INVESTOR
ENVIRONMENTAL HEALTH
NETWORK

January 31st, 2020
Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Via email to rule-comments@sec.gov

Re: File Number S7-23-19

Dear Ms. Countryman:

I am writing on behalf of the Investor Environmental Health Network (IEHN) to comment on the proposed amendments to procedural requirements and resubmission thresholds under Exchange Act Rule 14a-8.

Organizational Interest

IEHN is a collaborative partnership of investment managers ($80B AUM) concerned with the material risks associated with corporate management structures that do not account for, measure or disclose the use of hazardous chemicals in their products and operations. Through dialogue and shareholder resolutions, IEHN encourages companies to adopt policies and practices that continually and systematically reduce and eliminate the toxic chemicals in their products and activities. Such actions benefit both companies and society, as reflected in IEHN's tagline—*Healthy Business, Healthy People.*

IEHN, a project of Clean Production Action, is a membership-based investor collaborative that promotes the use of safer chemicals to enhance shareholder value, public health, and the environment. IEHN recognizes that a company's brand reputation, public trust, and market share are linked to the environmental and human health risks and safety of its products. Through direct corporate engagement IEHN members advance solutions and strategies to transform business practices through strategic tools and partnerships, including the Chemical Footprint Project.

SUMMARY

IEHN respectfully submits the following comments and recommendations on the Proposed Amendments, recommending that the Commission reject the proposed amendments to current Regulation 14a-8.

The Proposed Amendments are grounded in a fundamental misunderstanding of the role

of the shareholder proposal process in the investment and corporate governance ecosystem. At its core, the flaws in the rulemaking proposal originate from (1) a failure to calculate the lost benefits and financial risks associated with reducing the submissions of shareholder proposals and (2) a mistaken assumption that achieving a majority vote is the principal means of evaluating the success of shareholder proposals.

In our experience, the principal impacts and role of shareholder proposals are to (1) facilitate communication among shareholders on an issue facing the, (2) to encourage engagement, responsive action and disclosure of relevant updates on the issue by the company, and (3) to serve as a survey of investor perspectives through the proxy voting process.

First, the rulemaking proposal has failed to evaluate the lost benefits of reducing the filing of shareholder proposals. In our experience, shareholder proposals enabled by SEC Rule 14a-8 lead to engagement and dialogue among investors, boards and management at hundreds of companies on issues of governance, risk oversight and long-term value creation. The shareholder proposal process serves to provide input and advice to boards and management from investors and encourages dialogue among subgroups of investors with diverse investment strategies. As documented in this letter, investor experience with numerous US companies, including Monsanto, McDonald's, Whole Foods Market, E. I. Du Pont de Nemours, Chevron and Dollar Tree, demonstrates that the substantial value which the shareholder process generates with regard to risk management far exceeds all reasonable estimates of the cost of the process.

The Appendix to this comment letter highlights The Economic Impact of Toxic Chemicals on the Economy, Avoidable Through Robust Corporate ESG Practices, Supported by Multi-Year Minority Shareholder Engagement. the market-wide value at risk for associated with these chemical risk issues. The risks and opportunities are material issues for numerous companies and sectors.

Yet, the rulemaking proposal failed to even make an order of magnitude estimate of the lost value to investors associated with reducing the number of shareholder proposals by 37% or more.

Second, the Commission has mistakenly emphasized throughout the rulemaking proposal the question of whether and when a proposal is likely to receive majority support. Since most shareholder proposals, particularly those that IEHN members file regarding our focus issues are advisory in nature, the consideration of whether the voting outcome achieves greater than 50% shareholder support is seldom determinative of proposal impacts. For instance, in our experience many companies act as if a proposal that receives a vote in excess of 20% support has effectively "won," and proceeds to engage in responsive action. A majority vote is far less significant to the long-term value created and protected by shareholder proposals than whether a proposal fosters effective communications, influence and disclosure. This, in turn is frequently dependent on whether the proposal meets the Commission's resubmission thresholds. Therefore, raising those thresholds as proposed would undercut substantial value to shareholders.

Accordingly:

1. We urge the Commission not to adopt the proposed rule changes. If the Commission wishes to go forward on these topics, it should revise and reissue the rulemaking proposals with a complete and appropriately balanced policy and economic analysis. Such analysis should consider the impacts of the proposed rule changes regarding engagement, disclosure and management of ESG related risks, including those associated with toxic products and emissions, as well as the implications for the engagement and private ordering process that advances best practices and market standards for ESG disclosure including disclosure of chemical risks.

2. We urge the Commission to reject the proposal to increase resubmission thresholds, but instead to establish an exception from resubmission thresholds that reflects the need to allow continuation of proposals that address major emerging challenges for the issuer.

COMMENTS

1. The shareholder proposal process generates and protects value for investors regardless of whether a proposal is on track to achieve majority support.

Most shareholder proposals, particularly those that IEHN members file regarding our focus issues, are advisory in nature, such that the consideration of whether the voting outcome achieves greater than 50% shareholder support is seldom determinative of proposal impacts. For instance, in our experience many companies act as if a proposal that receives a vote in excess of 20% support has effectively "won." A majority vote is far less significant to the long-term value created and protected by shareholder proposals than whether a proposal fosters effective communications, influence and disclosure. This in turn is frequently dependent upon whether the proposal meets the Commission's resubmission thresholds. Therefore, raising the resubmission thresholds as proposed would undercut substantial value to shareholders.

The impact of the shareholder proposal process is grounded in improving disclosure, performance, and shareholder influence, not in achieving a majority vote. Additionally, it is often the case that meaningful engagement around a proposal results in the withdrawal of proposal altogether, resulting in significant progress on a matter in the absence of any vote. Yet, the focus on whether or not a proposal will receive a majority of support pervades the rulemaking proposal. As an example, the rulemaking proposal states, that the increase of the first-year resubmission threshold from 3% to 5% is justified because "our proposed increase for the initial resubmission threshold from 3 to 5 percent would exclude proposals that are very unlikely to earn majority support upon resubmission[1]

In our experience, **the productive impact of the shareholder proposal process occurs when a proposal can be filed and can be resubmitted**. In other words, the existing standards for filing and resubmission serve as a very substantial hurdle as to whether or not a proposal will be given the opportunity to elevate important issues and promote effective leadership and risk management by companies in member portfolios. Negotiated withdrawals take place within this context as well.

[1] Rulemaking Proposal, page 52.

For example, a proposal at McDonald's led to a very successful negotiation with the company leading to a highly significant program to address opportunities to reduce the use of pesticides on potato crops. McDonald's is the largest purchaser of potatoes in the US economy.[2] The action that followed this engagement, which included moves toward pesticide reduction, generated significant benefit for the company, as well as the environment and society.

Similarly, a 2005 proposal at CVS Health, asked the company to evaluate the feasibility of taking strengthened actions to assure the safety of its private label cosmetics and to encourage its brand name suppliers to do the same.[3] CVS's "no action" challenge at the SEC was successfully rebutted by the filers.[4] The resolution earned a supporting vote of only 10 percent. The investors refiled the following year, at which point an earnest dialogue began. This led to withdrawal of the resolution and CVS's release, in its inaugural Corporate Social Responsibility report in 2008, of a sector-leading Cosmetic Safety Policy.[5] CVS has since become a signatory of

---

[2] McDonalds has had a robust corporate sustainability program for many years with considerable accomplishments. In 2008, IEHN member Newground Social Investment joined with Bard College and the AFL-CIO to file a resolution asking the company to publish a report on policy options to reduce pesticide use in its supply chain. Investors noted the burdens pesticides impose on environmental health, recited disclosures by Sysco Corporation, Campbell Soup Company, and General Mills about programs to reduce their use, and observed that McDonalds had not systematically addressed the issue.

In the course of negotiating withdrawal of the resolution, the company and the investors agreed that the company would launch a pilot project for Integrated Pest Management on potatoes. McDonalds, the largest buyer of potatoes in the world, wholeheartedly embraced the program, hiring a leading IPM consultant and seeking the views of its three principal processing companies and their growers supplying potatoes in the US and Canada. The company developed a multi-question assessment tool, dividing its growers into four classes of IPM use, from "basic" to "master". The tool enables McDonalds, its processors, and growers to compare growers within regions. The aggregate results for both the US and Canada have been published annually since the 2010 growing season. In subsequent years, the survey was expanded to include an expanded range of sustainability practices. Results were initially published at the website of the potato industry trade association, the National Potato Council, viewable at http://www.nationalpotatocouncil.org/events-and-programs/environmental-stewardship/ipm-survey-and-information/ (The website now links to scores on a free-standing website, www.potatosustainabilityinitiative.org). Scores have been rising as have been the numbers of participating growers.

The agreement to withdraw the proposal was included in the Commission's no action decision finding that the proposal was moot. *McDonald's* (March 11, 2009) That agreement noted a commitment of the company to collect, and share with shareholders, examples of best practices for pesticide use reduction on potato crops within the current U.S. potato supply chain— including alternative pest control methods and reduction practices and to work to encourage the adoption of best practices related to pesticide use throughout McDonalds' global supply chain.

For further description of the engagement process by resolution co-filer Bruce Herbert, Newground Social Investment, listen to his interview on Seattle Public Radio here: http://www2.kuow.org/program.php?id=22354.

[3] The investors noted that the European Union had tightened regulations on toxic chemicals in products and that two of CVS' major brand suppliers had committed to reformulating their cosmetic products globally to meet European standards.

[4] *CVS Corporation* (March 3, 2006). The proposal requested that the board publish a report evaluating the feasibility of CVS reformulating all of its private label cosmetics products to be free of chemicals linked to cancer, mutation or birth defects, take certain other actions described in the proposal, and encourage or require manufacturers or distributors of other cosmetics

[5] CVS 2007 Corporate Social Responsibility Report, page. 34. https://cvshealth.com/sites/default/files/2007-csr-

the Chemical Footprint Project (CFP).[6]

The ability to file and refile proposals was central to our multi-year shareholder engagement process to improve company risk management and promote environmental impact risk reduction for companies engaged in hydraulic fracturing. Our organization has worked with members to track the sector and work with companies and investors to develop and advance best practices.[7] While IEHN published guidelines and issued scorecards, the state of practice in the sector was advanced at least as much by investors filing over 50 shareholder proposals with to oil and gas companies. Of the 48 hydraulic fracturing proposals submitted between 2009 and 2017, brought to at least 26 different companies, 24 were voted on, 23 were withdrawn, and one omitted. Numerous companies dramatically increased their scores in response to resolutions filed that were then withdrawn as a result of constructive shareholder engagement.[8]

---

report.pdf.

[6] The Chemical Footprint Project, https://www.chemicalfootprint.org/.

[7] Concerned investors have been seeking increased disclosure by upstream oil & gas companies about how they manage the environmental risks and community impacts associated with exploration and production operations utilizing hydraulic fracturing since 2009. IEHN has engaged with shareholders and companies alike on this topic, in line with its mission of tracking both risks related to chemicals in products and risks related to chemicals in communities.

As investors began asking oil and gas companies for greater disclosure on the risks related to hydraulic fracturing, IEHN and the Interfaith Center on Corporate Responsibility released *Extracting the Facts: An Investor Guide to Disclosing Risks from Hydraulic Fracturing Operations*. These disclosure guidelines were based on the concept that both companies and investors would be well-served by a published set of guidelines capturing investor reporting expectations. They identify core management goals, best management practices, and key performance indicators for assessing progress.

Recognizing that many companies might be implementing best practices but not disclosing them, and seeking to strengthen the voices of the more transparent companies that IEHN had engaged, IEHN followed on the disclosure guidelines with a disclosure scorecard in 2013, viewable online at www.disclosingthefacts.org The scorecards focus on toxic chemicals, water sourcing and waste water management, air emissions, community impacts and management accountability. For example, the scorecards enable companies to showcase their chemical risk reduction strategies, reporting their systematic evaluation and reduction in use of toxic chemicals. This helps investment portfolio managers and their clients differentiate those companies whose chemical management practices pose a higher environmental risk from those whose adoption of such chemical risk reduction measures reduce risk to shareholder value.

The sharply rising scores of many companies in the six years of the scorecards indicate that investors are achieving considerable success in triggering a competitive "race to the top" in risk management transparency. For example, Anadarko scored 20 out of 25 indicators in 2019, in contrast to 4 out of 32 indicators in 2013, marking significant advances in reporting. Significantly, hydraulic fracturing shareholder proposals submitted for inclusion on Anadarko's proxy statements in 2011 and 2012 — the 2011 proposal requesting a report on the environmental impacts of fracturing, and the 2012 proposal requesting a report on the risks of hydraulic fracturing to the company — were both withdrawn, indicating that meaningful company engagement on this issue with the concerned shareholders had begun, thanks to the Rule 14a-8 process.

[8] See http://disclosingthefacts.org

To cite another important example from our work, concerned investors used the shareholder proposal process to elevate response by Whole Foods Market to a reputational liability sitting on its shelves. In 2005, aware of growing scientific concern regarding the chemical Bisphenol-A (BPA) used in polycarbonate baby bottles, IEHN members contacted Whole Foods Market. Though BPA had been judged safe by regulators, investors were concerned about the emergence in scientific literature of research and weight of the evidence indicating that BPA could function as an endocrine disruptor. Whole Foods' continued stocking of such bottles, especially leading to exposure of babies, could easily damage its reputation for retailing healthy products.

Investors dialogued with the company, which had been monitoring the emerging science, but felt it necessary to file a shareholder resolution on this topic.[9] Though the resolution garnered only a 10% supporting vote, the proposal process elevated company attention to this issue and soon thereafter Whole Foods Market withdrew the baby bottles containing BPA from its shelves. The Company's early action, as promoted by its investors, ultimately helped to sustain its reputation as a leader. Two years later, additional scientific research led to broader scientific consensus on the danger of BPA exposure and ultimately withdrawal of the bottles from the national retail marketplace.

In our area of focus, it is clear that the Commission would need to consider and calculate the value to investors that could be lost by dampening the efficacy of shareholder efforts to improve disclosure and reporting on an array of environmental health issues, including hydraulic fracturing, chemical footprint and product safety; such efficacy being negatively impacted by reducing the number of proposals submitted and resubmitted. The economic and policy implications to consider include the implications of blocking proposals that would ultimately be withdrawn as a result of effective engagement.

---

[9] The proposal filed by Green Century noted that Whole Foods "is a leader in marketing of wholesome foods and nutritional products, including organic products that avoid the use of pesticides and other synthetic ingredients...Whole Foods has developed a valuable premium brand based on its faithful adherence to these high standards. Whole Foods customers and shareholders expect the company to provide leadership in product purity and to exercise the highest standards in ensuring that the products it sells do not contain harmful synthetic chemicals." The resolution continued, "Several products in the marketplace contain chemicals that are known to interfere with hormone signaling and are likely to disrupt human development. One such chemical is Bisphenol A (BPA), which is used in large quantities in polycarbonate (hard plastic) products and can linings. WFMI sells products containing BPA. Public health monitoring indicates that widespread human exposure to BPA and other endocrine disrupting substances is already at the range demonstrated to cause adverse effects in numerous animal studies. Effects of concern include changes in brain structure, the immune system, male and female reproductive systems, and changes in breast tissue associated with increased rates of breast cancer. Fetuses in utero and infants are at greatest risk of harm from these effects."

The proposal recommended that the Board publish a report evaluating Company policies and procedures for systematically monitoring and reducing consumer and environmental exposure to endocrine disrupting chemicals, including BPA, and persistent bioaccumulative toxics. In it supporting statement it noted that "Cutting edge innovative practices include inventorying chemicals in products using published lists and scientific research; establishing goals and milestones for action, even in the face of scientific uncertainty; providing inducements to suppliers to provide safer products; and publicly disclosing information to consumers and shareholders. Companies have adopted such practices to build public trust, protect brand reputation, and anticipate prospective regulation. Such actions by Whole Foods would underscore our company's leadership role in providing safe, wholesome products."

We agree with the recommendation of the SEC Investor Advisory Committee that the Commission needs to revise and re-issue the proposed rulemaking with a balanced view of the role of the shareholder proposal process.[10]

Shareholder proposals during the last two decades have effectively persuaded hundreds of companies to produce annual sustainability reports on key environmental and social metrics of interest to investors. The Commission's existing rules governing shareholder proposals facilitated bringing these practices to leading companies. In most cases, these precatory resolutions did not achieve majority votes, but the votes were of sufficient magnitude to prompt corporate response. Investor support for such disclosure and management has grown over time. An especially noteworthy voting jump occurred in the 2017 proxy season when dominant mutual fund players including BlackRock, State Street and Vanguard supported resolutions for more climate risk reporting at leading energy companies. **Any rulemaking changes that undercut ESG disclosure improvements or which silence the minority of shareholders that may be flagging critical ESG issues must be weighed against the increased risks and the lost benefits associated with omitting those proposals.**

2. Shareholder proposals are advancing market-wide standards for assessing and disclosing chemical risk.

Our member investors have observed and engaged regarding numerous material risks

---

[10] Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals, January 24, 2020. https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf.

Voted in favor by 10 of the 15 IAC members included recommendation that the Commission evaluate the cumulative impact of the shareholder proposal rule and proxy advisory role on investors, and what is the potential for unintended consequences of the combined actions? In particular, the Commission should ensure that it has a good understanding of the impact of these initiatives on small and mid-sized market participants, and ensure that it will not result in unjustified additional burdens and costs on small and mid-sized asset managers that will impair their ability to perform their responsibilities to clients.

Further, the IAC recommended that the commission revise and republish the rule proposals for balance and compliance with SEC guidance, stating, "The SEC should revise and re-issue the rule proposals to:

- Present a balanced assessment of proxy advisors and shareholder proposals.
- Comply with SEC guidance on the economic analysis included in the releases.
- Present evidence supporting the need for the proposals, rather than stating simply that
- problems "may" exist.
- Address reasonable alternatives to the proposed changes and why they are not more likely to
- achieve the stated goals of the proposals at a lower net social cost.
- More fully address how the PA/SP actions particularly affect small and mid-sized investment managers and "Main Street" shareholders.
- Discuss the risk that the proposals could impair the ability of proxy advisors to sustain their businesses, or new competitors to enter the business, which could result in increased monopoly power and more – not fewer – one-size-fits-all voting outcomes."

associated with corporate management structures that do not account for, measure or disclose the use of hazardous chemicals in their products and operations. This leads to *"chemical risks"* in the marketplace-- including fines, lawsuits, market share decline, lower market value, and loss of trust with consumers.

Part of the underlying reason for our work to address these risks is the failure of ESG information providers to address the core issues. Instead, as guided by the structure of our regulatory systems, they have traditionally focused on "end of the pipe" risks, *e.g.,* air emissions, wastewater discharges, and hazardous waste clean-up obligations related to federal regulation, and associated reputational and legal risks.

The state of market standards for chemical risk disclosure is in flux, and is being advanced by the shareholder proposal process. For example, shareholder proposals are beginning to advance consideration and adoption of Sustainability Accounting Standards Board (SASB) standards of reporting by issuers. SASB was established in 2011 "to develop and disseminate sustainability accounting standards that help public corporations disclose material, decision-useful information to investors."[11] Indicators have been developed for 77 industries in 11 sectors. The SASB Foundation's board was initially chaired by Michael Bloomberg, whose investment data service company began compiling sustainability data for investors in 2009.[12] Standards developed for building products and furnishings, household and personal products, apparel, accessories and footwear, toys and sporting goods and multi-line retailers incorporate indicators related to a firm's chemical footprint.

The chemical risk disclosure standards in those SASB standards are prompting engagement conversations between companies and investors seeking disclosure of material information. Some of that activity is translating into shareholder proposals.

As one example, in 2019 IEHN members Trinity Health and Sisters of St. Francis of Philadelphia filed a proposal at Dollar Tree, a chain of discount variety stores that operates 14,835 stores throughout the United States, seeking SASB-compliant disclosure on toxic chemical risks. In exchange for withdrawal of the proposal, the company agreed to work on management and disclosure of toxic chemicals in its supply chain and is in ongoing consultation with the Chemical Footprint Project. Sister Nora Nash of the Sisters of St. Francis of Philadelphia wrote to Dollar Tree in March 2019, in the letter withdrawing the proposal:

> "The proponents … have found these conversations to be respectful, constructive, and fruitful."

To assist Dollar Tree in moving toward SASB compliant disclosure, the shareholders introduced the company to the Chemical Footprint Project,[13] which is assisting the company in

---

[11] The Sustainability Accounting Standards Board, www.sasb.org.

[12] Page 2, Bloomberg, "Our Bottom Line is Impact", *2015,* https://www.bbhub.io/sustainability/sites/6/2015/06/15_0608-Impact-Report_Web.pdf.

[13] The Chemical Footprint Project (CFP) is an initiative of investors, retailers, government agencies, non-governmental organizations (NGOs), and health care organizations that aspire to support healthy lives, clean water and air, and sustainable consumption and production patterns through the effective management of chemicals in

becoming more transparent and in helping the company to track its commitment and progress toward removing chemicals of high concern from their suppliers' products. In the latest chemical policy report posted on its website, Dollar Tree notes, "We have a goal of eliminating the chemicals identified on our priority chemical list from private label products by 2020 or sooner by working with suppliers on safer alternatives.

In a broader sense, it is important to recognize that shareholder proposals often help create market leaders who have competitive advantage over companies who solely focus on compliance with regulations or standards. The setting of standards, by government agencies like the FDA lags emerging scientific and market understandings by many years. For instance, consider the example of Whole Foods discussed above. While the 2005 shareholder proposal helped to prompt the Company's action to remove BPA baby bottles from its shelves, it was not until 2012, that the FDA banned the use of BPA in baby bottles due to findings of chemical risk. The engagement of Whole Foods' shareholders causing the company to act long before safety standard setters bolstered the company's reputation for being a leader in health and wellness retailing;[14] it also created competitive advantage for the company and initiated a broader signal to the market that encouraged other companies to join Whole Foods in the best practice it helped to establish.

3. <u>The Commission should not get involved in issues of "engagement" without additional fact gathering.</u>

The rulemaking proposal contains an ill-conceived requirement for proponents to notify companies of their availability to confer with the company regarding the proposal. This seems to imply that the lack of engagement is attributable to investors, rather than to companies. While there is no requirement and should be no requirement to engage with a company in order to file a shareholder proposal, many IEHN members seek engagement with companies through correspondence, and only file proposals as a last resort. Therefore, if the encouragement for engagement should fall anywhere, the onus should be on companies to demonstrate that they have attempted to engage with the proponent. However, we believe that fundamentally, the process of engagement is outside of the jurisdiction and authority of the Securities and Exchange Commission, and that the Commission would be wise to steer clear of rulemaking in this area, or risk creating an extensive and complicated bureaucratic addition to the shareholder proposal process that would prove unworkable for the Staff.

To the extent that the Commission chooses to pursue issues of engagement, it is obvious that a more substantive research base is necessary. For instance, the Commission should survey

---

products and supply chains. CFP Signatories, representing over $2.8 trillion in assets under management and over $700 billion in purchasing power, are engaging corporations in CFP. As noted, the SASB standards include chemical risk and product safety as a part of their materiality disclosures for major consumer-facing business sectors. The Chemical Footprint Project provides common data and metrics companies can use to report to these standards.

[14] IEHN reported on 2008's events, when market-wide retail withdrawal of bottles occurred in response to heightened warnings, in *Public awareness drives market for safer alternatives: Bisphenol A market analysis report*, iehn.org/documents/BPA%20market%20report%20Final.pdf 2008). The report analyzed market trends for companies that made products containing bisphenol A as well as businesses developing and selling BPA-free products.

companies and investors regarding their current practices and then consider whether there is a logical rule that would be helpful rather than harmful to the current baseline of engagement activities. We believe that such a survey would turn up substantial differences among companies.

As one example, we note that the company Lumber Liquidators, after a crisis involving the presence of formaldehyde in its products led to criminal liability[15] and a shareholder derivative suit,[16] agreed to a settlement which set forth requirements regarding how the company will review shareholder proposals and when engagement with investors is mandatory.[17] These requirements are now established in the company's bylaws. It is advisable that the Commission review whether other companies have a similar practice already enshrined in corporate documents, before applying a blanket rule on engagement.

RECOMMENDATIONS

Recommendation 1*: The Commission should reject the current proposals and revise and re-issue the rulemaking proposals to reflect a clearer understanding of the role of shareholder proposals in the current investing ecosystem, including their role in financial risk management and in promoting market leaders and advancing establishment of best practices.*

---

[15] In March of 2019, Reuters reported that Lumber Liquidators Holdings Inc will pay a $33 million criminal penalty to settle federal charges it misled investors about the safety of its laminate flooring made in China and sold to U.S. customers. Shares in Lumber Liquidators fell 2.5 percent after the news. The stock has lost nearly 80 percent of its value since a CBS "60 Minutes" report questioning the safety of Lumber Liquidators' products aired in March 2015. *See* article at *https://www.reuters.com/article/us-lumberliquidators-settlement/lumber-liquidators-pays-regulators-33-mln-in-flooring-scandal-settlement-idUSKBN1QT2BR.*

[16] The Consolidated Complaint alleges that defendants are liable to Lumber Liquidators for causing the Company to violate the law by selling wood containing toxic levels of formaldehyde in violation of the California Air Resources Board's Regulations ("CARB Regulations"), and that a majority of the directors face a substantial likelihood of liability for knowingly causing the Company to seek profits in violations of the law,

[17] *In re Lumber Liquidators Holdings, Inc. Securities Litigation*, Stipulation of Settlement, page 15, https://www.sec.gov/Archives/edgar/data/1396033/000114420416114129/v444602_ex10-1.htm.

"3.9 Board Evaluation of Stockholder Proposals. The Board shall include a provision in the Company's Bylaws which requires that stockholder proposals be evaluated by the directors as follows:

(a) The Company shall distribute to the entire Board all proposals received by the Company. After the distribution to the Board, and before the making of any recommendation to the Board or any of its members concerning a response, approval or disapproval, Lumber Liquidators' law department and senior management shall discuss with the Chair of any Board committee responsible for oversight of the subject matter of the proposal, if applicable, the financial, legal, practical and social implications of approval and implementation of the proposal;

(b) Where a stockholder proposal has been made by any stockholder holding at least 2% of the Company's outstanding shares as of the Company's last-filed Form 10-Q or 10-K, the Company shall timely contact the proponent of the proposal to arrange a teleconference or an in-person meeting to discuss the proposal and its financial, legal, social and practical implications. If the proponent agrees to a meeting or teleconference, the Chair of any Board committee responsible for the oversight of the subject matter of the proposal shall attend;

(c) Lumber Liquidators' law department and senior management, shall make a recommendation to the Board committee responsible for oversight of the subject matter of the proposal concerning whether to include or exclude the shareholder proposal in the proxy and/or to submit a no-action request to the SEC pursuant to Securities Exchange Act of 1934 §14(a), and SEC Rule 14r."

The Commission's internal memorandum on economic analysis associated with rulemaking requires that these issues be hashed out before issuing a proposed rule. For instance, the Memorandum states that "The proposing release should include a substantially complete analysis of the most likely economic consequences of the rule proposal." Because the Commission has failed to start from such a basis, we recommend the Commission revise and reissue the proposed rule.[18]

The Commission's efforts to evaluate shareholder proposals according to whether they are calculated to obtain majority support flies in the face of hundreds of shareholder proposals that have improved value at companies, reduced financial risk, and advanced market practices, while garnering votes substantially below 50%. The underlying basis for the proposals to restrict shareholder proposals by increasing both filing and resubmission threshold appears to be based on an erroneous conclusion that the proposal process imposes a net cost on fellow investors, when in fact, the evidence *strongly* suggests that the proposal process offers a very substantial net benefit for fellow shareholders, companies and society.

As an organization of investors who have extensive experience using the shareholder proposal process to protect and advance value, we feel that the Commission's failure to assess the benefits facilitated by the shareholder resolution process has led to a proposed rule change that threatens to undermine the public interest and the role of the SEC in investor protection.

Recommendation 2*: The Commission should establish an exception to the resubmissions rule allowing the proposal to be resubmitted where the Company is unable to demonstrate the absence of accumulated scientific evidence that may potentially portend substantial company liability or market demand, documentation of a significant exposure of the company to risks associated with the issuer's products or activities; or other demonstration of catastrophic or existential risk to the company.*

Investor experience demonstrates that the existing resubmission thresholds are in fact often too restrictive – they block needed opportunities to call attention to major, material risks facing portfolio companies. The proposed scaling up of resubmission thresholds would undermine Commission interests in promoting shareholder protection and availability of material information.

Mismanagement of toxic chemical management issues by issuers can lead to public health crises, reputational disasters and bankrupting levels of liability. To cite two important examples, a look at investor concerns regarding toxic chemicals at Monsanto demonstrates that the *existing* resubmission thresholds are already too stringent to ensure the right of investors to elevate visibility of issues posing highly material risks to their companies. The experience of investors at E. I. Du Pont de Nemours demonstrates that the proposed resubmission threshold could well have obstructed investor efforts to encourage the company to phase out the toxic

[18] In making this recommendation, we echo that important recommendation of the SEC Investor Advisory Committee. https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf

product PFOA.

Monsanto - Prescient shareholder proposals on risks of glyphosate blocked by existing resubmission threshold

Our experience with investor voting and prescience demonstrates that a continuing support of 5% of investors is sufficient to flag an issue of existential liability for a company. *Unfortunately, the existing resubmission thresholds would block even a proposal that is addressing what is obviously an existential risk for a company. Therefore, our experience suggests that the current resubmission thresholds are already poorly configured in that they block important issues from further consideration.*

One example is investor concern over Monsanto's flagship product glyphosate-based herbicide, Roundup. A 2015 shareholder proposal[19] described how an increasing number of independent studies assessing the toxicity of glyphosate were associating the compound with "cancer, birth defects, kidney disease, and hormone disruption, causing international concern about its safety", and that the International Agency for Research on Cancer of the World Health Organization reclassification of glyphosate as "probably carcinogenic to humans" in March 2015 raised concern for substantial increases in overall legal and financial risk, damage to Monsanto's name brand and corporate reputation.[20] The proposal requested that the company issue a report assessing the effectiveness and risks associated with the company's responses to public policy developments intended to control pollution and food contamination from glyphosate, and quantifying potential material, financial risks or operational impacts on the Company in the event that proposed bans and restrictions were enacted.[21]

---

[19] Shareholder John Harrington, the President of Harrington Investments Inc., filed a proposal at Monsanto in 2015 regarding health risks from glyphosate.

[20] Monsanto Company 2015 Proxy Statement, Page 86.
https://www.sec.gov/Archives/edgar/data/1110783/000120677415003737/monsanto_def14a.pdf

[21] When Mr. Harrington filed the proposals described above in 2015 and 2016, the safety of glyphosate was being seriously considered and challenged within the international scientific community. For example, a 2015 article in *Environmental Sciences Europe* that extensively reviewed industry studies of glyphosate-tolerant GM crops found that evidence of importance for regulatory assessment had been "systematically ignored", based on numerous flaws in the scientific methodology employed by industry-produced studies. Contrary to these industry studies, the researcher found that independent research showed glyphosate-tolerant plants accumulating glyphosate residues at unexpectedly *high* levels and passing residues onto consumers. *See* Cuhra, M. Review of GMO safety assessment studies: glyphosate residues in Roundup Ready crops is an ignored issue. *Environ Sci Eur* **27**, 20 (2015) doi:10.1186/s12302-015-0052-7.

In May 2015, the International Society of Doctors for the Environment called for an immediate ban on glyphosate herbicides due to associations with health problems such as birth defects, infertility, damage to the nervous system, Parkinson's disease and several forms of cancer. *See* "International Doctors Demand Immediate Ban on Glyphosate Herbicides", The Detox Project, May 17, 2015, https://detoxproject.org/doctors-demand-immediate-ban-on-glyphosate-herbicides/.

Also in 2015, French researchers published an article in international scientific journal *Food and Chemical*

The proposal was vigorously opposed by the company, which claimed that compliance testing demonstrated the safety of glyphosate.[22] On its 2015 vote, the proposal received 5.3% voting support.

As the 5.3% vote was within resubmission thresholds, the shareholder refiled the proposal in 2016. At that time, actions by government and nongovernmental entities were continuing to escalate, with nearly 40 countries proposing restrictions or bans on glyphosate-based products. In 2016, the company once again opposed the proposal. It still received only 5.5% support, thus failing to meet the 6% threshold for a second resubmission. Proposal filing on this topic was required under the existing Rule 14a-8(i)(12) to cease.

But, the events that followed demonstrated that the 5.5% of investor votes in favor of the proposal were on target. After Monsanto was acquired by the German pharmaceutical company Bayer in 2018, the acquirer discovered that it had acquired and an enormous, potentially bankrupting liability. Two months after the acquisition, 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 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.[23]

Toxicology, looking at the potential toxic effects of glyphosate and its commercial formulations below regulatory limits. They found that glyphosate-based herbicides caused teratogenic, tumorigenic and hepatorenal effects, that these effects could be explained by endocrine disruption, that some effects were detected within the range of "safe" exposure under regulatory standards, and that this evidence raised concern and need for further study. Residue levels in food and water, as well as human exposure, were escalating, and their research demonstrated chronic toxic effects connected to environmental toxicity. *See* Potential toxic effects of glyphosate and its commercial formulations below regulatory limits, Food and Chemical Toxicology, Volume 84, October 2015, Pages 133-153. https://www.sciencedirect.com/science/article/pii/S027869151530034X.

Many of these studies considered what regulators and industry were not examining: the long-term impact of environmental toxicity based on chemical accumulation in the environment.

[22] As an example, the company asserted that the World Health Organization finding of likely carcinogenesis was a minority view among the scientific community. *See* Monsanto Company 2015 Proxy Statement, Pages 87-88. https://www.sec.gov/Archives/edgar/data/1110783/000120677415003737/monsanto_def14a.pdf.

[23] The litigation has continued 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. In May 2019, a California jury awarded more than $2 billion in a Roundup cancer trial. As of May 2019, Bayer has faced more than 13,400 U.S. lawsuits over the herbicide's cancer risk. *See* Tina Bellon, "California jury hits Bayer with $2 billion award in Roundup cancer trial", Reuters, May 13, 2019. https://www.reuters.com/article/us-bayer-glyphosate-lawsuit/california-jury-hits-bayer-with-2-billion-award-in-roundup-cancer-trial-idUSKCN1SJ29F.

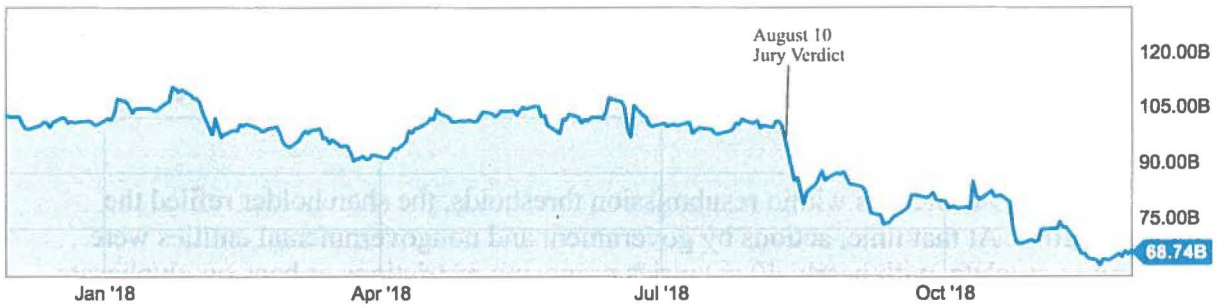


Figure 1 Bayer Market Capitalization Before and after the Jury Verdict

This ongoing litigation has subtracted over $30 billion from Bayer's market value since the first jury verdict, Bayer stock has lost over 44% of its value since the company acquired Monsanto, and Bayer is facing over 18,000 court cases involving claims that glyphosate in Roundup is linked to non-Hodgkin's lymphoma. It would clearly have been in all investors' interest to have paid closer attention to the information on these emerging liabilities, yet the SEC's existing resubmission thresholds blocked this needed deliberation.

Looking back in time, these shareholder proposals clearly sounded the alarm on a matter of significant material risk to the company. There is little economic justification for ever keeping this issue off the proxy given the magnitude of risks it posed to the company as well as to public welfare.

Thus, it should be recognized that the existing resubmission thresholds are insufficiently nuanced to prevent the removal of a proposal from the proxy that would represent a long-term material issue that is in the best interests of all investors to consider. It does not seem in the interests of investors or the capital markets for the SEC to so truncate the opportunity for prescient investors to elevate discussion through shareholder proposals, even if they are only 5% of investors.

The shareholder proposal process provides a critical pathway for groups of investors, including smaller groups that may have particular insights or foresight, to elevate visibility and consideration of an issue of potential significance to a company. In many instances, persistent investors have sounded a clarion call to address an emerging risk issue. **Even though voting support for the proposal may have been close to or even under the existing resubmission thresholds**, all investors would likely agree in retrospect in this example that the proposal provided a valid warning and opportunity to anticipated and fend off the material impact the issue later had on the company.

Although we can see this with 20-20 hindsight at particular companies like Monsanto and Wells Fargo[24], the evidence strongly suggests that the Commission also needs to adjust its approach and stop excluding proposals that are the best opportunity for shareowners to flag issues posing major exposure for the company, even if the voting levels are close to the current resubmission thresholds.

[24] See comment letter On the rulemaking process from Sanford Lewis, Shareholder Rights Group, January 6, 2020.

E. I. Du Pont de Nemours - shareholder proposals successfully addressing risks of perfluorinated chemicals would have been blocked, had proposed rules then applied

Shareholder engagement with E. I. Du Pont de Nemours offers another poignant example of how application of the proposed rule would harm shareholder value. The proposed resubmission thresholds, had they then applied, would have undercut efforts by investors at E. I. Du Pont de Nemours to encourage the company to phase out a problematic chemical.

With this company, shareholders with concern about the health impacts of perfluorinated chemicals (PFAS) engaged with the company regarding risk over many years, noting that evidence from scientific literature demonstrated that PFAS generate substantial threat to human health and the environment and the production and use of PFAS had posed substantial liability risks for chemical companies.

Shareholders at E. I. Du Pont de Nemours and Company voted for several years in the 2000s on PFAS related proposals. A first year vote in 2006 on a proposal seeking disclosure of PFAS related expenses received 28.9% support. The second year, 2007, the same proposal received only 6.2% support. Yet at the same meeting a proposal asking the company to commit to a phaseout of PFAS was filed in 2007 receiving 22.9% support. but the company had then committed to phase out PFOA by 2008 and the staff found that the proposal seeking phaseout was substantially implemented.[25] This was based on the announcement by Chairman and Chief Executive Officer Charles Holliday that "we are developing potential alternative technologies and today we are committing to eliminate the need to make buy or use PFAS by 2015".[26] Arguably, the 2007 proposals may have been excludable if the Commission's proposed rules were in place –due to the second year vote of 6%.[27] The progress associated with this multi-year shareholder engagement effort would have been truncated if the proposed resubmissions rule were then in effect and the momentum that led to successful resolution of this issue at the company may have been thwarted.

Since then there has been dramatic valuation impact in this sector as a result of PFAS-related lawsuits, with dramatic drops in market valuation concurrent with a surge in successfully prosecuted environmental liability cases in the last couple of years.[28] One news report described the situation in August 2019:

> "Environmental considerations appear to be part of the reason all four stocks [*companies 3M, Chemours, DePont and Corteva, the latter three all formerly part of I.E. DuPont de Nemours*] have lagged behind the market. DuPont shares are down 3.7% year to date, worse than the 15.2% gain of the Dow Jones Industrial Average. 3M has fallen 8.3%, and

---

[25] *E. I. du Pont de Nemours and Company* (February 26, 2008). https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/eidupontdenemours022608-14a8.pdf.

[26] Quoted in no action request, Id.

[27] Although phrased differently, it is likely the Staff may have seen the phaseout proposal as the "same subject matter" for purposes of Rule 14a-8(i)(12).

[28] "Plummeting stock prices show PFAS are bad business", *International Chemical Secretariat*, September 10, 2019. https://chemsec.org/plummeting-stock-prices-show-pfas-are-bad-business/.

Chemours share are down 32% year to date. Corteva stock is up 1.7% since it began trading on May 24, prior to its official separation from DuPont on June 1. The Dow has risen 5% since May 24.[29]

Multiple large settlements came out of PFAS litigation. Dupont and its spin-off Chemours have agreed to pay $671M to settle lawsuits connected to water contamination from a plant where it was used to make Teflon."[30] 3M, a PFAS producer, paid $850M to settle a water contamination case.[31] An analyst at Gordon Haskett predict a potential liability between $25B and $40B for the PFAS industry.[32]

The exception to the resubmissions threshold described above would be even more critical if the Commission, despite the urgings of proponents, chooses to increase the resubmission thresholds, to ensure that the focus exclusively on voting levels does not undermine prescient efforts to share highly material information with the company and fellow shareholders. The Commission's interest in ensuring that investors have robust disclosure weighs heavily in favor of allowing proposals that target an issue that can be demonstrated to impose substantial exposure to the company and its investors. Accordingly, we recommend that the Commission, in revising and reissuing the rule proposal, establish an exception to the resubmissions rule allowing the proposal to be resubmitted where the Company is unable to demonstrate the absence of:

- Accumulated scientific evidence, known to the company that may potentially portend substantial company liability or market demand, e.g. Where several articles have appeared in peer-reviewed scientific literature indicative of public health or environmental risks associated with ingredients of the issuer's products or activities, even if the company maintains its own scientific analysis purporting to prove safety;
- Documentation of a significant exposure of the company to these risks, including significant environmental releases or consumer exposure, associated with the issuer's products or activities;
- Other demonstration of catastrophic or existential risk to the company, systemic or highly material risks, or where the proposal addresses documented interests of universal investors.

CONCLUSION

[29] Al Root, "Sizing Up an Environmental Liability for 3M and Others", Barrons, August 1, 2019. https://www.barrons.com/articles/sizing-up-liability-for-pfas-chemicals-at-3m-and-others-51564653600.

[30] Arathy S Nair, "DuPont settles lawsuits over leak of chemical used to make Teflon", Reuters, February 13, 2017. https://www.reuters.com/article/us-du-pont-lawsuit-west-virginia/dupont-settles-lawsuits-over-leak-of-chemical-used-to-make-teflon-idUSKBN15S18U.

[31] Marc S. Reisch, "3M to pay $850 million to settle fluorosurfactants lawsuit", *c&en*, February 26, 2018. https://cen.acs.org/articles/96/i9/3M-pay-850-million-settle.html.

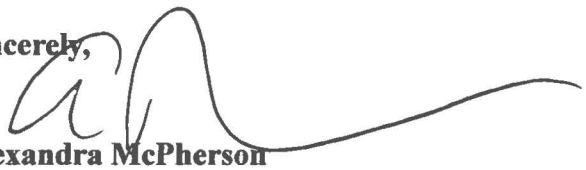
[32] Al Root, "Sizing Up an Environmental Liability for 3M and Others", Barrons, August 1, 2019. https://www.barrons.com/articles/sizing-up-liability-for-pfas-chemicals-at-3m-and-others-51564653600.

As demonstrated in this letter, IEHN believes that the economic and public benefits of the existing Rule 14a-8 far exceed the costs associated with proposals, and reducing submitted shareholder proposals by as much as 37% would have significant negative impacts on management of issues of concern to our members.

We urge the Commission to either consider the no action alternative – taking no action on the proposed rulemaking – or revise and reissue the rulemaking proposal with adequate research and analysis.

At a minimum, we urge the Commission to thoroughly evaluate the economic impact associated with reducing the submission of proposals on materials management and chemical risks from proxy statements. A complete economic analysis would evaluate the extent of added risk to the economy, to companies, and to investors, associated with reduced access to the shareholder proposal process.

Sincerely,



Alexandra McPherson
Manager
Investor Environmental Health Network

Appendix

The Economic Impact of Toxic Chemicals on the Economy, Avoidable Through Robust Corporate ESG Practices, Supported by Multi-Year Minority Shareholder Engagement

A scientific study published in the Lancet in 2016, estimated that exposure to endocrine-disrupting chemicals costs more than $340 billion in *annual* damages to the U.S. economy (2.33% of GDP), in health costs and lost earnings.[33] These costs were estimated by using epidemiological and toxicological study models to assess probabilities of causation for exposure-response relations between various substances and disorders. The bulk of toxics-related costs described in this study were considered to derive from intelligence quotient (IQ) points loss and intellectual disability, due to exposure to polybrominated diphenyl ethers, commonly referred to as PBDEs (11 million IQ points lost and 43,000 cases costing $266 billion). PBDEs are bioaccumulative compounds used as flame-retardants and are found in numerous consumer goods such as electrical equipment, construction materials, paint, coatings, textiles and polyurethane foam in household furniture. Similar in structure to polychlorinated biphenyls (PCBs), PBDEs resist degradation in the environment, and are also associated with tumor disorders, neurodevelopmental toxicity and thyroid hormone imbalance. The other main category of exposure-related costs was disease caused by to exposure to organophosphate pesticides, such as Monsanto's product Roundup (estimated at $42 billion).

Lowering Regulatory, Reputational, and Litigation (or Redesign) Risks. Companies adopting safer chemicals policies can anticipate and avoid "toxic lockout" from the marketplace, such as government bans or restrictions on products and consumer and institutional decisions to seek safer products. Companies establishing safer chemical policies can reduce their reputational and legal risks and enhance long-term shareholder value. These risks extend throughout supply chains. Suppliers of consumer goods to such major retailers as Walmart, Target, and CVS that have established such corporate safer chemicals policies (including lists of banned chemicals) are especially vulnerable to loss of sales and market share if they fail to anticipate and respond to the growing numbers of such retailer policies. Conversely, companies producing and selling safer products can gain market share, grow their top- and bottom-lines, and enhance their brand. Seeking safer chemicals drives corporate innovation.

Investors prompt development of forward-looking, beyond compliance programs. Like soccer, football, baseball and ice hockey stars, the most successful companies anticipate and move to where the ball or puck is going to be and get there ahead of the competition. In 2005, investors raised concerns about Bisphenol-A (BPA) in polycarbonate plastic bottles, three years ahead of

---

[33] The study was based on blood and urine measurements gathered by scientists at the U.S. National Institutes of Health. The researchers note the U.S. damages are twice the annual estimated cost of $163 billion in the European Union, where regulations may limit exposure to some of the chemicals analyzed. "Toxic chemicals tied to $340 billion in U.S. health costs and lost wages", Reuters (2016), http://www.reuters.com/article/us-health-chemicals-environment-idUSKBN12H2KB. Original report: "Exposure to endocrine-disrupting chemicals in the USA: a population-based disease burden and cost analysis," The Lancet, Diabetes and Endocrinology, VOLUME 4, ISSUE 12, P996-1003, December 1, 2016.

the massive national market shift to alternatives that advantaged companies providing safer alternatives and disadvantaged suppliers of BPA bottles. In 2010, investors suggested that companies consider exit strategies for triclosan used in soaps and body washes,[34] which the U.S. Food and Drug Administration subsequently banned.

Business management conversations and literature often refer to the power of "disruptive" developments. Disruptive developments include quickly changing consumer concerns, emerging understanding of environmental or product hazards and rapidly changing technologies. A key business goal is to anticipate where possible and respond swiftly to disruptions to avoid substantial destruction of business value. The shareholder proposal process brings an opportunity through engagement and shareholder deliberation to address disruptive developments in a proactive manner that is not destructive to the firm or its long-term value creation. The *effectiveness* of these engagements is measured by achieving value-enhancing corporate change and is not contingent on whether the proponents are on track to win majority support among other share owners, The ability to sustain such engagements over time can, in turn, depend on the ability of shareholders to file resolutions repeatedly (if necessary) to encourage corporate management to maintain good-faith dialogue and forward progress on potentially complex issues.

Reputational Risks

Companies face higher financial liabilities of losing consumer trust, and market share to competitors when corporate management and governance policies and practices do not stay ahead of **growing public focus on chemicals of high concern.**

The CFP footprint metric includes Chemicals of High Concern (CoHC) that are prioritized in high profile consumer safety campaigns like Mind the Store Campaign (MTS). MTS benchmarks retailer performance on reducing a 100^{+} CoHCs in consumer products.[35] Examples include:

- **Heavy metals** used electronics, jewelry, and children's toys
- **Per-and polyfluoraklkyl substances** used in clothing, furniture, food packaging
- **Formaldehyde** used to produce building materials, clothing, and cosmetics
- **Triclosan**, a pesticide used in toothpaste, cosmetics and consumer goods

[34] See "Should your company wash its hands of Triclosan?", *greenbiz.com*, http://www.greenbiz.com/blog/2010/09/09/should-your-company-wash-its-hands-triclosan; "Triclosan's dirty secrets can land your products in 'toxic lockout'", *greenbiz.com*, http://www.greenbiz.com/blog/2010/12/20/triclosan-dirty-secrets-can-land-your-products-toxic-lockout.

[35] https://saferchemicals.org/mind-the-store/