companies on levels of support for issues.

[16] The Business Case for the Current SEC Shareholder Proposal Process, April 2017, Published by US SIF, ICCR and Ceres https://www.ussif.org/files/Public_Policy/Comment_Letters/Business%20Case%20for%2014a-8.pdf
[17] https://corpgov.law.harvard.edu/2013/09/16/accuracy-in-proxy-monitoring-2/

4. CLOSER EXAMINATION OF DATA REGARDING RESUBMISSION THRESHOLDS DIMINISHES THE ARGUMENTS IN SUPPORT OF ALTERING THE THRESHOLDS.

The resubmission thresholds of Rule 14a-8 reflect an ongoing and evolving deliberative process in the ecosystem of investors expressed through education, policy development, engagement and persistence. Ultimately, the success of any shareholder proposal may depend on being able to make that *business case* to other shareholders. If a proposal does not win a baseline of support from fellow shareholders, the idea is taken off the agenda for several subsequent annual meetings.[18]

The SEC thresholds for resubmission of a proposal, require 3%, 6% and 10% support of shareholders respectively over the first three years of submission. Gaining additional support may in some instances happen rapidly. In other instances, where the materiality of a proposal's focus is not yet widely understood, support beyond the 10% threshold may abruptly change in a subsequent year with the evolution (or disruptive developments) in market conditions, policy making, and investing strategies. Most importantly, larger shareholders often support a proposal only after it is no longer seen as a "flash in the pan" –i.e. once it has persisted long enough for slower moving, larger investment firms to establish a voting policy relevant to the specific issue raised.

Sometimes the subject matter of a proposal may linger on the proxy for a course of years before becoming widely supported. For instance, proposals at Exxon Mobil asking the company to assess the impact of climate change on its business model tended to get 10% support over the course of decades. However, shareholder support jumped to 30% support in 2016 and then 62.3% support at its annual meeting in 2017.

The Council of Institutional Investors submitted a detailed report and data analysis regarding the resubmissions thresholds.[19] The report was intended to evaluate the impact of the resubmission thresholds proposed under the Financial CHOICE Act, which would raise thresholds from the current 3-5-10 to 6-15-30. Although the CII report included important data, the analysis included with the report neglected to highlight what we believe to be some of the most significant and relevant implications of this data.

First-time submittals with low votes.
The data demonstrates an appropriate level of restraint by shareholders, who are not reflexively refiling proposals. Only one third of proposals that received less than 6% support when submitted the first time were resubmitted a second time.

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[18] The existing threshold require that a proposal at least 3% support the first year is introduced, 6% the second year and 10% the third year, otherwise they are taken off the proxy. SEC Rule 14a-8(i)(12).

[19] Brandon Whitehill, *Clearing the Bar: Shareholder Proposals and Resubmission Thresholds*, Council of Institutional Investors, November 2108. https://www.sec.gov/comments/4-725/4725-4630831-176413.pdf

In addition, some of the proposals resubmitted do indeed gain support on refiling. Of the 74 proposals refiled between 2011 and 2018 with under 6% support, eight of the proposals, or roughly one in 10 were able to garner substantially larger support the second time they were submitted, including several that achieved majority support when submitted a second time. The continuation of a total of 74 proposals during this timeframe in order to allow 10 of them to garner additional support seems proportional and not an inappropriate outcome of the functioning of the current rule.

Examples of increased support in subsequent filings included a proposal on proxy access that received 4.4% support the first year it was filed at Netflix but won a majority vote when refiled two years later. Similarly, proxy access proposals at Cisco, Citigroup, and Apple jumped significantly from relatively low support the first year to much more significant support in a second filing. Other proposals that rose from under 6% support in the first filing to substantial support in a second resubmission included Walgreens Boots Alliance from 5.7% support the first time a proposal linking sustainability metrics to compensation came up to 23% support the second time. Other proposals with similar jumps include human rights risk disclosure at Amazon.com, and Procter & Gamble's proposal on unrecyclable packaging. These increases in support are demonstrations of the manner in which significant shareholder education or emerging issues elicit greater support from the first submission to the second.

Lingering proposals
The Council of Institutional Investors analysis identified a total of 38 proposals from 2011 to 2018 that eventually drew significant shareholder support which would have been blocked if the CHOICE Act's proposed limits of 6-15-30 were put into effect.

In addition to the above examples, there were a number of proposals that eventually won significant support, but that would have been eventually excluded if the second and third year thresholds were raised to 15% and 30%. These included six proposals for an independent board chair (UMB Financial, American Express, AutoNation, Chevron, Wendy's, and KeyCorp), twelve proposals seeking disclosure of political contributions or lobbying payments (Wynn Resorts, Allstate, Republic Services, Nike, FedEx, Express Scripts, Charles Schwab, IBM, Citigroup, Verizon, UnitedHealth Group, and Devon Energy), three proposals urging One Share One Vote (Alphabet, United Parcel Service, and Telephone and Data Systems), and numerous other proposals.[20]

The eventual shareholder support demonstrating substantial interest in these issues shows that the process is working, and that the opportunity to weigh in on these matters over a course of years is valued by investors. Retaining the topics on the proxy allows shareholders to exercise prerogatives of shareholder democracy – to debate and deliberate, and to evolve their opinions on a timely basis as concerns and issues emerge.

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[20] These include an array of other issues — stock retention holding periods (Verizon), coal combustion waste (Ameren), Proxy Access at Urban Outfitters, pro rata vesting of equity awards at Comcast and McKesson, employment diversity at Charles Schwab and Omnicom and unrecyclable packaging at Kroger.

Private ordering value of resubmission thresholds not reflected in CII data or analysis
There is an additional important omission from the CII data and analysis regarding resubmissions, as the report's data does not illuminate the issue of private ordering and engagement spurred after proposals cross the current 3%, 6% and 10% thresholds. It has been noted in the comments submitted by the Interfaith Center on Corporate Responsibility[21] that about a third of proposals are withdrawn because they produce effective engagement.

Meanwhile, the CII data only show the proposals ***that were refiled*** and appeared on the proxy. They do not provide necessary analysis of the private ordering impact of proposals that are filed and later withdrawn, nor of the private ordering impacts that exist because access to the shareholder proposal process exists. In our experience, there are many instances in which a proposal is NOT refiled because the successful vote above the current resubmission threshold leads to an engagement that obviates the need for a proposal.

The aforementioned trade associations implied that the fact that some proposals may receive less than 50% support year after year shows they are not appropriate for resubmission. But shareholder proposals prompt effective engagement, and sometimes the proponents must persist over a course of years. These benefits are not reflected in the data and analysis and merit substantial consideration by the Securities and Exchange Commission as they reflect some of the most valuable outcomes generated by the proposal process.

An increasing number of withdrawals illustrate some of the positive results of effective engagement:

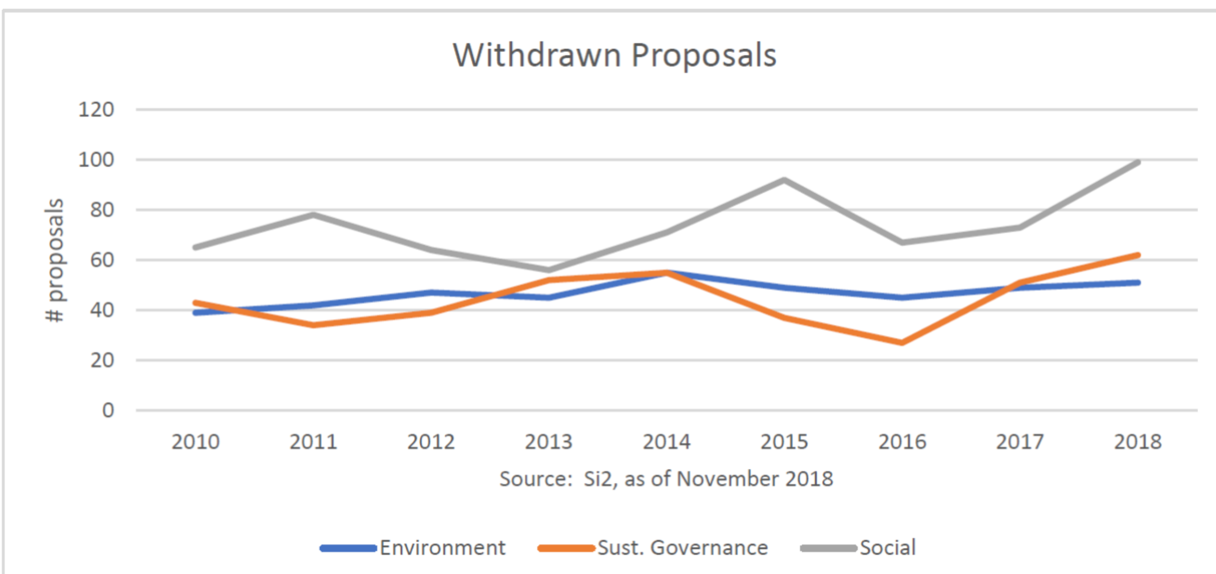

Figure 3 More ESG proposals are being withdrawn, in part due to successful engagement

[21] https://www.sec.gov/comments/4-725/4725-4621915-176393.pdf

Cost of resubmissions is likely significantly less than cost of first-time proposals
As we noted above, the costs of the shareholder proposal process have been exaggerated by the trade associations. But even so, we believe it is important for the SEC to recognize that the cost of *resubmission* of proposals is likely to be significantly less than the cost of first-time proposals. Our experience as proponents of proposals leads us to believe that companies expend less resources on proposals that are resubmitted. If resources are expended in opposition to proposals, the lion's share of those resources and board attention to a proposal are most likely expended in the first effort to oppose the proposal.

5. FILING OF PROPOSALS BY AN AGENT OF A SHARE OWNER IS A PROTECTED RIGHT UNDER STATE LAW AND SHOULD NOT BE UNDERMINED BY SEC REGULATION.

During the Roundtable there were several comments seeking to limit the ability of shareholders to rely on an agent to file a proposal on their behalf. These discussions were framed in the somewhat confusing nomenclature of "filing by proxy." In fact, it is a long-standing practice for shareholders to exercise their right to file proposals via agents, investment managers, experts, advisors, and lawyers who file proposals on behalf of a shareowner, and whose agency may also have been requested, as representative of the shareholders' interests, or wishes regarding an investment strategy, to engage with companies on their behalf. Just as issuers are able to hire a lawyer to file a no action request, and otherwise channel correspondence regarding a shareholder proposal through their attorneys, so are shareholders entitled as a matter of state law to hire an array of agents, analysts and representatives to exercise their rights to engage with their investee companies. It is neither necessary nor appropriate for an individual or institutional shareholder to be required to engage in direct communication with issuers.

The Securities and Exchange Commission Staff already addressed this concern of some issuers in 2017 in Staff Legal Bulletin 14 I which noted:

> There have also been concerns raised that shareholders may not know that proposals are being submitted on their behalf. In light of these challenges and concerns, and to help the staff and companies better evaluate whether the eligibility requirements of Rule 14a-8(b) have been satisfied, going forward, the staff will look to whether the shareholders who submit a proposal by proxy provide documentation describing the shareholder's delegation of authority to the proxy. In general, we would expect this documentation to:
>
> - identify the shareholder-proponent and the person or entity selected as proxy;
> - identify the company to which the proposal is directed;
> - identify the annual or special meeting for which the proposal is submitted;
> - identify the specific proposal to be submitted (e.g., proposal to lower the

> threshold for calling a special meeting from 25% to 10%); and
>
> - be signed and dated by the shareholder.
>
> We believe this documentation will help alleviate concerns about proposals by proxy, and will also help companies and the staff better evaluate whether the eligibility requirements of Rule 14a-8(b) have been satisfied in connection with a proposal's submission by proxy. Where this information is not provided, there may be a basis to exclude the proposal under Rule 14a-8(b).

This new requirement which the staff imposed only recently, demands significantly more specificity, documentation, and disclosure from shareholders. It has so far only been tested for a single season. To our knowledge, there have been as yet no demonstrations, including in the roundtable, to indicate that this new requirement is failing to address the underlying concerns.

6. THE PURPOSES OF RULE 14A-8 WOULD NOT BE ADVANCED BY *REQUIRING* ENGAGEMENT.

Some commenters suggested that there should be a requirement for the proponent and/or their "proxy" to attempt to engage at least once with a target company prior to filing a proposal. While in some instances, proponents and their investee companies may find it efficacious for engagement to occur, Rule 14a-8 is not based on an assumption of engagement by all share owners. Some proponents of proposals do not file proposals primarily in order to engage with management, but more as a means of communication and consensus building with fellow shareholders. This is clearly an equally appropriate function under the rule.

Similarly, there were recommendations in the Roundtable that there be *disclosure* of any engagement that happened in a proposal or no action defense. We note that the Staff has already invited boards of directors who wish to assert that a proposal is "insignificant" to discuss any engagement with shareholders for purposes of Staff Legal Bulletins 14I and 14J.

Furthermore, under the current implementation of the rule and Staff Legal Bulletins 14I and 14J either the proponent or a company is already free to discuss whatever engagement has transpired, addressing arguments related to significance and relevance under Rules 14a-8(i)(7) and Rule 14a-8(i)(5).

7. A FUTURE STAFF LEGAL BULLETIN, OR CHANGING THE APPROACH TAKEN IN NO ACTION LETTERS, CAN RECTIFY NEW IMPEDIMENTS TO SHAREHOLDER RIGHTS.

We previously submitted to the Division of Corporation Finance on July 2, 2018 a report regarding the recent developments in the no action process, along with our recommendations for improvements that could be implemented through a staff legal bulletin.[22]. Our analysis concluded that certain changes in SEC practices during the 2017-2018 proxy season raised serious threats to the rights of proponents to file proposals that are of material interest to investors. We included recommendations for additional SEC guidance to temper the damage done by recent Staff rulings.

We note that the Staff Legal Bulletin 14J responded to one of our recommendations, to provide clarifying guidance regarding the obligations of boards of directors to document substantively the basis for finding a proposal to be "insignificant" or "irrelevant" to a company. However, it has fallen short in addressing a number of our concerns. We will reiterate a few of the key outstanding concerns and issues here.

Micromanagement
While applying long-standing language and doctrines to justify its decisions, we interpret recent rulings by the Staff as a departure from its prior approach to ascertaining whether a proposal engages in micromanagement under 14a-8(i)(7). As stated in the 1998 Release, the ordinary business exclusion is intended to "confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for the shareholders to decide how to solve such problems at an annual shareholders meeting." In applying this principle to micromanagement, the Release stated that micromanagement involved "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."

Consistent with this rationale, micromanagement exclusions have historically been limited to proposals that sought to manage the minutiae of the company's business and not to proposals addressing material questions of business strategy associated with a significant policy issue. During 2017 and 2018, the Staff found in a number of instances where a company had existing policies on a complex issue, that even proposals seeking top-level action on those issues constituted micromanagement. We remain concerned that the emerging approach by the staff represents a radical departure from the past, potentially foreclosing proposals on a very wide range of material and significant policy matters where the scale, pace, or rigor of management responses is at issue.

A key example raising this concern is the decision in *EOG Resources, Inc.* (February 26, 2018)[23] where the proposal asked the company to set targets for the reduction of greenhouse gas (GHG) emissions. The proposal did not seek to dictate minutiae. It left management with full discretion to determine the timing, scope, and magnitude of appropriate targets. Yet, the Staff allowed the proposal to be omitted on the basis of micromanagement, even though it sought the adoption of a high-level business strategy commonly deployed by many other large companies on a widely recognized, significant policy issue facing the company and society.

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[22] Proxy Season 2018:Shareholder Proposal Decision-Making of the Securities and Exchange Commission, Analysis and Recommendations of the Shareholder Rights Group, July 2, 2018. http://bit.ly/SRGReportJuly2018

[23] https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/trilliummiller022618-14a8.pdf

The EOG proposal did not raise an off-limits point for shareholder deliberation but rather a topic that is routinely voted upon and well supported by shareholders. Because the same proposal model submitted to EOG Resources had been deemed in prior no-action decisions to not constitute micromanagement, the proposal on GHG targets has been filed at dozens of companies since 2010 and has received voting support averaging above 20%. In 2018, at Emerson Electric and Fluor Corporation the proposals earned around 40% support. The proposal has also been withdrawn by investors at numerous companies that have agreed to set targets. Overall, more than 400 companies have committed to set science-based targets for GHG emission reductions to date.

The change in approach could have wide-ranging and deleterious implications, including limiting the availability of shareholder proposals at companies that already have disclosure and policy frameworks in place, which a significant portion of shareholders view as boilerplate or grossly inadequate. At a time in which shareholder proposals on climate change are receiving unprecedented levels of voting support (including many majority votes) and investors like JPMorgan, BlackRock, and PIMCO are asking companies about greenhouse gas reduction targets, the micromanagement rulings interfere with functioning market mechanisms.

This year's Staff Legal Bulletin 14J states that reports and studies requested in proposals can be subject to micromanagement exclusion if the substance of the report relates to the "imposition or assumption of specific time frames or methods for implementing complex policies." It is important to keep in mind that in today's corporations, most policies are "complex". Request for improvement of those policies requires a reasonable level of specificity to not be found vague or even already substantially implemented on the basis of a very general policy of the company, even if such a policy has not been effectively implemented by the company.

We believe that it is incumbent on the Staff to clarify through no action letters or a new SLB that micromanagement will not be found in instances where it is reasonable and practical for shareholders to weigh in on the issue raised by the proposal. For instance, the SEC can consider evidence that similar proposals were considered elsewhere. The rulings and guidance should make it clear that shareholders have a right to ask companies to do better on the pace, scale and rigor of their responses to significant policy issues, as long as the proposal does not prescribe an inappropriate level of detail.

Conflicting proposals

In 2017 and 2018 the Staff developed a new approach to the interpretation of Rule 14a-8(i)(9) this season, effectively allowing companies to "game the system" by simply offering a proposal to ratify business as usual – after receiving a shareholder's governance reform proposal. Although a Staff requirement for the proxy statement to mention the excluded proposal may help inform investors, such an approach may undermine the rights and logic of shareholders being able to request specific reforms. Ratification of the status quo in lieu of a shareholder's proposal, besides being unnecessary, means that shareholders only get to hear one side of an issue and avoids productive debate.

The Staff should limit exclusions to instances where two binding proposals could not both be legally enacted simultaneously without creating a legal conflict. Advisory proposals as a general proposition, cannot conflict with management proposals. There should be a rebuttable presumption against a "conflict" when management seeks ratification of an existing policy.

Providing additional detail in no action decisions
In our July 2 report we urged that the Staff provide additional detail in no-action decisions, by expressly applying the rule to the facts and language of the proposal to clarify the dispositive issues. This practice could eliminate guesswork and for "kitchen sink" arguments in no-action correspondence, and provide clearer guidance in future proposal filings.

CONCLUSION

Rather than initiating a rulemaking and constraining shareholder rights to file proposals, we believe improvements can be made to better defend shareholder rights through the no action process and staff legal bulletins. Retail investor engagement can best be advanced as suggested in the roundtable by James McRitchie. The Commission can and should provide basic education to shareholders on their responsibility to cast votes on these issues of long-term value creation, as well as on their rights and responsibilities to file proposals.

Thank you for this opportunity to comment. If we may provide additional information on these issues, please contact us at [redacted] or [redacted].

Respectfully Submitted,

Sanford Lewis
Director
Shareholder Rights Group