Business Roundtable

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June 3, 2019

Ms. Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number 4-725

Dear Ms. Countryman:

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers who collectively lead companies with more than 15 million employees and $7.5 trillion in revenues. Our companies annually pay $296 billion in dividends to shareholders and generate $488 billion in revenues for small and medium-sized businesses. In addition, Business Roundtable members invest nearly $147 billion in research and development.

On November 9, 2018, Business Roundtable submitted a letter (the “2018 Comment Letter”) to the Securities and Exchange Commission (the “Commission” or “SEC”) that provided input on the November 18, 2018 Roundtable on the Proxy Process (the “Roundtable”) in support of the Commission’s efforts to evaluate and improve the proxy system. The 2018 Comment Letter discussed several updates and reforms to the proxy system that we believe will not only promote more successful shareholder engagement but also benefit investors and other stakeholders over the long term.

One primary reform Business Roundtable recommended in the 2018 Comment Letter was the modernization of the shareholder proposal process to provide more effective shareholder communication and engagement. As further illustrated in this letter, Business Roundtable strongly supports constructive, open engagement and communication between companies and investors and believes that the rules regarding shareholder proposals should be changed to ensure that proposals that seek to advance only the narrow interests of a small minority of shareholders do not hinder the ability of the majority of shareholders as a whole to express their views on important issues.

A second key reform relates to the accuracy and transparency of the reports and recommendations made by proxy advisory firms to their clients. As we noted in the 2018 Comment Letter, these firms provide important services on which many shareholders rely. Because of the prominent role these firms have come to play in the proxy process, it is imperative that their reports and recommendations adhere to high standards of quality and accuracy. These high standards are not currently being met. Business Roundtable believes that the SEC is best positioned to make targeted reforms that improve the accuracy of proxy advisory reports, as well as the interactions among proxy advisory firms, companies and shareholders.

This letter supplements the 2018 Comment Letter, focusing on the areas of shareholder proposals and issues relating to proxy advisory firms. For each of those topics, we have outlined several issues that contribute to inefficiencies in the proxy process, as well as several recommendations for reform. This letter also provides specific examples from our member companies' actual experiences that demonstrate that thoughtful reform to the current proxy system — particularly on the topics of shareholder proposals and proxy advisory firms — are critically important. These examples came in response to a survey distributed by Business Roundtable to its member companies in early 2019. The survey solicited information regarding the member companies' experience with several topics relating to the proxy process, including shareholder proposals, inaccuracies or factual errors in proxy advisory reports and experience in dealing with proxy advisory firms. The responses were provided directly by our members but have been anonymized for purposes of this public submission. The examples included in this letter describe only a few of the many scenarios that Business Roundtable member companies experience each proxy season, but they represent compelling evidence that change is warranted. It is important to emphasize that the examples described are indicative of the broader experiences of Business Roundtable members — these incidents are not isolated exceptions.

This letter briefly restates several points raised in the 2018 Comment Letter for ease of reference and to provide context, although we have endeavored not to reproduce the relevant sections of the 2018 Comment Letter in full. Variances in phrasing or level of detail between the 2018 Comment Letter and this letter are not intended to suggest that Business Roundtable's positions or recommendations have changed; particularly, we have provided more detailed recommendations for reform in some instances based on the specific experiences and input provided by member companies.

<u>Modernizing the Shareholder Proposal Process</u>

Business Roundtable believes that effective engagement and communication with shareholders are critical for today's public companies. The importance of this relationship requires a shareholder proposal process that is productive, focused on materiality and oriented toward long-term value creation for all shareholders. That is not the case today. Instead, the shareholder proposal process has become an outdated exercise that does not effectively facilitate productive shareholder engagement, in marked contrast to other forms of shareholder engagement that have become widespread practice.

Shareholders now engage directly with management and boards of companies in which they invest in ways never before possible. Shareholders with specific questions and concerns now often initiate contact with companies on an ongoing basis. Many companies have responded to such interest with communications such as webcasts, videos and voluntary publications well beyond any SEC reporting requirement. Corporate investor relations teams are expanding their size and responsibilities to accommodate more frequent shareholder meetings and to organize corporate governance "roadshows" that convey the company's positions on key issues and solicit investor feedback on the company's direction, governance practices and shareholder concerns. In 2017, the Spencer Stuart U.S. Board Index highlighted shareholder engagement as an emerging theme, noting that 82 percent of its surveyed companies proactively reached out to individual shareholders.[1]

While companies receive more helpful input from shareholders than ever before through voluntary, and often informal, interactions, the shareholder proposal process has not kept pace — it simply does not promote meaningful engagement between shareholders and the companies in which they invest.

Many elements of the current process contribute to this issue, but preeminent is the low filing threshold for the submission of shareholder proposals. Business Roundtable believes that the $2,000 ownership requirement — in practice the only relevant ownership requirement — falls well short of any reasonable material ownership standard for public companies (for some member companies, it is less than 1 millionth of 1 percent of their outstanding shares) and that it should be increased significantly. The current nominal monetary threshold for filing proposals risks obscuring matters of true economic significance to companies by potentially allowing annual meeting ballots to present multiple immaterial proposals for consideration.

The low proposal submission threshold permits shareholders to make a nominal investment in a company to present proposals as a form of social commentary or to advocate for a social aim, regardless of the proposal's financial impact on the company, its relevance to long-term shareholder value or the cost to other shareholders. People for the Ethical Treatment of Animals (PETA), for example, employed exactly this tactic, making the minimum investment necessary to file a shareholder proposal with Levi Strauss & Co. that asked the company to switch its cow-skin leather patches to "vegan leather."[2] In instances such as this, proponents' behavior suggests that their proposals are submitted without any serious intention to improve the company's operations or any real expectation of shareholder support. Instead of seeking meaningful engagement, such proponents may be aiming to leverage the Rule 14a-8 process to advance a societal cause that is tangential or unrelated to the company's business, without regard for the best interests of the company and long-term shareholder value.
Adding to the problem is the ability of activists to file shareholder proposals by proxy, allowing them to submit proposals even if they do not own the minimum $2,000 of stock. In such cases, the true proponent of a proposal may have no significant economic ownership in, or material

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[1] Spencer Stuart (2017). *2017 U.S. Board Index*. Retrieved from Spencer Stuart website: https://www.spencerstuart.com/~/media/ssbi2017/ssbi_2017_final.pdf.
[2] Garcia, T. (March 22, 2019). PETA Takes a Stake in Levi's to Press for Vegan Leather Patches. *MarketWatch*.

relationship to, the company. When a proponent does not own any shares of the company, the result is at odds with a set of rules designed to facilitate and ensure shareholder access to the companies in which they invest and instead fosters an environment in which unrelated individuals can attempt to influence aspects of the company's management without any investment in the company or alignment with its shareholders. These proponents are able to leverage other shareholders to affect a far greater number of companies than they would had they complied with the express eligibility requirements imposed by the current shareholder proposal rules.

One consequence of these outdated features is that the current proxy process is dominated by a small group of individual shareholder proponents who own only a nominal stake (or, in the case of proponents who submit proposals via proxy, no stake) in the companies they target. These proponents often file similar proposals across a wide range of companies. In fact, from 2016 to 2018, the same three individuals and their families submitted or co-filed over 24 percent of all shareholder proposals each year at Russell 3000 companies.[3]

The low stock ownership requirement and the option of making proposals by proxy combine with other aspects of the shareholder proposal process to enable many proponents to submit proposals that are not relevant to shareholders at large, simultaneously at a host of companies. In the past few decades, companies have had to contend with an increasing influx of shareholder proposals focused on general societal issues. Currently, more environmental, social and policy-related shareholder proposals are submitted than any other type of proposal each year.[4] Many of these proposals are of little relevance to shareholders as a whole. For example, one member company reported receiving a proposal seeking a commitment to issue a report, and during subsequent discussions a demand to implement a reverse supply chain to dispose of expired product. The company spent hours discussing the issue with the proponent and explained that the core request was already effectively being met through other company programs and disclosures and, moreover, the issue was not of importance to the vast majority of company shareholders. The proponent, nevertheless, refused to withdraw the proposal. The company therefore had to seek, and ultimately obtained, no-action relief from the SEC. The same company reported receiving a separate proposal asking for a report detailing how public concern related to the pricing of its products would be factored into executive compensation decisions. Unsurprisingly, these types of proposals have limited success and seldom receive the majority support of shareholders if they are not first excluded from a company's proxy statement via the SEC's no-action process. In fact, in 2018, only 10 of the 145 environmental,

[3] ISS Corporate Solutions, Inc. (2018). *Voting Analytics – Shareholder Proposals*. Retrieved from https://www.isscorporatesolutions.com/.

[4] Broadridge Investor Communication Solutions, Inc. and PricewaterhouseCoopers LLP (2018). 2018 Proxy Season Review. *ProxyPulse*. Retrieved from https://www.broadridge.com/_assets/pdf/gated/broadridge-2018-proxy-season-review.pdf.

social and policy-related shareholder proposals submitted to a vote received majority shareholder support.[5]

In addition, in some cases, the supporting statements used by activists to discuss social and policy-related views are based on outdated information, refer to the wrong company or include baseless criticisms of management.[6] While a shareholder proposal may be excluded under Rule 14a-8(i)(3) if the supporting statement is false and misleading, in our experience, the SEC staff has generally been reluctant to grant no-action requests on that basis since the SEC curtailed the application of the rule in a 2004 release.[7] Given the significant resources expended by companies in responding to shareholder proposals, the supporting statements used by proponents should at least be held to a standard of accuracy that incentivizes care and attention in filing and avoids unnecessary expenditures of resources — costs that are ultimately borne by all shareholders.

The costs these serial proponents impose on other shareholders are not trivial. Even proposals excluded under the SEC's no-action process impose significant costs, not only in terms of outside advisor expenses, but also in management's time and effort. Proposals that are not excluded cost companies and their shareholders even more. Beyond no-action efforts, a company often spends significant effort communicating with proponents to understand their concerns and to find common ground to come to a positive solution. If no agreement can be reached, a company not only incurs the cost of adding the proposal to its proxy statement but must also expend additional time, effort and expense to explain its concerns with the proposal in an opposition statement and in engagement with other shareholders.

These activities divert management's and the board's attention away from creating long-term value for the company. Moreover, shareholders can lose sight of matters of true economic significance to the company if they are spending time considering one, or even numerous, immaterial proposals. The resources and attention expended in addressing shareholder proposals cost the company and its shareholders in absolute dollars and management time and, perhaps worse, divert capital resources to removal of an immediate distraction and away from investment in value-adding allocations, such as research and development and corporate strategy.

These costs are exacerbated when a failed shareholder proposal is resubmitted year after year. The current proxy rules allow proposals that have been repeatedly rejected by a substantial majority of shareholders to be resubmitted in perpetuity. Under current resubmission rules,

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[5] ISS Corporate Solutions, Inc. (2018). Voting Analytics – Proposals. Retrieved from https://www.isscorporatesolutions.com/.
[6] Chiu, N. (April 8, 2015). *SEC Staff Allows Shareholder Proposal to be Excluded Due to False and Misleading Supporting Statement*. Retrieved from https://www.briefinggovernance.com/2015/04/sec-staff-allows-shareholder-proposal-to-be-excluded-due-to-false-and-misleading-supporting-statement/.
[7] SEC Division of Corporate Finance (September 15, 2004). *Shareholder Proposals* (Staff Legal Bulletin No. 14B). Retrieved from SEC website: https://www.sec.gov/interps/legal/cfslb14b.htm.

proposals that receive a minimum of 3 percent of the votes cast qualify for resubmission at least once, and for as long as a proposal obtains 10 percent of the votes cast, it may be resubmitted indefinitely.

Another common issue raised by Business Roundtable member companies relates to proponents' failure to attend annual meetings with companies on the proposals they submit, or attendance at the meeting by a representative who is not prepared to present and explain the proposal or to answer questions about the proposal. The current proxy rules require a proponent or its representative to attend the annual meeting in person to present its shareholder proposal.[8] The Commission has stated that this requirement provides some degree of assurance that the proposal not only will be presented for action at the meeting, but also that someone will be present to knowledgeably discuss the proposal and answer any questions that may arise from shareholders attending the meeting.[9] The rule facilitates shareholder education, creating an opportunity for question and debate that can better inform shareholders about the merits of a proposal.

In practice, representatives who attend meetings on behalf of a proponent are often unable to answer questions or facilitate meaningful dialogue about the proposal with other shareholders and with management. For example, an actor and ventriloquist attended one member company's 2018 annual shareholder meeting on behalf of a frequent submitter to present a proposal concerning shareholders' ability to call a special meeting. The individual had no knowledge of the company or the issue. Similarly, one of the panelists at the SEC's November 2018 Roundtable on the proxy process described the frustration of spending time and resources addressing a shareholder proposal only to find that the representative sent to present the cumulative voting proposal at the annual meeting could not even pronounce the key terms of the proposal.[10] Although these examples may appear extraordinary, Business Roundtable member companies regularly complain that representatives of proposals often appear unprepared and unserious.

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[8] SEC Rule 14a-8(a)(2), 17 C.F.R. §240.14a-8 (2018).

[9] Adoption of Amendments Relating to Proposals by Security Holders (final), 41 Fed. Reg. 52994, at 52994 (December 3, 1976). ("[T]he amended rule retains the requirement . . . that the proponent must provide written notice to the management of his intention to appear personally at the meeting to present his proposal for action. Some commentators criticized the requirement of personal attendance at the meeting on the ground that, in reality, the proposal is "presented" to most security holders for their action when it is included in the proxy statement. While the Commission does not disagree with the significance these commentators have assigned to the proxy statement, it nevertheless believes that the notice requirement serves a useful purpose. **That is, it provides some degree of assurance that the proposal not only will be presented for action at the meeting (the management has no responsibility to do so), but also that someone will be present to knowledgeably discuss the matter proposed for action and answer any questions which may arise from the shareholders attending the meeting.**") (Emphasis added.)

[10] Smith, D. (November 15, 2018). *U.S. Securities and Exchange Commission Roundtable on the Proxy Process*. Retrieved from SEC website: https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf.

Business Roundtable Recommendations

To address the undesirable effects resulting from the current shareholder proposal process, the 2018 Comment Letter asked that the Commission consider the following changes, among others, to reform and modernize the proxy process:

- Significantly increase the threshold for initial proposal submissions.

- Increase the length of the holding requirement.

- Increase the thresholds for proposal resubmissions to 6 percent shareholder support on the first submission, 15 percent on the second and 30 percent on the third.

- Enhance proponent disclosure requirements to include a proponent's motivations, goals, economic interests and holdings in the company's securities, and any similar proposals they have submitted at other companies.

Business Roundtable continues to support these reforms and believes that they would improve the mix of proposals fielded by companies each year without stifling shareholder advocacy on material issues. Moreover, Business Roundtable believes that these recommended changes to shareholder proposal submission thresholds will not hinder the ability of shareholders — regardless of the size of their holdings — to engage the companies in which they invest. In fact, in recent years, Congress and the Commission have significantly increased the ability of holders of small quantities of shares to influence companies in many ways, including:

- The adoption of Say-on-Pay votes, which provided shareholders an advisory vote on executive compensation matters almost every year, thereby providing shareholders with an opportunity to vote on the issue without any shareholder having to go to the trouble of submitting a proposal or attending a meeting.

- Clarifications enabling just-vote-no campaigns, which can have nearly the impact of a proxy contest at a fraction of the cost.

- The legalization of short slate proxy contests, which significantly reduce the cost of activism.

- A steady intended or unintended erosion of certain bases for exclusion of shareholder proposals, through SEC staff interpretations or non-enforcement of existing rules governing the process.

It is thus no longer true — if it ever was — that nominal ownership thresholds for the submission of shareholder proposals are necessary to enable shareholders to raise issues or meaningfully engage the companies in which they invest.

Business Roundtable believes that engagement, in many cases, can reduce the need for shareholders proposals and facilitate constructive, ongoing relationships between investors and companies. Our recommendation to increase resubmission levels for shareholder proposals is not intended to negatively affect meaningful shareholder engagement and action. The vast improvements in technology over the past several decades permit investors to communicate directly with companies with ease and to join other shareholders on common interests. For example, technology now enables individual filers to run sophisticated environmental, social and governance-focused ("ESG") campaigns with other like-minded shareholders, in some cases potentially triggering and ignoring SEC rules governing the formation of groups.

Such campaigns are assisted by entities such as the UN Principles of Responsible Investing ("PRI"), whose website hosts a Collaboration Program that helps shareholders pick companies to target, form groups, select group leaders, identify issues and help shareholders solicit votes on shareholder proposals. The PRI website purports to contain member posts that include: "Invitations to sign joint letters to companies; Proposals for in-depth research and investor guidance; Opportunities to join investor-company engagements on particular ESG themes; Calls to foster dialogue with policy makers; and Requests for support on upcoming shareholder resolutions."[11] In addition, As You Sow and other organizations have platforms that support shareholders in the Rule 14a-8 process, allowing them to identify issues, target companies, form groups and solicit votes on proposals.

Recent empirical data supports the proposition that increased resubmission thresholds will not impair the shareholder proposal process. In November 2018, the Council of Institutional Investors ("CII") published a research report on shareholder proposal resubmission thresholds based on its analysis of shareholder proposals that went to a vote at Russell 3000 companies between 2011 and 2018.[12] CII's report states that on average, the shareholder proposals submitted to a vote during that period won 33.6 percent on the first submission, 29.2 percent on the second and 31.8 percent on the third — all of which exceed the 6/15/30 percent thresholds recommended by Business Roundtable.[13] The increased resubmission threshold is not intended to, and this recent empirical evidence suggests that it will not, eliminate the ability for shareholders to advocate for change across multiple years — even on matters that do not initially receive even moderate levels of shareholder support. Instead, this data indicates that increased resubmission thresholds would work around the edges to eliminate repetitive proposals that a company's shareholders have decisively rejected one or more times.

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[11] Dimson, E., Karakaş, O. & Li, X. (December 24, 2018). *Coordinated Engagements*. Retrieved from https://ssrn.com/id=3209072.

[12] CII Research and Education fund (November 2018). *Cleaning the Bar: Shareholder Proposals and Resubmission Thresholds.*

[13] Ibid. CII's research concluded that the median levels of support (30.3%/28.6%/30.4%) closely tracked the average levels of support, suggesting that the data was not skewed by proposals that received extremely high or extremely low support.

Enhancing the Quality of Interactions with Proxy Advisory Firms

Business Roundtable's 2018 Comment Letter recognized that proxy advisory firms play an important role in the proxy system but also highlighted elements of the operation of proxy advisors and their interactions with companies and shareholders that need to be addressed. Among other things, the 2018 Comment Letter cited the common concerns that proxy advisory firms produce reports that frequently include factually inaccurate information and lack transparency with respect to their methodologies and procedures and their conflicts of interest. Further, proxy advisory firms are subject to little regulatory oversight, and there are questions as to whether some institutional investors are complying with their fiduciary duties related to the voting of the shares they control, as well as duties to oversee the proxy advisory firms they retain.

The 2018 Comment Letter recommended reforms to improve the accuracy, transparency and accountability of proxy advisory firms, including improving the accuracy of proxy advisor recommendations, implementing additional transparency requirements for proxy advisors and increasing disclosure requirements of proxy advisory firms' conflicts of interest. The 2018 Comment Letter also discussed concerns that some institutional investors rely on the recommendations of proxy advisory firms and allow their votes to be cast automatically shortly after publication of the proxy advisor's voting recommendations, without first evaluating the firm's analyses and recommendations to ensure that they are in the best interests of their clients.

As noted in the 2018 Comment Letter, recent survey results support the contention that a spike in voting follows adverse voting recommendations by ISS during the three-business-day period immediately after the release of the recommendation.[14] One Business Roundtable member company, for example, reported that the number of votes cast tripled in a single business day following a report from Institutional Shareholder Services ("ISS"), with the votes overwhelmingly consistent with ISS's recommendation. This high incidence of voting immediately on the heels of the publication of proxy advisory reports suggests, at best, that investors spend little time evaluating proxy advisory firms' guidance and determining whether it is in the best interests of their clients and, at worst, that they simply outsource the vote to the proxy advisor (i.e., automatic voting). We continue to believe that this issue warrants further evaluation by and guidance from the Commission as an independent issue, particularly in instances where companies seek to directly respond to an adverse recommendation before shareholders cast their vote.

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[14] Placenti, F.M. (October 2018). *Are Proxy Advisors Really a Problem?* Retrieved from American Council for Capital Formation website: http://accfcorpgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport _FINAL.pdf.

The factual accuracy of proxy advisory reports must be improved.

One of the most critical areas our member companies experience is the inaccuracy of proxy advisory reports. In 2013 and again in 2018, a survey of Business Roundtable CEO members found that nearly all respondents found one or more factual errors in reports prepared by proxy advisory firms about their companies.[15] In the 2018 member survey, 95 percent of respondents identified factual errors in proxy advisory reports about their companies, and over 90 percent notified proxy advisory firms of these inaccuracies. Some of the factual errors are relatively minor but many are meaningful, and all raise concerns regarding the rigor and integrity of the proxy advisory firms' internal fact-collection and analysis processes now hidden from public view. Although some errors are ultimately corrected, the incidence of errors is far too frequent for reports so widely used and relied upon.

Responses to the survey Business Roundtable submitted to member companies following the 2018 Comment Letter provided specific examples of the types of errors companies have encountered. One member company reported that its retired CFO, rather than its current CFO, was included in ISS's compensation analysis, in conflict with ISS's stated practice and despite the fact that the company had brought the issue to ISS's attention. Another member company stated that a proxy advisor repeatedly characterized its compensation practices as having "single trigger acceleration," based solely on one legacy equity award that was made to an executive. The proxy advisor acknowledged that the company had adopted double-trigger vesting for its long-term incentive plans but refused to include a clarifying note in its recommendations. During the same period, another proxy advisor did not characterize the company's equity awards as having single-trigger vesting. Yet another member company reported that ISS overstated the GAAP value of its option grants by 54 percent and 44 percent in successive years. Another member company reported that Glass Lewis recently reversed a recommendation regarding a shareholder proposal related to executive compensation, citing a disclosure by the company that had been filed two months prior to Glass Lewis's initial recommendation that Glass Lewis had apparently previously failed to consider.

Executive compensation, in particular, is an area in which proxy advisory firms' analysis often falls short. One member company has had significant discrepancies with ISS's analysis of its pay practice for multiple years in a row. The company has had to resort to public letters to its shareholders to defend its practices and to highlight the nuances that ISS's analysis and recommendations glossed over. The letters illustrated that ISS's executive compensation standards fail to adequately address structural differences among industries that require compensation systems to be designed with different incentives. The member company pointed out that its business model requires long-term investments beyond the typical time horizon of ISS's evaluations, with incentive timing to match, that ISS's one-size-fits-all approach

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[15] Business Roundtable (September 12, 2013). *Letter to SEC Chairman White on Proxy Advisory Firms*. Retrieved from Business Roundtable website: https://www.businessroundtable.org/archive/resources/letter-to-chairman-white-on-proxy-advisory-firms.

inappropriately assessed. Additionally, ISS's measurement of CEO compensation for this company failed to account for the full value of realized and unrealized compensation for CEOs in a peer group, resulting in ISS stating that the CEO's relative compensation was two quartiles higher versus peers than the company's analysis showed. The following year, ISS's compensation analysis continued to miss the mark, utilizing a peer group for total shareholder return and executive compensation that not only included peer companies from unrelated industries but also differed from the peer group used for the company's largest U.S.-based competitor.

Business Roundtable members' experiences are not unique. According to an American Council for Capital Formation's ("ACCF") survey published in October 2018 covering the 2016 and 2017 proxy seasons, 94 companies tallied 139 significant complaints in companies' supplemental filings, of which 39 regarded factual errors, 51 involved analytical errors and 49 related to "serious disputes."[16]

As suggested by the number of "serious disputes" in the ACCF survey, proxy advisors' response to identified errors often fails to provide a satisfactory remedy for the affected company. Glass Lewis's recently announced Report Feedback Statement pilot program indicates that proxy advisors have the ability to improve this process.[17] Several Business Roundtable member companies have reported being given insufficient time to respond to draft reports provided by proxy advisory firms. Some members have also suggested that proxy advisory firms should be required to engage companies about their draft reports and recommendations. Member companies that identify inaccuracies in their proxy reports may expend substantial effort, at times from their senior management and their directors, to explain facts that proxy advisory firms too often seem to ignore. If a proxy advisor fails to engage or declines to take management's arguments into account, the company is left with little ability to set the record straight in the aftermath.

More than two weeks after one Business Roundtable member company's proxy statement was filed, the company was surprised to learn that ISS had recommended that its clients vote against the company's say-on-pay proposal despite its prior engagements with ISS, citing a severance package granted to a departing executive in the prior year. To be considered in its final report, ISS asked for comments from the company to be provided within less than four days, two of which fell over a weekend. This minimal review time significantly impedes the ability of companies to provide missing information to ISS and results in inferior disclosure and recommendations to shareholders.

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[16] Placenti, F.M. (November 7, 2018). *Are Proxy Advisors Really A Problem?* Harvard Law School Forum on Corporate Governance and Financial Regulation. Retrieved from https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/.
[17] Glass, Lewis & Co. (March 14, 2019). *Glass Lewis Launches Report Feedback Statement Service*. Retrieved from Glass Lewis website: https://www.glasslewis.com/glass-lewis-launches-report-feedback-statement-service/.

Laboring to comply within the tight timeframe, the company provided comments and spoke with ISS to discuss the errors driving its analysis of the cited severance package and to challenge the negative overall say-on-pay recommendation notwithstanding the adherence of the current named executive officers' compensation to ISS's standards. Following the call, and upon the company's request, ISS provided a list of questions it would like to have answered in a public disclosure. The company responded the following day with a public disclosure containing answers to the listed questions following feedback from ISS that the answers did indeed provide clarity on the issue in question. Although ISS ultimately revised its report to reflect some of the information provided by the company, it nevertheless left its recommendation unchanged. When ISS released its final recommendation the following day, it resulted in a substantial drop in shareholder approval of the company's say-on-pay proposal.

Business Roundtable Recommendations

In light of these shortcomings, Business Roundtable recommends that the Commission consider the following reforms, which were discussed in the 2018 Comment Letter, to increase the accuracy of proxy advisory reports:

- The Commission should reaffirm the fact that proxy advisors who rely on an exemption from proxy solicitation rules under Rule 14a-2(b) are still subject to liability for false and misleading statements under Rule 14a-9 and should specifically make clear whether these anti-fraud provisions apply when proxy advisory firms' voting reports include information, statements or opinions that have not been included in material filed with the Commission.

- The Commission should require proxy advisory firms to publicly disclose the final voting report about a public company 90 days after a shareholder meeting has occurred. This information would, among other things, allow for analysis of the effect that proxy advisory firm recommendations have on long-term shareholder value.

The Commission should consider additional transparency requirements for proxy advisors.

Proxy advisory firms offer little transparency into the internal standards, procedures and methodologies they use to develop their voting recommendations. Further, proxy advisory firms generally do not disclose the research, if any, used in formulating their recommendations, and whether recommendations were designed to promote the creation and preservation of long-term shareholder value. Business Roundtable member companies often have had to contend with proxy advisors' opaque, seemingly arbitrary and sometimes inconsistent policies in recent proxy cycles, including the examples described below.

Several Business Roundtable member companies have indicated that flawed peer group selection by proxy advisory firms caused significant issues. One member company reported that ISS made 15 changes to its compensation peer group within a four-year period. Constant changes prevent the board from establishing consistent long-term baselines that match the executive's payouts to long-term stockholders returns. Another member company pointed out that the average market capitalization of the companies included in the peer group ISS used in its analysis was 29 percent smaller than the company's market capitalization. The member company also indicated that ISS selected the company's peers at year end, while the company selected its own peer group at the beginning of the year, leading to discrepancies between the selected peers and an inability of the board to consider ISS's peer groups in making relevant compensation decisions for the period.

Several member companies observed that proxy advisory firms' peer group selections often differ widely from one another. One member noted that 36 percent of the companies included in the peer group used by ISS were not included in Glass Lewis's peer group in the same year. Such divergence calls into question the quality of the peer groups selected by both proxy advisors and compromises the ability of investors to compare the conclusions reached by the firms with one another and with the company's own analysis.

A member company also stated that the "cross-industry" comparisons used by ISS were problematic — ISS compared the member company's financial and operating performance against companies in different industries with different capital investment and business profiles, resulting in comparisons that were neither meaningful nor useful for shareholders.

Business Roundtable Recommendations

As the above examples illustrate, proxy advisory firms' policies, procedures and methodologies can produce conclusions that greatly differ from the companies' own analysis. Since the conclusions of the proxy advisory firms are the basis on which the firms determine their recommendations, companies should rightfully have an avenue to understand and evaluate how the applicable standards were used. To address this need, Business Roundtable continues to support the additional transparency requirements for proxy advisory firms recommended in the 2018 Comment Letter:

- Require proxy advisory firms to disclose how they have determined that their voting policies and methodologies are consistent with the best long-term interests of shareholders, including addressing any new, or additional, empirical studies or evidence on the subject of voting issues and shareholder value.

- To the extent that a proxy advisory firm's analysis and recommendation utilizes information different from what the company filed (e.g., peer group or value of option grant), require the proxy advisory firm to disclose not just the fact that different information was used, but also illustrate what the analysis would have been if the company's filed information had been used.

- Require proxy advisory firms to provide more transparency into their internal controls, policies, procedures, guidelines and methodologies, and to disclose when and why they choose to deviate from their stated standard practices.

- Require proxy advisory firms to disclose their criteria and requirements for evaluating matters subject to a vote before the beginning of the fiscal year in which the matters arise.

Conclusion

The U.S. proxy system plays an essential role for public companies, as well as for America's workers, employees and retirees. Business Roundtable commends the Commission's efforts to monitor and improve the proxy process and appreciates the opportunity to continue to share the views and experiences of our member companies as part of those efforts. Business Roundtable believes the recommendations discussed above and in our 2018 Comment Letter have the potential to meaningfully improve the proxy process and to give companies the ability to communicate more effectively with their ultimate owners.

Thank you for considering our comments and recommendations. We would be happy to discuss these comments or any other matters you believe would be helpful.

Sincerely,

Maria Ghazal

Maria Ghazal
Senior Vice President & Counsel
Business Roundtable