February 3, 2020

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

Re: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8
Release No. 34-87458; File Number S7-23-19

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 trillion in revenues. Business Roundtable members invest nearly $147 billion in research and development. In addition, our companies annually pay $296 billion in dividends to shareholders and generate $488 billion in revenues for small and medium-sized businesses.

We appreciate the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "Commission" or "SEC") on November 5, 2019, entitled Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (the "Proposing Release").[1] Business Roundtable agrees that it is imperative to reform the shareholder-proposal process so that it is transparent, productive and oriented toward long-term value creation. Indeed, a more effective and efficient shareholder-proposal process will facilitate the ability of corporate boards and management to drive long-term value, which serves all corporate stakeholders including investors, employees, communities, suppliers and customers. We believe that the changes included in the Proposing Release support this goal, and this letter provides our comments on the proposed amendments. We have also included feedback from our member companies on the need for Rule 14a-8 reform and on the Proposing Release, which was obtained through surveys we distributed to our member companies in 2019 and anonymized for purposes of this public submission.

EXECUTIVE SUMMARY

Overall, Business Roundtable is highly supportive of the changes to the shareholder-proposal process outlined in the Proposing Release, and we commend the Commission for its extensive efforts in pursuing thoughtful and comprehensive reform on this topic. A summary of our key comments follows:

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[1] Where relevant, this letter references comments previously made in letters dated November 9, 2018 and June 3, 2019 that we submitted to the Commission in connection with our participation in the Commission's November 2018 Roundtable on the Proxy Process (the "SEC Roundtable"). For ease of reference, we have attached those letters.

- **Rule 14a-8(b) Eligibility Requirements:** We support the changes to the eligibility standards, i.e., the three-tiered eligibility threshold and the proscription against aggregation of shareholders' holdings. While we feel that the proposed standards are an improvement over the current approach, we continue to believe that the long-standing $2,000 threshold for proposal submissions has become outdated and is far too low to ensure that shareholder-proponents have meaningful, long-term interests in the companies in which they invest. We recommend, therefore, that the Commission adjust the threshold amount for inflation. We also recommend that each of the three proposed thresholds be adjusted for inflation once every three years on a going-forward basis. Lastly, we recommend that the Commission <u>require</u> shareholders who co-file a proposal to designate a lead filer who is authorized to act on the proposal.

- **Proposals Submitted on Behalf of Shareholders:** We support the Commission's proposal to amend Rule 14a-8's eligibility requirements to require the additional information specified in the Proposing Release. Further, we urge the SEC to require both the shareholder and their representative to provide information regarding their motivations, goals, economic interests in the company, their relationship with each other and a description of their past advocacy on the topic at issue.

- **The Role of the Shareholder-Proposal Process in Shareholder Engagement:** We support the Commission's proposal to require a shareholder-proponent to provide a written statement that the shareholder is able to meet with the issuer in person or by telephone within a specified timeframe after submitting a proposal.

- **One-Proposal Limit:** We support the proposal to amend Rule 14a-8(c) to explicitly state that each person may submit no more than one proposal, directly or indirectly as a representative, to a company for a particular shareholder meeting.

- **Rule 14a-8(i)(12) – Resubmissions:** We support increasing the current thresholds for resubmission of proposals. We believe, however, that there is sufficient support to set the new thresholds at 6%/15%/30% rather than the 5%/15%/25% levels proposed by the Commission. In addition, we support the Commission's proposed "momentum requirement."

I. <u>RULE 14a-8(b) — ELIGIBILITY REQUIREMENTS</u>

A. THE NEED FOR REFORM OF RULE 14A-8(B)'S ELIGIBILITY REQUIREMENTS

Business Roundtable believes that the shareholder-proposal process must be improved so that it promotes long-term value, which serves all corporate stakeholders including investors, employees, communities, suppliers and customers. Some of the most significant problems with the current shareholder-proposal system relate to the low eligibility requirements for filing a proposal. Currently, a shareholder needs to own only $2,000 in market value of a company's stock for one year in order to be eligible to submit a proposal. The $2,000 ownership requirement falls well short of any reasonable material ownership standard for public companies (for some Business Roundtable member companies, it is less than 1 millionth of 1 percent of their outstanding shares). In addition, shareholders who own less than that amount are permitted to aggregate their holdings with other shareholders in order to meet the eligibility requirement.

The current nominal monetary threshold for filing proposals risks obscuring matters of true economic significance to the long-term health of companies and occupying valuable corporate time and resources addressing multiple, immaterial shareholder proposals. Moreover, the low submission threshold:

(i) has led to the domination of the shareholder-proposal process by a small group of individual shareholders who may lack significant, long-term ownership stakes as often exemplified by the proposals they submit;

(ii) has resulted in a high volume of shareholder proposals that impose significant costs on companies and other shareholders and divert management resources from long-term growth; and

(iii) ignores the availability of many other avenues of communication that shareholders may use to engage with companies and other shareholders.

Each of these issues is briefly discussed below.

Domination by a Small Group of Shareholders. The shareholder-proposal process has become dominated by a limited number of individuals who own nominal stakes in the companies they target. In fact, from 2016 to 2018, the same three individuals and their families submitted or co-filed over 24 percent of all shareholder proposals submitted to Russell 3000 companies.

Proposals with No Rational Relationship to Creating Long-Term Value. The low proposal submission threshold permits certain shareholders and special interest groups to make a nominal investment in a company so that they may present proposals that do not relate to, or in some cases could even undermine the long-term success of the company if implemented.[2]

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[2] *See* Letter from Maria Ghazal, Senior Vice President & Counsel, Bus. Roundtable, to Vanessa Countryman, Acting Sec'y, Sec. & Exch. Comm'n (June 3, 2019), *available at* https://www.businessroundtable.org/business-roundtable-supplemental-public-comments-to-sec-on-the-proxy-process (noting, as an example, one instance in which People for the Ethical Treatment of Animals (PETA) made the minimum investment necessary to file a shareholder proposal with Levi Strauss & Co. asking the company to switch its cow-skin leather patches to "vegan leather") (explaining that instead of seeking meaningful engagement, such proponents may be aiming to leverage the Rule

In fact, companies have had to contend with an increasing influx of shareholder proposals that have little relevance to a company's business, performance or long-term value, a trend that has been spurred by court-driven changes in SEC policy in the late 1970s. For example, one Business Roundtable member company reported receiving a proposal requesting that the company implement and report on a reverse supply chain to dispose of expired products. The company spent hours explaining to the shareholder-proponent that the company was already addressing the request and that the matter was not of importance to the vast majority of company shareholders, but the shareholder-proponent refused to withdraw the proposal. The company then spent significant resources pursuing (and obtaining) "no-action" relief from the SEC.

Significant Costs of Proposals. Abuse of the shareholder-proposal process imposes significant costs on companies and shareholders, including by diverting management and board attention away from running the business, whether or not the proposals are excluded under the SEC's "no-action" process. Member companies report that various internal groups, including legal, investor relations, executive officers and the board of directors and its committees spend considerable amounts of time evaluating and addressing shareholder proposals. In many cases, companies also engage outside advisors, including legal advisors and proxy solicitors, to assess and assist with proposals.[3]

Other Avenues for Communication with Companies. *Nominal* proposal submission thresholds are, in fact, not necessary for many shareholders to engage meaningfully with companies and other shareholders. Shareholders initiate contact with companies and their boards through say-on-pay votes, letter writing campaigns and "vote no" campaigns, as well as less formal means like email, social media and other web-based communications. Further, in recent years, many companies have expanded their communications with shareholders through investor conferences, webcasts, videos, one-on-one "sunny day" meetings and voluntary publications that go well beyond any SEC reporting requirement. Corporate investor relations teams and other corporate governance professionals engage in more frequent meetings with shareholders of all types and hold 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 sum, today's companies receive more input from shareholders than ever before through voluntary, and often informal, interactions with shareholders. Shareholder proposals are a necessary and important part of this process and help facilitate engagement between shareholders and the companies they own. However, the current eligibility standards of Rule 14a-

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14a-8 process to advance parochial publicity interests that are unrelated to the company's business and without regard for the long-term interests of the company or the vast majority of its shareholders).

[3] Although many member companies reported that it was difficult to quantify the costs of shareholder proposals, several reported costs ranging from $50,000 to $100,000 or more per proposal. In addition, a number of companies noted that their costs for first-time proposals are generally higher than those incurred for resubmitted proposals.

8(b) have enabled certain shareholders without a meaningful investment interest in a company to present proposals that often hinder the ability of the board and management to drive long-term value, which serves all corporate stakeholders including investors, employees, communities, suppliers and customers. As the Commission has recognized, Rule 14a-8(b)'s ownership threshold and holding period are intended to strike an appropriate balance so that only shareholders with a meaningful economic stake or investment interest in a company may submit proposals for inclusion in the company's proxy materials at the expense of the company and other shareholders. This balancing of costs and benefits supports an efficient shareholder-proposal process that creates long-term value for corporations and their stakeholders.

Moreover, the Commission has recognized that because the shareholder-proposal process shifts burdens from shareholder-proponents to companies, it is subject to overuse and misuse. The reforms supported by Business Roundtable, including the amendments contemplated by the Proposing Release, are directed toward the small subset of investors who have misused or circumvented the process; they are not designed to inhibit the use of the shareholder-proposal process by the many shareholders who use it every year to advance long-term, value enhancing initiatives.

B. PROPOSED AMENDMENTS TO RULE 14A-8(B) ELIGIBILITY THRESHOLDS

Under the current rules, to be eligible to submit a proposal, a shareholder-proponent must have continuously held for at least one year by the date the proposal is submitted at least $2,000 in market value or 1 percent of the company's securities entitled to be voted on the proposal at the meeting. The Commission last substantively reviewed this $2,000 ownership threshold in 1998.

Proposed Three-Tiered Approach to Eligibility. Under the proposed rules, a shareholder would be eligible to submit a Rule 14a-8 proposal if the shareholder satisfies one of three ownership requirements. This new tiered approach would provide multiple options for demonstrating eligibility through a combination of the amount of securities owned and length of time held. Specifically, a shareholder would be eligible to submit a Rule 14a-8 proposal if the shareholder has continuously held at least:

- $2,000 of the company's securities entitled to vote on the proposal for at least three years;
- $15,000 of the company's securities entitled to vote on the proposal for at least two years; or
- $25,000 of the company's securities entitled to vote on proposal for at least one year.

We believe that the Commission's proposed three-tiered approach will more appropriately balance the interests of shareholders submitting shareholder proposals with the interests of other shareholders who bear the costs associated with the inclusion of such proposals in companies' proxy statements. Further, the three-tiered approach will provide shareholders with a number of approaches to become eligible to submit a proposal and will continue to allow holders with a modest investment in a company to submit proposals.

Business Roundtable also supports the increased holding requirements included in the Commission's proposed rule. The current one-year holding period encourages an undue focus on short-term goals and is out of step with the three-year holding period that has come to govern proxy access proposals. Longer holding periods will better align the interests of shareholders making the proposals with the long-term success of the company, and we believe those longer periods are appropriate in circumstances when a shareholder holds less than a $25,000 stake in a company's securities.

A longer holding period is particularly important if the dollar value of the ownership interest is minimal, and the proposed three-year holding requirement associated with the lowest threshold level will help to establish that the shareholder has a sufficient, long-term investment interest in the company to justify the use of the Rule 14a-8 process. However, Business Roundtable continues to believe that the $2,000 ownership requirement established in 1998 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. If the Commission determines to preserve that minimum threshold, it should adjust it for inflation to $3,152; after 21 years, this basic adjustment is long overdue. In addition, going forward, we recommend that each of the SEC's proposed monetary thresholds be adjusted for inflation every three years to preserve the value of those thresholds so that they do not quickly become "stale."

Prohibition on Aggregation to Meet Thresholds. The Commission's proposed rules prohibit shareholders from aggregating their securities in order to meet the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal. We agree with the Commission's approach; every shareholder-proponent should have a sufficient economic stake or investment interest in a company to justify use of the Rule 14a-8 process and the imposition of its attendant costs on companies and shareholders. Permitting aggregation of holdings is contrary to this principle.

Designation of a Lead Filer for Co-Sponsored Proposals. While the aggregation of holdings would be prohibited by the proposed rules, shareholders that individually meet the eligibility requirements may jointly submit a shareholder proposal to a company in order to demonstrate wider interest in and support for the proposal. The Commission has asked whether co-filing or co-sponsoring shareholders should be required to designate a lead filer for the proposal, and whether a lead filer must be authorized to negotiate the withdrawal of the proposal on behalf of the other proponents. We believe that those requirements are appropriate. When there are multiple shareholder-proponents, designating one shareholder as the lead filer would improve the company's ability to discuss the proposal with the proponent group and reduce the burden on the company to determine which filers have been authorized on behalf of the group to discuss the proposal and negotiate for its amendment or withdrawal.

The Rule 14a-8 No-Action Letter Process. The Commission has also solicited comments on whether the Rule 14a-8 process works well and whether the Commission staff (or the Commission) should continue to review proposals that companies wish to exclude from their proxy materials. A 2019 Business Roundtable survey indicated that the vast majority of our members do not believe the Commission's "no-action" letter process is administered in a consistent and transparent manner. At the same time, public companies have long relied on "no-action" letters when evaluating whether to exclude shareholder proposals from the proxy. Rather than declining to review proposals that companies wish to exclude, we urge the SEC to revise the "no-action" letter process.[4]

II. PROPOSALS SUBMITTED ON BEHALF OF SHAREHOLDERS

A. THE NEED FOR REFORM

The Proposing Release addresses shareholder-proponents' use of representatives in the Rule 14a-8 process. When a shareholder appoints a representative, that representative typically submits the proposal on an eligible shareholder's behalf, together with the documentation establishing the shareholder's eligibility and the representative's authority to submit the proposal on the shareholder's behalf. After the initial proposal is submitted, communications between the shareholder and the company are generally handled by the representative, and the representative typically attends the company's annual meeting to present the proposal on behalf of the eligible shareholder.

Interests of Named Shareholder and Representative. An eligible shareholder's designation of a "representative" to act on the shareholder's behalf often presents uncertainties and complications in the Rule 14a-8 process. Companies find it difficult to ascertain the economic interests of the shareholder and the representative in the company, the nature and extent of

[4] The SEC staff's current decentralized, issue-by-issue "no action" review process may lead to inconsistent and/or arbitrary guidance and interpretation of the rules, with little transparency and public accountability, especially over the course of time. As we discussed in our November 9, 2018 comment letter relating to the SEC Roundtable, we believe that the SEC should study ways in which the guidance process can be made more consistent. This may include considering whether the "no-action" letter process should be converted into an SEC advisory opinion process, whereby the SEC would issue opinions on major policy issues rather than issuing "no-action" letters. Alternatively, the "no-action" letter process should be adjusted to allow for enhanced review and oversight mechanisms to achieve greater consistency.

Further, as we discussed in our November 9, 2018 comment letter relating to the SEC Roundtable, we believe that there are a number of ways that the standards surrounding "no-action" relief for excluded proposals should be modified. *See also* Letter from Maria Ghazal, Senior Vice President & Counsel, Bus. Roundtable, to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n, at 13 (Feb. 3, 2020) (discussing the "no-action" process and responses taken by proxy advisory firms).

their relationship, and the history of their advocacy on the topic in question. Further, companies may not be able to ascertain whether the named shareholder actually supports the proposal that has been submitted on its behalf. One company noted that the shareholder's documentation typically delegates authority to the representative to support the proposal but never includes statements of the shareholder's support of the proposal. In addition, when a representative speaks and acts for a shareholder, companies may rightfully question whether the shareholder has a genuine and meaningful interest in the proposal, or whether the shareholder has only an acquiescent interest in a proposal that is of primary importance to the representative.

Representative's Attendance at Meeting. A representative's presentation of a proposal at an annual meeting may also present difficulties for companies. The Commission has stated that requiring a shareholder-proponent or its representative attend an annual meeting in person to present a shareholder proposal is intended to provide some degree of assurance that the proposal will be presented for action at the meeting by someone who can knowledgeably discuss the proposal and answer any questions that may arise.[5] Accordingly, the requirement facilitates shareholder education, creating an opportunity for question and debate that can better inform shareholders about the merits of a proposal.

In the experience of our members, however, representatives are often not prepared to present and explain the proposal at the annual meeting, to answer questions about the proposal, or to facilitate meaningful dialogue about the proposal with other shareholders and with management. For example, an actor and ventriloquist attended one Business Roundtable 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, an SEC Roundtable panelist described the frustration of spending time and resources addressing a shareholder proposal only to find that the representative sent to present a cumulative voting proposal at the annual meeting could not even pronounce the key terms of the proposal.[6] These examples may appear extraordinary, but Business Roundtable member companies regularly report that representatives often appear

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[5] Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 41 Fed. Reg. 52994 (Dec. 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) *available at* https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1976/12/3/52980-53001.pdf#page=15.

[6] Transcript of SEC Roundtable on the Proxy Process at 149 (Nov. 15, 2018) *available at* https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf.

unprepared and largely unfamiliar with the substance of the issues they are putatively addressing.

B. PROPOSED AMENDMENTS

The Commission has proposed to amend Rule 14a-8 to require the shareholder to provide to the company additional documentation when using a representative to act on its behalf in the shareholder-proposal process. Among other things, this documentation must identify the company, the shareholder and the representative, authorize the representative to submit the proposal and act on the shareholder's behalf, identify the proposal to be submitted, and include the shareholder's statement supporting the proposal. Business Roundtable agrees that this additional documentation requirement will improve the shareholder-proposal process in cases where a representative is involved. These new informational requirements will help to formalize the relationship between the shareholder-proponent and the representative and to clarify the role of the representative in the shareholder-proposal process. Further, we agree that the shareholder should include a statement supporting the proposal, as that will help to ensure that the shareholder has a genuine interest in the proposal being submitted. Many member companies reported that shareholder-proponents already provide much of the information that would be required by the Proposing Release, and that providing this additional documentation should not impose more than a minimal burden on shareholder-proponents.

Under the proposed rules, the shareholder would be required to sign and date the proposed new documentation. Some of our members believe that requiring that this documentation be notarized will help to ensure that the documentation is signed correctly, that the shareholder-proponent supports the proposal and that the shareholder-proponent has knowingly and willingly authorized the representative to act on his or her behalf.

In addition, we understand that some additional information from shareholder-proponents may be useful including, for example, information on their motivations, goals, economic ownership in the company (including the period of time of their investments), their relationship with each other and a description of their advocacy on the issue in question, including any similar proposals they have submitted to other companies and the results of those proposals. This information may allow shareholders to make a better-informed decision about the proposal and to better evaluate the materiality and merit of the proposal to the company.

III. THE ROLE OF THE SHAREHOLDER PROCESS IN SHAREHOLDER ENGAGEMENT

A. THE NEED FOR REFORM

The shareholder-proposal process established by Rule 14a-8 is designed to facilitate engagement between shareholders and the companies they own. Unfortunately, several of our member companies report that certain perennial shareholders are generally not willing or available to discuss their proposals with the companies to which they submit them.[7] Other member companies have expressed concern that some shareholder-proponents may not make a good faith effort to engage with companies about the proposals they submit.[8]

B. THE PROPOSED AMENDMENTS

The Commission is proposing that, in an effort to facilitate engagement between issuers and their shareholders, a shareholder-proponent be required to provide a written statement that he or she is able to meet with the company in-person or by telephone no less than 10 or more than 30 days after submitting the proposal. The proponent would also be required to include contact information as well as business days and specific times that the shareholder-proponent would be available for discussion.

We support the addition of this shareholder engagement component to the eligibility criteria contained in Rule 14a-8(b). We believe that this proposed amendment will help facilitate useful dialogue between shareholder-proponents and companies by enabling the company to reach out directly to a shareholder-proponent to understand the proposal and the concerns that led the shareholder to submit it. In fact, this type of direct engagement may, in some cases, satisfy the shareholder-proponent that the company has already addressed or is addressing the proponent's concerns — in which case the proponent may choose to amend the proposal or withdraw it entirely.

A number of member companies commented that they viewed the proposed 10- to 30-day timeframe as reasonable and appropriate, and a few indicated that a longer period (*e.g.*, 45 or 60 days) could be appropriate as well. Alternatively, the Commission could consider whether the timeframe for dialogue should begin on the 14th calendar day after submission of the proposal, which would correspond to the date on which the company would need to provide to the shareholder written notice of any procedural defects in the proposal under Rule 14a-8(f).

IV. <u>ONE PROPOSAL LIMIT</u>

A. THE NEED FOR REFORM

Since 1976, Rule 14a-8(c) has provided that each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. We agree with the Commission that this one-proposal limit is appropriate. As the SEC is aware, however, some shareholder-

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[7] Moreover, some shareholders submit their proposals either very close in time to or at the "no-action" request submission deadline. Consequently, companies are left with little time to engage with the shareholder if the company intends to request "no-action" relief.

[8] Importantly, some of our members also have raised questions regarding whether the requirements in the proposed amendments include sufficient guidance to ensure that shareholder-proponents actually engage in good faith efforts to communicate with management and noted that the Commission has not proposed a remedy in the event they do not.

proponents circumvent the one-proposal limit by having other individuals submit proposals on their behalf. This phenomenon of submitting proposals "by proxy" appears to have become particularly prevalent in recent years.

B. THE PROPOSED AMENDMENT

The Commission has proposed to amend Rule 14a-8(c) to apply the one-proposal rule to each person (rather than each shareholder) who submits a proposal. The proposed amendments effectively would prohibit a shareholder from submitting a proposal to a company and also serving as a representative on another proposal submitted to the same company on behalf of another shareholder.

This proposed amendment is designed to deter abuse of the one-proposal limit, and we support its adoption. Our members reported instances in which an individual had submitted multiple proposals to a company through the use of a representative, and this clarification of the proxy rules will eliminate this type of circumvention of the one-proposal limit.

V. RULE 14a-8(i)(12) — RESUBMISSIONS

A. THE NEED FOR REFORM

General. Under the current proxy rules, companies are largely prevented from excluding repeat submissions of proposals (or those dealing with substantially the same subject matter), even when those proposals have been unsuccessful in prior shareholder votes. Under current resubmission rules, proposals that receive the support of a mere 3 percent of the votes cast qualify for resubmission at least once, and as long as a proposal obtains 10 percent of the votes cast, it may be resubmitted indefinitely. This structure allows a small subset of shareholders to override indefinitely the expressed will of a substantial majority of shareholders. Business Roundtable member companies have reported facing the same shareholder proposal for five or more years in a row (and sometimes for more than a decade), even as shareholders voting in favor of the proposals represent significantly less than a majority year after year.

We believe resubmission thresholds should be high enough to demonstrate that a resubmitted proposal is realistically on the path to majority approval. Accordingly, it is our position that the resubmission thresholds the SEC itself proposed in 1997 — 6 percent on the first submission, 15 percent on the second and 30 percent on the third — would be more appropriate than today's thresholds.[9]

Impact of Technology. Our recommendation to increase resubmission levels for shareholder proposals is not intended to negatively affect meaningful shareholder engagement and action.

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[9] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093, 62 Fed. Reg. 50682, 50689 (Sept. 26, 1997) (proposing release), *available at* https://www.govinfo.gov/content/pkg/FR-1997-09-26/pdf/97-25448.pdf.

The vast improvements in technology over the past several decades permit investors to communicate directly with companies with ease and to coordinate with other shareholders on proposals instantly on electronic media. For example, technology now enables individual filers to run sophisticated environmental, social and governance-focused ("ESG") campaigns with other like-minded shareholders.

Those campaigns are assisted by entities such as the UN Principles of Responsible Investing ("PRI"), which hosts an online Collaboration Program that helps shareholders select 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."[10] 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.

CII Research on Resubmissions. Recent empirical data also 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.[11] CII reported 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% thresholds recommended by Business Roundtable.[12] This recent empirical evidence suggests that the resubmission thresholds we recommend will not eliminate shareholders' ability 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 effectively restrict only repetitive proposals that have been decisively rejected by a company's shareholders one or more times.

B. THE PROPOSED AMENDMENTS

Resubmission Thresholds. The SEC is proposing to allow a company to exclude a shareholder proposal that was included in a company's proxy materials in the preceding five years if the most

[10] Elroy Dimson, Oğuzhan Karakaş & Xi Li, Coordinated Engagements (Oct. 29, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209072.

[11] BRANDON WHITEHILL, COUNCIL OF INST. INV'RS, CLEARING THE BAR: SHAREHOLDER PROPOSALS AND RESUBMISSION THRESHOLDS (2018), *available at* https://docs.wixstatic.com/ugd/72d47f_092014c240614a1b9454629039d1c649.pdf.

[12] *Id.* at 6. 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.

recent vote occurred within the preceding three years and the level of shareholder approval for that vote was: less than 5 percent of the votes cast if voted on once in the preceding five years, less than 15 percent of the votes cast if voted on twice in the preceding five years, or less than 25 percent of the votes cast if voted on three or more times in the preceding five years.

We believe that maintaining the current three-tiered approach to resubmission thresholds helps ensure that the costs associated with management's and shareholders' repeated consideration of shareholder proposals and their inclusion in the proxy statement are balanced against shareholders' ability to submit proposals on matters of interest to shareholders. However, we recommend that the Commission consider increasing the resubmission thresholds to 6 percent shareholder support on the first submission, 15 percent on the second and 30 percent on the third. We believe that these thresholds, which were proposed by the Commission in 1997, would better distinguish those proposals that are on a path to meaningful shareholder support from those that are not. The above-outlined CII data on resubmissions also supports the 6%/15%/30% model.[13]

These increased resubmission thresholds are of particular importance given the outsized influence that proxy advisory firms have in the shareholder voting process. For example, one study found that "an adverse recommendation on a proposal from a proxy advisory firm is associated with a reduction in the favorable vote count by 10 percent to 30 percent."[14] Under the SEC's proposed resubmission rules, proposals garnering up to 30 percent support due to the receipt of a favorable recommendation from a dominant proxy advisor may be resubmitted indefinitely. This may result in the continuous resubmission of shareholder proposals that, while supported by proxy advisory firms, do not actually advance the long-term interests of companies, shareholders and other corporate stakeholders. Business Roundtable supports the proposal to increase the current resubmission thresholds, but believes the suggested 6%/15%/30% thresholds would help ameliorate this issue, while not hindering the ability of shareholders to bring repeat proposals that have achieved a modicum of success.

Vote Counting Methodology. We do not believe that the vote-counting methodology under Rule 14a-8(i)(12) should be revised. Further, many member companies reported they believe the current voting standards for shareholder proposals are appropriate.

"Momentum" Requirement. The SEC is also proposing to adopt a "momentum requirement" that would permit companies to exclude proposals that have been submitted three or more times in the preceding five years if they received less than 50% of the vote and support declined by 10% or more compared to the immediately preceding shareholder vote on the matter.

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[13] *See also id*.

[14] James Copland, David F. Larcker & Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (Stan. U. Graduate Sch. Bus., Research Paper No. 18-27, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188174.

Business Roundtable members believe that this momentum requirement is an appropriate addition to the proposed increased resubmission threshold requirements and will provide an appropriate mechanism to exclude proposals that are demonstrably not on a path to gaining majority support.

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 evaluate and improve the proxy process and appreciates the opportunity to continue to share our views and the views and experiences of our member companies as part of those efforts. Business Roundtable believes the changes included in the Proposing Release, together with the recommendations discussed above and in our November 9, 2018 and June 3, 2019 comment letters relating to the SEC Staff Roundtable on the Proxy Process held on November 15, 2018, have the potential to meaningfully improve the proxy process and improve communications and engagement between companies and their shareholders. We believe that these additional reforms and updates will help create a better proxy system that will benefit investors and other stakeholders over the long term.

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. Please contact Maria Ghazal, Senior Vice President & Counsel of Business Roundtable, at mghazal@brt.org or (202) 496-3268.

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.

Modernizing the Shareholder Proposal Process

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

November 9, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number 4-725

Dear Mr. Fields:

These comments are submitted on behalf of Business Roundtable, an association of chief executive officers who collectively lead companies with more than $7 trillion in annual revenues and nearly 15 million employees. Member companies annually pay nearly $296 billion in dividends to shareholders and generate more than $488 billion in revenues for small- and medium-sized businesses. In addition, Business Roundtable members invest over $147 billion annually in research and development.

Business Roundtable appreciates the opportunity to provide input for the Securities and Exchange Commission's (the "Commission" or "SEC") upcoming Roundtable on the Proxy Process (the "Roundtable"). Business Roundtable supports the Commission's efforts to evaluate and improve the proxy system, and agrees that as a result of regulatory, technological and market changes, the time is right to discuss and propose updates to the current proxy system.

Business Roundtable believes that having an accurate, efficient, transparent, and verifiable proxy system that is oriented toward long-term value creation is vital to constructive shareholder engagement and the successful operation of public companies. The importance of this point was made clear in the SEC's 2010 Concept Release on the U.S. Proxy System (the "2010 Concept Release"), which noted: "With 600 billion shares voted every year at more than 13,000 shareholder meetings, shareholders should be served by a well-functioning proxy system that promotes efficient and accurate voting."[1]

To maximize the operation of the proxy system, it is critical to address issues and inefficiencies as they are identified. To that end, as more fully detailed in our comment letter, we believe updates and reforms to the proxy system are currently warranted and specifically propose the following:

- Modernizing the shareholder proposal process so that it provides for more effective shareholder communication and engagement and is oriented toward creating long-term value for all shareholders;

[1] SEC Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42982, at 42983 (July 22, 2010).

- Reforming the regulation of proxy advisory firms to improve accuracy, transparency and accountability;

- Reforming and streamlining the shareholder communications and proxy voting process to make voting more transparent and verifiable and to increase retail investor participation; and

- Reforming the disclosure rules under Securities Exchange Act Section 13(d) to ensure timely and transparent disclosures from investors seeking to control a company.

In addition, Business Roundtable believes that the Commission should fully analyze the potential negative implications of universal proxy cards before adopting rules mandating their use.

Business Roundtable believes these updates and reforms will help create a better proxy system that will not only promote more successful shareholder engagement but also benefit investors and other stakeholders over the long term.

<u>Current Proxy System and the Need for Change</u>

The proxy voting system was developed to provide dispersed shareholders a method to vote on proposals in an informed manner without having to attend a company's annual meeting. To that end, when companies solicit votes from shareholders, the Commission requires them to provide shareholders with a proxy statement that discloses information that would be material to an investor's voting decision, including information regarding potential conflicts of interest, and prohibits companies from making false and misleading statements.[2] In theory, this is an efficient and effective way for companies to communicate with their shareholders and for shareholders to receive relevant and accurate information on which to base their votes.

However, many aspects of the proxy solicitation process have changed during the more than 80 years the Commission has regulated it, and the cumulative effects of these changes have resulted in a system in need of modernization and reform.

As an initial matter, communicating with and soliciting votes from the majority of a company's shareholders is more cumbersome than necessary and it is difficult (if not impossible) to verify the accuracy of votes. Public company shares in the United States are predominantly held in "street name," meaning a bank or broker holds the shares on behalf of its client, who is the "beneficial owner."[3] In order to communicate with or solicit votes from a street name holder, companies must navigate a multi-layer system of intermediaries and third-party advisors who

[2] SEC Rule 14a-3, 17 C.F.R. §240.14a-3 (2018); SEC Rule 14a-9, 17 C.F.R. §240.14a-9 (2018).

[3] *Examining the Market Power and Impact of Proxy Advisory Firms*, 113th Cong. 524 (June 5, 2013) (statement of Niels Holch) (noting that reports have estimated between 75 percent and 80 percent of all public company shares are held in street name).

are not uniformly regulated by the Commission. The barriers between companies and retail investors may help explain why only a fraction of retail investors exercise their voting rights. In 2018, retail investors have voted only 28 percent of their shares, while institutional investors have voted 91 percent of their shares.[4]

In addition, concerns exist about how voting decisions are being made. Ownership and voting of public company stock in the United States is dominated by institutional investors: 70 percent of public company shares are owned by institutional investors such as index funds, mutual funds, pension funds and hedge funds.[5] Certain of these institutional investors rely on the recommendations of proxy advisory firms.[6] Concerns have consistently been raised regarding, among other things, the accuracy, transparency, accountability and conflicts of interest related to the recommendations of proxy advisory firms.[7] Based on current practices, serious questions exist as to whether some institutional investors are actually making informed voting decisions based on accurate and material information.

Finally, proxy voting has become more important. Investor activism has not slowed. In the first half of 2018, shareholder activism reached record levels in terms of campaigns mounted and capital deployed, and 2017 played host to 4 of the 10 most expensive proxy contests in history.[8,9] Regulatory changes such as the limitations on discretionary broker voting and required "say on pay" votes, and corporate governance changes such as the trend toward majority voting in director elections, have also heightened the need for a better proxy system and increased retail investor participation.

The rules governing the proxy system have not kept up to accommodate the new realities of the system and do not reflect the current market or technology. Updates and reforms are needed to ensure that the proxy system is working efficiently and effectively to serve the long-term interests of shareholders. The following provides an overview of the issues and the related recommendations for reform that Business Roundtable believes are most critical when evaluating and refining the proxy system and the rules and regulations that govern it.

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[4] Broadridge Investor Communication Solutions, Inc. and PricewaterhouseCoopers LLP (October 2018). *Proxy Pulse: 2018 Proxy Season Review*. Retrieved from https://www.broadridge.com/report/2018-proxy-season-review?id=00203PPRUSA15JUNLPG02PPR&so=se&po=&di=&ct=&ot=rp&mt=oc&yr=18&rg=us&on=01&ep=pd&gcli d =EAIaIQobChMIzar1rcmV3gIVF7bICh1D1QYoEAAYASAAEgKYO_D_BwE

[5] Ibid.

[6] Gallagher, D.M. (August 2014). Outsized Power & Influence: The Role of Proxy Advisers. *Washington Legal Foundation Critical Legal Issues Working Paper Series*. Retrieved from https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/GallagherWP8-14.pdf

[7] Ibid.

[8] Lazard (July 2018). *Review of Shareholder Activism – 1H 2018*. Retrieved from https://www.lazard.com/media/450655/lazards-review-of-shareholder-activism-1h-2018.pdf

[9] Racanelli, V.J. (July 6, 2018). Proxy Voting is Broken and Needs to Change. *Barron's*. Retrieved from https://www.barrons.com/articles/proxy-voting-is-broken-and-needs-to-change-1530924318

Modernizing the Shareholder Proposal Process

Business Roundtable believes effective communication with shareholders is a critical element of the operation of today's public company. The importance of this relationship necessitates 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.

Business Roundtable believes the shareholder proposal process is no longer functioning efficiently and needs modernization for two primary reasons: (i) the threshold for submitting a proposal is too low and (ii) excluding proposals relating to general social issues is difficult for companies.

The shareholder proposal process has become dominated by a limited number of individuals who own only nominal stakes (or, in the case of proponents who submit via proxy, no stake) in the companies they target and file similar proposals across a wide range of companies. In fact, from 2016 to 2018, the same three individuals and their families have submitted or co-filed over 24 percent of all shareholder proposals each year at Russell 3000 companies.[10] Among other top shareholder proponents are institutional investors with an express social, religious or policy purpose who may pursue idiosyncratic interests, which may have no rational relationship to the creation of long-term shareholder value and may conflict with what a typical investor views as material to making an investment or voting decision.[11]

In addition, spurred by court-driven changes in SEC policy beginning in the 1970s, companies have had to contend with a continuous influx of 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.[12,13] These proposals typically have limited success and very seldom receive the majority support of shareholders. In fact, in 2018, only 10 of 145 of such proposals voted on received majority shareholder support.[14]

The current shareholder proposal process also imposes unnecessary costs on companies, both in money spent to exclude inappropriate and immaterial proposals and in the loss of board and

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

[11] Copland, J., & O'Keefe, M.M. (November 7, 2017). *Proxy Monitor 2017: Season Review*. Retrieved from http://www.proxymonitor.org/Forms/pmr_15.aspx/; ISS Corporate Solutions, Inc. (2018). Voting Analytics – Shareholder Proposals. Retrieved from https://www.isscorporatesolutions.com/

[12] Copland, J., & O'Keefe, M.M. (November 7, 2017). *Proxy Monitor 2017: Season Review*. Retrieved from http://www.proxymonitor.org/Forms/pmr_15.aspx

[13] Westcott, S. (Junes 2018). 2018 Proxy Season Brings Some Surprises. *The Advisor*. Retrieved from Alliance Advisors website: https://allianceadvisors.com/wp-content/uploads/2018/06/Alliance-Advisors-Newsletter-Jun.-2018-2018-Proxy-Season-Brings-Some-Surprises-1.pdf

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

management time related thereto that could otherwise be spent on value-creating activities. These costs are borne by all shareholders, not just those making the proposal. There is also, of course, a cost to the resources of the Commission and its Staff. Further, the current proposal process risks obscuring matters of true economic significance to the company by potentially allowing annual meeting ballots to simultaneously present numerous immaterial proposals for consideration.

In October 2016, Business Roundtable suggested 10 pragmatic reforms to the shareholder proposal process to address our greatest concerns.[15] Certain aspects of the concerns we raised have been addressed by the Commission in subsequent Staff guidance, which we view as positive first steps.[16,17] However, as the Commission undertakes a comprehensive review of the proxy system, we believe the following reforms should be considered as additional steps to modernize the shareholder proposal rules to provide for more effective shareholder communication and engagement.

Increase the Threshold for Initial Proposal Submission. Under the current shareholder proposal rules, shareholders must only own $2,000 or 1 percent — whichever is less — of a company's stock for just one year to submit a proposal. The ownership threshold was implemented in 1983 and has only been updated once in the past 35 years, and then only an adjustment for inflation in 1998.[18,19] Based on current stock prices, the 1 percent threshold is entirely subsumed by the $2,000 ownership requirement, which falls well short of any reasonable material ownership standard for public companies. As a result, we believe the $2,000 ownership threshold for the submission of shareholder proposals needs modernization and should be increased significantly. In addition, to be eligible to submit a proposal, Business Roundtable believes all proponents, even those relying on a proxy to submit a proposal, should be required to meet the minimum ownership threshold.

Increase the Length of the Holding Requirement. The current one-year holding period encourages an undue focus on short-term goals. This holding requirement is also out of step with the three-year holding period more recently established through private ordering with respect to proxy access. Given that shareholder proponents are required to hold only $2,000 of a company's stock for just one year, as a practical matter, there currently is no mechanism to

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[15] Business Roundtable (October 2016). *Responsible Shareholder Engagement and Long-Term Value Creation*. Retrieved from Business Roundtable website: https://www.businessroundtable.org/archive/resources/responsible-shareholder-engagement-long-term-value-creation

[16] SEC Division of Corporate Finance (November 1, 2017). *Shareholder Proposals* (Staff Legal Bulletin No. 14I). Retrieved from SEC website: https://www.sec.gov/interps/legal/cfslb14i.htm

[17] SEC Division of Corporate Finance (October 23, 2018). *Shareholder Proposals* (Staff Legal Bulletin No. 14J). Retrieved from SEC website: https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals

[18] Amendments to Rules on Shareholder Proposals (proposed), 62 Fed. Reg. 50682, at 50694 (September 26, 1997).

[19] Amendments to Rules on Shareholder Proposals (final), 63 Fed. Reg. 29106, at 29111 (May 28, 1998).

ensure that the shareholder proposal process is reasonably designed to further the interests of long-term shareholders and support the creation of long-term value. We believe the required holding period should be lengthened to better align the interests of the shareholders making the proposals with the long-term success of the company. In addition, we believe that proponents should have true economic exposure to the investment for the entire holding period, and not be able to rely on the shares of the owner whose proxy they hold.

Strengthen the Resubmission Thresholds. Companies are largely prevented from excluding repeat submissions of proposals (or those dealing with substantially the same subject matter), even when such proposals have been unsuccessful. Under current resubmission rules, proposals getting a mere 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. This structure allows a small subset of shareholders (or a proxy advisor voting on behalf of shareholders) to override indefinitely the expressed will of a substantial majority of shareholders. Companies have at times faced the same shareholder proposal for five or more years in a row (and sometimes for more than a decade), even as shareholders voting in favor of the proposals represent significantly less than a majority year after year. The argument that proposals should be allowed time to gain traction is far less compelling today, when activist shareholders are able to, and do, coordinate and advocate instantly via electronic media. We believe resubmission thresholds should be high enough to demonstrate that a resubmitted proposal is realistically on the path to majority approval. Accordingly, the resubmission thresholds the SEC itself proposed in 1997 — 6 percent on the first submission, 15 percent on the second and 30 percent on the third — would be more appropriate than today's thresholds.[20]

Enhance Proponent Disclosure Requirements. While companies must include in their proxy statement the proponent's name, address and number of voting securities the proponent owns (or an undertaking to provide the same upon request), proponents are not required to state their economic ownership in the company, the period of time of their investments or the breadth of their advocacy on the issue in question. Business Roundtable believes the rules governing the grounds to exclude a proposal should be amended to require proponents — and proponents by proxy — to disclose their motivations, goals, economic interests and holdings in the company's securities and any similar proposals they have submitted at other companies (as well as the results of those proposals), which would allow shareholders to make a better-informed decision about the proposal. Such a requirement would also enable shareholders to better evaluate the materiality and long-term value of the proposal to the company.

Enforce Limitations on the Use of Images. To avoid forcing companies to include immaterial and inflammatory content in their proxy statements, it is essential that the Commission have a clear and robust framework to evaluate images included in shareholder proposals. Recognizing the potential for abuse, in Staff Legal Bulletin 14I the Commission provided guidance regarding

[20] Amendments to Rules on Shareholder Proposals (proposed), 62 Fed. Reg. 50682, at 50689 (September 26, 1997).

the use of images in shareholder proposals.[21] The parameters set in the Staff's guidance are a sensible first step to curb a practice that had been used to circumvent securities regulations, and Business Roundtable appreciates the Commission's actions. As companies and proponents continue to test the application of the new guidance, we encourage the Commission to consistently enforce the restrictions it has adopted and allow companies to exclude proposals including images that are, among other things, false or misleading, offensive, protected by copyright, oversized, or otherwise aimed at circumventing the parameters with respect to supporting statements set forth in Rule 14a-8(d).

Reexamine the Rules Surrounding "No-Action" Relief.

Better Define the Criteria for Applying the Ordinary Business Exclusion. Companies seeking no-action relief under the "ordinary business" exclusion must contend with the fact that "ordinary business" has not been clearly or consistently defined. The Commission has stated that when analyzing an "ordinary business" exclusion, there are two central considerations: the subject matter of the proposal and the degree to which the proposal seeks to "micromanage" the company.[22] Under the first consideration, companies may exclude a shareholder proposal if the subject matter of the proposal relates "so fundamental[ly] to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight" unless, in the Staff's view, such matters focus on a significant social policy that are appropriate for consideration by the shareholders.[23] The second consideration looks at whether the proposal delves too deeply and into too much detail into matters of a complex nature such that shareholders would not be in a position to make an informed judgment on it. The Staff's approach to addressing questions regarding both the existence of a sufficiently significant social policy and micromanagement has varied. The Commission has said that it "applies the most well-reasoned standards possible, given the complexity of the task," but that, "from time to time, in light of the experience in dealing with proposals in particular subject areas, it adjusts its approach."[24] In Staff Legal Bulletin 14I, the Staff conceded that "these determinations often raise difficult judgment calls" and asked that companies begin providing the analysis of their boards of directors in no-action letters seeking exclusion under this provision.[25] Results from no-action letters following Staff Legal Bulletin 14I have continued to raise questions about the requirements for this exclusion and the value of including a board analysis. In an attempt to provide further guidance, the Staff recently released Staff Legal Bulletin 14J, which discussed the Staff's approach to evaluating the board analysis and issues of micromanagement. The Staff noted in Staff Legal Bulletin 14J that, unlike historical practice, it

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[21] SEC Division of Corporate Finance (November 1, 2017). *Shareholder Proposals* (Staff Legal Bulletin No. 14I). Retrieved from SEC website: https://www.sec.gov/interps/legal/cfslb14i.htm

[22] Release No. 34-30018 (May 21, 1998).

[23] Ibid.

[24] Ibid. at 50688.

[25] SEC Division of Corporate Finance (November 1, 2017). *Shareholder Proposals* (Staff Legal Bulletin No. 14I). Retrieved from SEC website: https://www.sec.gov/interps/legal/cfslb14i.htm

will now agree to exclude proposals addressing executive and director compensation on the basis of micromanagement.[26] Business Roundtable appreciates that the Commission has attempted to provide additional guidance regarding the application of the "ordinary business" exclusion. However, since the approach to evaluating "ordinary business" exclusions has not been consistently applied, and to add to the Staff's recent efforts to build a more consistent approach, we recommend that the Commission implement expanded review and oversight procedures, developed with input from issuers and investors, to prevent arbitrary changes in direction.

Reinstate the Conflicting Proposal Exclusion. In 2015, the SEC revised its approach to the conflicting proposal exclusion, materially departing from decades of guidance. The SEC's new interpretation limits the ability of companies to exclude a shareholder proposal that conflicts with a company proposal unless "a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal."[27] The new interpretation risks confusing shareholders and intruding upon the fiduciary duties of directors. Further, this departure from long-established practice was adopted in a Staff Legal Bulletin without formal rulemaking. The Commission should reinstate the prior interpretation of the conflicting proposal exclusion to eliminate the risk of confusion that the new guidance presents.

Reevaluate the Standard for Excluding Proposals that are Contrary to Proxy Rules. Rule 14a-8(i)(3) permits the exclusion of proposals that are contrary to the SEC's proxy rules, including proposals that are materially false or misleading or that are overly vague. In 2004, the SEC Staff significantly curtailed the ability of companies to use this exclusion when it took the position that it will not allow a company to exclude a supporting statement or proposal — even if it contains unsupported factual assertions, is disputed or countered, impugns the company or management or relies upon unidentified sources — unless the company "demonstrates objectively that a factual statement is materially false or misleading."[28] Since that time, the Staff have found that very few statements meet this standard and have indicated that companies should use a "statement of opposition" to respond to any false or misleading statements.[29] As a result, a company may be faced with the decision whether to include in its proxy a proposal that contains misstatements but is not deemed excludable under SEC Staff standards or to instead engage in expensive litigation to enforce its right to exclude the proposal. The responsibility to make sure shareholder proposals are accurate and not misleading ought to be borne by the authors of proposals: the shareholder proponents. The

[26] SEC Division of Corporate Finance (October 23, 2018). Shareholder Proposals (Staff Legal Bulletin No. 14J). Retrieved from SEC website: https://www.sec.gov/corpfin/staff-legal-bulletin-14jshareholder-proposals

[27] SEC Division of Corporate Finance (October 22, 2015). *Shareholder Proposals* (Staff Legal Bulletin No. 14H). Retrieved from SEC website: https://www.sec.gov/interps/legal/cfslb14h.htm#_ednref15

[28] 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

[29] Ibid.

Staff should reevaluate the current proponent-deferential standard it is applying to the exclusion of proposals contrary to proxy rules and place the burden back on proponents to demonstrate that their proposals are consistent with SEC rules.

Revise the Standard for Excluding Proposals on the Basis of Substantial Implementation. Rule 14a-8(i)(10) permits the exclusion of shareholder proposals if a company has already substantially implemented the proposal. The Commission has stated that "substantial" implementation does not require implementation in full or exactly as presented by the proponent.[30] However, over time, full or exact implementation of a proposal appears to have become the standard applied under paragraph (i)(10). At times, proposals request a report on a topic that is already addressed in communications with shareholders disclosing what the board believes to be the appropriate level and extent of information. Business Roundtable believes, consistent with the fiduciary duty of directors and the original intent of the Commission, that shareholder proposals requesting additional information on the same topic or seeking to address the same subject matter from a different point of view should generally be excludable on the basis of substantial implementation.

Revise the "No-Action" Letter Process. Based on a recent survey of our members, only about 20 percent of respondents believe the SEC's no-action letter process is administered in a consistent and transparent manner. The current no-action letter process is administered at the Staff level at the SEC, with presidentially appointed SEC Commissioners who bear ultimate accountability for SEC actions possessing little authority to reconsider a Staff decision. This decentralized issue-by-issue review, especially over the course of time, leads to inconsistent guidance and interpretation of the rules. To make the guidance process more consistent, the Commission could convert the no-action letter process into an SEC advisory opinion process, whereby the SEC issues opinion on major policy issues rather than issuing no-action letters. Alternatively, the process should be adjusted to allow for enhanced review and oversight mechanisms to achieve greater consistency.

<u>Reforming the Regulation of Proxy Advisory Firms</u>

Institutional investors, who, as noted above, own 70 percent of all public company shares in the United States, often rely on proxy advisory firms to help advise them on how best to manage their fiduciary duty to vote their proxies in the best interest of the beneficial owners they represent.[31] Based largely on the Rule 206(4)-6 adopting release and two recently withdrawn no-action letters, institutional investors have for some time operated under the belief that they could avoid potential conflicts of interest by voting their proxies in accordance with the

[30] Amendments to Rules on Shareholder Proposals (final), 63 Fed. Reg. 29106, at 29120 (May 28, 1998).

[31] Broadridge Investor Communication Solutions, Inc. and PricewaterhouseCoopers LLP (October 2018). *Proxy Pulse: 2018 Proxy Season Review*. Retrieved from https://www.broadridge.com/report/2018-proxy-season-review?id=00203PPRUSA15JUNLPG02PPR&so=se&po=&di=&ct=&ot=rp&mt=oc&yr=18&rg=us&on=01&ep=pd&gclid =EAIaIQobChMIzar1rcmV3gIVF7bICh1D1QYoEAAYASAAEgKYO_D_BwE

recommendations of proxy advisory firms, including those that provide consulting services.[32,33] In addition, many institutional investors have interpreted SEC and Department of Labor rules and guidance as requiring institutional investors to vote on every matter on a proxy.[34] Since many institutional investors lack the personnel and back-office support to manage such extensive voting obligations, they have sought to outsource these tasks to proxy advisory firms. As a result of the combined effect of the foregoing, proxy advisory firms have come to wield enormous influence over shareholder voting at public companies.

The market for proxy advisory services is dominated by two companies. Institutional Shareholder Services Inc. ("ISS") and Glass Lewis & Co. ("Glass Lewis") effectively operate as a duopoly, enjoying a 97 percent combined market share.[35] Academic studies have produced varied conclusions regarding the degree to which proxy advisory firms influence voting outcomes, but a recent report generated three important findings based on an extensive review of the research: (1) an adverse recommendation on a proposal from a proxy advisory firm is associated with a reduction in the favorable vote count by 10 percent to 30 percent, (2) proxy advisory firms' influence on voting is generally shown to be *at a minimum* moderate, and (3) proxy advisory firms' influence on corporate behavior and shareholder value is generally shown to be negative.[36]

While Business Roundtable recognizes that proxy advisory firms play an important role in the proxy system, we also believe there are serious concerns with the current system that need to be addressed. Specifically, there has been continued concern that proxy advisory firms produce reports that frequently include factually inaccurate information, that they are not transparent with respect to their methodologies and procedures and that they have conflicts of interest. In addition, there is no indication that proxy advisory firms test their voting guidelines and recommendations to confirm that they are consistent with long-term value creation. 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.

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[32] SEC Rule 206(4)-6, 17 C.F.R. §275.206(4)-6 (2018). Release IA-2106.

[33] SEC No-Action Letter to Egan Jones Proxy Services (May 27, 2004) (withdrawn September 13, 2018); SEC No-Action Letter to Institutional Shareholder Services, Inc. (September 15, 2004) (withdrawn September 13, 2018).

[34] Gallagher, D.M. (August 2014). Outsized Power & Influence: The Role of Proxy Advisers. *Washington Legal Foundation Critical Legal Issues Working Paper Series*. Retrieved from https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/GallagherWP8-14.pdf

[35] Glassman, J.K., & Peirce, H. (June 18, 2014). *How Proxy Advisory Services Became So Powerful*. Retrieved from Mercatus Center website: https://www.mercatus.org/publication/how-proxy-advisory-services-became-so-powerful

[36] Copland, J., Larcker, D.F., & Tayan, B. (May 30, 2018). *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (Working Paper No. 3679). Retrieved from Stanford Graduate School of Business website: https://www.gsb.stanford.edu/faculty-research/working-papers/big-thumb-scale-overview-proxy-advisory-industry

Business Roundtable believes that the investing public would benefit from reforms, including the following, that would improve the accuracy, transparency and accountability of proxy advisory firms.

Increase Accuracy of Recommendations. Concern has long been raised that proxy advisory firm recommendations often include errors, material factual inaccuracies and incomplete analyses. 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.[37] The 2018 survey results further indicate that although 90 percent of companies notify the proxy advisory firms of the errors, only 8 percent of companies find that the errors are consistently corrected. Additionally, even if errors are corrected in the report, our members have noted that corresponding updates are not necessarily made to the recommendations. The majority of our members responding to the survey have also pursued opportunities to meet with proxy advisory firms, but only 33 percent report that their efforts have consistently resulted in meetings. Further, nearly one in five respondents who met with proxy advisory firms to discuss their reports was unsatisfied with the outcome of those interactions.

A better mechanism needs to be in place to ensure investors are receiving accurate information. We believe proxy advisory firms should provide public companies with copies of their draft reports a reasonable time before dissemination to their clients to enable companies to review the reports, correct inaccurate information and make any significant comments.[38] During this review period, proxy advisory firms need to clearly and transparently show their methodologies and calculations. Figures included in proxy advisory firms' reports and voting recommendations should be reconciled to figures in the companies' public filings. It is impossible for companies or investors to verify the accuracy of numerical data in proxy advisor reports without access to the underlying calculations. Companies should also be allowed to share draft reports with their legal counsel and other advisers on a confidential basis. If any errors or concerns are identified, the proxy advisory firm should engage with the company to understand the issue and correct errors promptly.

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[37] 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

[38] ISS provides draft reports to S&P 500 companies with a limited window for comment, but Glass Lewis does not (although it does provide an "Issuer Data Report" for a fee). The ISS review period is generally short. At the 2013 Proxy Advisory Firms Roundtable, ISS President Gary Retelny noted that their target was a 24- to 48-hour review time. However, some respondents to a recent joint survey from Nasdaq and the Center for Capital Markets Competitiveness indicated receiving as little as 30 to 60 <u>minutes</u> to review the report, and 36 percent of respondents to a recent survey of public companies indicated they received fewer than 12 hours to review the report. Only 15 percent of respondents in the same survey of public companies reported receiving more than 72 hours to review the report. These periods are all shorter than the five days many believe necessary to communicate with shareholders on a negative recommendation.

Business Roundtable members also express concern that, when making recommendations, proxy advisory firms include or rely upon information not included in the company's public SEC filings or base their recommendations on factors other than the regulatory scheme to which companies are subject. For instance, proxy advisory firms have their own guidelines for determining independence of directors. This has resulted in situations where a proxy advisory firm recommends against the election of a director because it has determined a director is not independent under its standards, despite the fact that the company's board of directors, carrying out its fiduciary duties, determined that the director in question was independent under the requirements of the Commission and the company's stock exchange listing rules and corporate governance guidelines. Similarly, Glass Lewis has announced that beginning in 2019 it may recommend a vote against members of a company's governance committee if the company excludes shareholder proposals through a valid use of the no-action letter process.[39] This decision will hinge on whether Glass Lewis, in its own determination, believes exclusion of the shareholder proposal was "detrimental to shareholders." As a result, companies will now need to contend with the reality that a legitimate use of the Commission's no-action letter process could result in votes against directors based on the subjective views of a proxy advisory firm. 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.

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

Implement Additional Transparency Requirements. Proxy advisory firms offer little transparency into their internal standards, procedures and methodologies. Neither ISS nor Glass Lewis fully discloses the methodologies used to develop their voting recommendations. As a result, it is not possible to determine the degree to which any factors, including pressure to conform to the agenda of large clients of the proxy advisory firms and the demand for proxy advisory firm consulting services, are driving updates to voting guidelines. ISS, in particular, has an economic incentive to make its policies opaque and complex and to change them frequently to increase demand for its consulting services from issuers. For example, as part of its "2019 Benchmark Policy Comment Period," ISS has proposed switching its Financial Performance

[39] Glass, Lewis & Co. (October 24, 2018). *2019 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice – United States*. Retrieved from http://www.glasslewis.com/wp-content/uploads/2018/10/2019_GUIDELINES_UnitedStates.pdf

Assessment measures from GAAP-based measures to Economic Value Added (EVA) measures, notably in the same year that ISS acquired EVA Dimensions LLC.[40]

ISS and Glass Lewis also do not disclose academic research, if any, that is used in formulating their recommendations and whether the recommendations were designed to promote the creation and preservation of long-term shareholder value. To allow investor clients to fulfill their own fiduciary obligations to oversee and assess the policies and methodologies of proxy advisors upon whom the investors rely, we believe proxy advisory firm disclosures should explain how the proxy advisory firm has determined that its 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.

The need for additional transparency has been raised particularly around issues of executive compensation and employee incentive plans, where Business Roundtable members report the criteria used are not generally well understood and are inflexible when applied. In order to increase transparency with respect to these matters, 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), the proxy advisory firm should be required 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.

Proxy advisory firms also set certain requirements, the bases for which are unclear, and compliance with which is based on a subjective analysis (e.g., whether a board has been "responsive" to a say-on-pay vote receiving less than 70 percent of the vote). The degree to which proxy advisory firms outsource their fact-gathering and analysis to third-party raters and rankings, especially in the environmental, social and governance space, has also been a growing concern. While there may be justification to exclude certain proprietary information, proxy advisory firms should be required 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.

Further, proxy advisory firms' criteria and requirements for evaluating matters subject to a vote should be published before the beginning of the fiscal year in which the matters arise. For example, a change in criteria published in November 2018 ought to apply only to issuers' fiscal years beginning after that date. At present, changes to criteria published in November 2018 would apply retroactively, in the case of a calendar-year issuer, to the company's policies and actions beginning on January 1, 2018.

[40] Institutional Shareholder Services Inc. (February 12, 2018). *ISS Announces Acquisition of EVA Dimensions*. Retrieved from ISS website: https://www.issgovernance.com/iss-announces-acquisition-of-eva-dimensions/

Increase Disclosure of Conflicts of Interest. Several aspects of the current ownership and operations of proxy advisory firms create the potential for conflicts of interest. For example, Glass Lewis is owned by the Ontario Teachers' Pension Plan and Alberta Investment Management Corp., which invest in companies on whose proxies Glass Lewis makes recommendations, and ISS is owned by a private equity firm.[41,42] In addition, proxy advisory firms may be incentivized to align their recommendations with the interests of their clients, who may be proponents of a matter to be voted on at a shareholder meeting or who may have a specific agenda on governance, executive compensation or other matters. Further, ISS (unlike Glass Lewis) provides consulting services to the same public companies whose proxy proposals they evaluate and provide recommendations on.

These conflicts need to be addressed. Staff Legal Bulletin 20 was a good first step, making clear that to qualify for the exemption from certain proxy rules, proxy advisory firms must proactively and specifically disclose "significant" or "material" interests the proxy advisory firm has "in the matter that is the subject of the voting recommendation." However, Business Roundtable believes there is still room for improvement with respect to disclosure of conflicts of interest. At a minimum, proxy advisory firms should provide conflict of interest disclosures that are prominently displayed and describe specific conflicts, instead of relying on generalized statements about conflicts of interest. For instance, proxy advisory firms should disclose to their clients when they are providing voting recommendations on shareholder proposals submitted by their institutional investor clients and when the subject company has received consulting services from the proxy advisory firm on proxy matters.

Reduce Reliance on Arbitrary Methodology and Ensure Appropriate Staffing. Proxy advisory firm voting policies are generally developed using a one-size-fits-all approach, leading in many instances to the same standards being applied to all public companies without regard to, or understanding of, a specific company or its industry. Compounding this issue is concern over whether proxy advisory firms have sufficient and knowledgeable staffing for the proxy review process. ISS reports that it employs approximately 1,200 individuals and provides proxy recommendations for 42,000 shareholder meetings, and Glass Lewis reports that it employs approximately 360 individuals and provides proxy recommendations for 20,000 shareholder meetings.[43,44] Business Roundtable member companies report that proxy advisory reports frequently misinterpret information due to their limited understanding of the company and its operations. Especially in light of the short time frame during which the bulk of the proxy season takes place each year, proxy advisory firms should ensure that they have sufficient staff to produce proxy voting recommendations that are based on accurate and current information and that the staff formulating voting recommendations for specific companies possess an

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[41] Company Overview. (2018). Retrieved from http://www.glasslewis.com/company-overview/

[42] ISS History. (2018). Retrieved from https://www.issgovernance.com/about/iss-history/

[43] The Global Leader in Corporate Governance & Responsible Investment. (n.d.). Retrieved from https://www.issgovernance.com/about/about-iss/

[44] Company Overview. (n.d.). Retrieved from http://www.glasslewis.com/company-overview/

appropriate level of background knowledge and industry expertise to properly evaluate the issues at hand. As a matter of best practice, proxy advisory firms should disclose the extent to which they engage with issuers to develop both general voting policies and company-specific recommendations to ensure that they fully understand the matters on which they provide guidance. Proxy advisors should also disclose to their clients whether a recommendation is based on their general standards or a company-specific analysis.

Develop and Employ a Uniform Regulatory Framework. Despite their significant influence on the shareholder voting process, proxy advisory firms are not subject to regular and uniform regulatory oversight. Glass Lewis is not currently subject to any regulatory supervision, and, while ISS and other proxy advisory firms are registered under the *Investment Advisers Act of 1940* (the "'40 Act"), regulation under the '40 Act does not reflect the unique role proxy advisory firms play in the proxy system. Consequently, under the current proxy advisory system, entities that have no economic stake in the outcome of the voting on which they advise are able to influence the vote of institutional investors without being governed by uniform regulation and disregarding the regulatory schemes that are in place. Given the importance of proxy advisory firms' recommendations on proxy voting and to create more certainty, proxy advisory firms should be subject to a uniform set of rules and more robust oversight by the SEC.

The Commission should consider requiring proxy advisory firms to register under the '40 Act under a new regulatory framework that defines an "independent" third party advisor to more appropriately reflect the role proxy advisory firms perform in the proxy voting process.[45,46] At a minimum, this more tailored set of regulations would require proxy advisory firms to (1) establish, maintain and enforce written policies and procedures to address conflicts of interest; (2) establish, maintain and enforce a written code of ethics and professional conduct; (3) establish, maintain and enforce an effective internal control structure governing the implementation of and adherence to the policies, procedures, guidelines and methodologies used to provide proxy voting recommendations to persons with whom the proxy advisory firm has a business relationship; (4) provide for website disclosure of the policies, procedures, guidelines and methodologies used by each proxy advisory firm to develop proxy voting recommendations; and (5) require proxy advisory firms to maintain records and file annual or other reports required by the SEC.

Another approach would be to require that proxy advisory firms meet certain additional minimum requirements governing their activities and conduct to qualify for the exemption from the proxy rules on which they currently rely. These additional requirements could be tied to, among other things, making proxy advisory firm voting reports more accurate, making their

[45] SEC Rule 206(4)-6, 17 C.F.R. §275.206(4)-6 (2018). Release IA-2106.

[46] SEC Division of Corporate Finance, SEC Division of Investment Management (June 30, 2014). *Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms* (Staff Legal Bulletin No. 20). Retrieved from SEC website: https://www.sec.gov/interps/legal/cfslb20.htm

methodologies and conflicts more transparent and prohibiting prepopulated voting when an adverse recommendation has been issued.

Focus on Responsibilities of Investment Advisers. If institutional investors choose to use the services of proxy advisory firms and the information they provide, these investors retain ultimate responsibility to vote their proxies in the best interests of their beneficial owners and, as a result, have a responsibility to oversee the proxy advisory firms they retain. Staff Legal Bulletin 20 provides a good starting point regarding how investment advisers should oversee the proxy advisory firms they retain, but greater attention needs to be paid to whether institutional investors are appropriately exercising their fiduciary duties in making voting decisions.

While companies recognize that many institutional investors use proxy advisory firm recommendations as one part of their proxy voting analysis, companies have voiced particular concern that some institutional investors rely on the recommendations of proxy advisory firms and allow their votes to be cast automatically without first evaluating recommendations to ensure that the vote is in the best interests of their clients. Supporting this contention are results from a recently conducted survey, which revealed a spike in voting in response to adverse voting recommendations by ISS during the 2017 proxy season. During the three business days immediately after the release of an adverse recommendation, the survey showed that an average of 19.3 percent of the total shareholder vote was submitted consistent with the adverse voting recommendation.[47] This practice is troublesome for several reasons. A high incidence of voting immediately on the heels of proxy advisory reports suggests that investors spend little time evaluating proxy advisory firms' guidance and determining whether it is in the best interests of their clients. Investors also would not have an opportunity to identify inaccuracies in the reports or an ability to consider proxy advisory firms' methodologies or potential conflicts in making their recommendations. Further, this rushed voting significantly curtails the ability of companies to advocate for themselves when facing an adverse recommendation, as votes may be cast before companies even have time to respond to the proxy advisory firm regarding an adverse recommendation or engage with shareholders on the issue. We believe this issue warrants further evaluation by and guidance from the Commission.

As the Commission further considers the oversight responsibilities of investment advisers, we also believe the September 2018 withdrawal of the Egan-Jones and ISS no-action letters invites discussion regarding how institutional investors ensure compliance with their fiduciary duties when using the services of a proxy advisory firm.[48] Any new SEC rules or guidance should emphasize the responsibility of each registered investment adviser to exercise appropriate

[47] 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

[48] SEC Statement Regarding Staff Proxy Advisory Letters (September 13, 2018). Retrieved from SEC website: https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters

oversight over its proxy voting process and ensure its voting decisions on client securities are in its clients' best interests.

Reforming Shareholder Communications and the Proxy Voting Process and Increasing Retail Shareholder Participation

The current shareholder communication system and proxy voting process are cumbersome, circuitous and expensive for public companies. Public companies may directly communicate with and solicit proxies from their registered shareholders, who generally include the company's employees, directors and pension funds, but these shareholders typically represent only about 25 percent of the ownership of a company's stock.[49] To communicate with or solicit proxies from the remaining 75 percent to 85 percent of shareholders, who hold their stock in "street name," public companies must go through intermediaries, primarily banks and brokers.[50]

The street name ownership system was created in response to the paperwork crisis of the 1970s to process and clear securities transactions more efficiently.[51] For that purpose, street name ownership works well. As applied to shareholder communications and proxy voting, however, the current system results in inefficiencies, inaccuracies and added costs. In addition, the system does not take full advantage of technological advancements, like internet voting and blockchain technology, that could make direct communications more feasible and potentially revolutionize the entire proxy process.

Further complicating effective communication with shareholders are the SEC's rules prohibiting companies from communicating directly with beneficial owners who object to providing their names and addresses to companies (so-called "OBOs"). Information regarding the ultimate beneficial owners of street name shares is maintained by banks and brokers and not the companies themselves. Banks and brokers are required to provide companies lists of names and addresses only for beneficial owners who have not objected to having their information shared with the company (so-called "NOBOs") upon request, but they may not provide companies with such information for OBOs. The primary reason given for the creation of the NOBO/OBO distinction was privacy, but it is not clear that investors value this anonymity or truly understand the implications of becoming an OBO.[52,53] Because OBOs are estimated to

[49] Racanelli, V.J. (July 6, 2018). Proxy Voting is Broken and Needs to Change. *Barron's*. Retrieved from https://www.barrons.com/articles/proxy-voting-is-broken-and-needs-to-change-1530924318

[50] Ibid.

[51] Ibid.

[52] Opinion Research Corporation (April 7, 2006). *Investor Attitudes Study* (finding that only 20 percent of investors remembered being asked if they wanted their contact information provided companies in which they own stock). Retrieved from http://www.shareholdercoalition.com/sites/default/files/ NYSE%20ORC%20Investor %20Study%204-7-06_0.pdf

[53] Studies conducted during the development of the NOBO/OBO system indicate that only between 8 and 12 percent of street name holders raised an objection to disclosure of their names to companies. SEC Advisory

constitute 75 percent of shares held in street name and the majority of total beneficial ownership of most public companies' shares, the current rules create significant obstacles to public companies' identification of and direct communication with a substantial number of their ultimate owners.[54]

Business Roundtable believes that the current system plays a major role in depressing the proxy voting participation of retail holders. While institutional investors were estimated to have 91 percent voting participation in 2018, during the same period, retail investors, who own around 30 percent of public company shares, were estimated to achieve only 28 percent voting participation.[55] A more streamlined and direct system of communication and proxy voting is essential to increasing retail shareholder participation. Business Roundtable has advocated for reform of the shareholder communications and proxy voting process for over a decade, and the current dynamics of the marketplace — ownership composition, activism trends, and regulatory and corporate governance changes (e.g., limitations on broker discretionary voting, say-on-pay vote requirements, and increased use of majority voting standards in director elections) — make the need for reform more important than ever.[56]

Business Roundtable believes the following potential reforms would help to make the shareholder communications and proxy voting processes more efficient and increase retail shareholder participation by addressing many of the underlying and interconnected elements in the process.

Suggested Improvements to the Shareholder Communication System

Provide for Direct Communications with All Beneficial Owners. As an initial matter, the NOBO/OBO distinction unduly impedes and unnecessarily complicates communications with beneficial owners. To improve communications between companies and their shareholders, remove unnecessary costs and delays, and increase retail shareholder participation, we believe

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Committee on Shareholder Communications (1982). Improving Communications between Issuers and Beneficial Owners of Nominee Held Securities. Retrieved from https://www.sec.gov/comments/s7-14-10/s71410-29.pdf. SEC Division of Corporate Finance (1980). Report to Senate Comm. On Banking, Housing and Urban Affairs: Staff Report on Corporate Accountability (96th Cong. 328).

[54] Beller, A.L., & Fisher, J.L. (February 2010). *The OBO/NOBO Distinction: Implications for Shareowner Communications and voting*. Retrieved from Council of Institutional Investors website: https://www.cii.org/files/publications/white_papers/02_18_10_obo_nobo_distinction_white_paper.pdf

[55] Broadridge Investor Communication Solutions, Inc. and PricewaterhouseCoopers LLP (October 2018). *Proxy Pulse: 2018 Proxy Season Review*. Retrieved from https://www.broadridge.com/report/2018-proxy-season-review?id=00203PPRUSA15JUNLPG02PPR&so=se&po=&di=&ct=&ot=rp&mt=oc&yr=18&rg=us&on=01&ep=pd&gcli d =EAIaIQobChMIzar1rcmV3gIVF7bICh1D1QYoEAAYASAAEgKYO_D_BwE

[56] Business Roundtable (April 12, 2004). *Request for Rulemaking Concerning Shareholder Communications* (SEC File No. 4-493). Retrieved from SEC website: https://www.sec.gov/rules/petitions/petn4-493.htm

this distinction should be eliminated. Brokers and banks should be required to provide companies with contact information for all beneficial owners (not just NOBOs), which would facilitate more complete and accurate shareholder lists, enabling a company to communicate directly with all its owners. Companies should also be permitted to send proxy materials to and solicit proxy cards directly from all shareholders (not just registered holders).[57]

To the extent they exist, we believe privacy concerns raised by elimination of the NOBO/OBO distinction can be mitigated through regulation. The SEC could implement rules enabling investors who wish to remain anonymous to use nominee names or custodial arrangements to hold their shares, at their own expense. Rules could also enable individual shareholders with concerns regarding the type and frequency of communications — from the company or other shareholders — to set their communication preferences electronically to limit contacts to those they find relevant.

Provide National Investor Education. In conjunction with new voting and shareholder communication systems, Business Roundtable believes a national investor educational program would help retail investors understand the proxy voting process and encourage participation in voting.

Suggested Improvements to the Proxy Voting Process

Authorize Beneficial Owners to Vote Directly. As mentioned above, Business Roundtable believes to reduce costs, increase participation and make the system more efficient, companies should be permitted to solicit proxies from beneficial owners directly. As a corollary, the Commission should consider requiring brokers, banks and their agents to provide beneficial owners with the authority to vote their shares directly (instead of requiring instructions to the broker-dealers to vote on their behalf). This could be accomplished by requiring the intermediaries to execute omnibus proxies transferring the legal right to vote the shares from broker-dealers and banks to the beneficial owners. Another possible approach would be to allow the beneficial owners to vote directly with the company, eliminating the need for an omnibus proxy. We believe either approach would be an improvement on the efficiency and accuracy of the current process of vote tabulation through the imperfect tandem of voting instructions and broker discretionary voting.

Require Beneficial Owner List Reconciliation. Brokers typically hold shares in fungible bulk, meaning there is no allocation of the shares into separate investor accounts, resulting in an inability to match long and short positions. When shares have been lent, the person who purchased the securities from the short seller and the person who loaned the shares to the

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[57] Although companies have the right to mail proxy materials directly to NOBOs, as a practical matter, that does not happen because current SEC rules require companies to forward proxy materials through brokers and banks regardless of whether they are also directly mailed. Brown, R. (1988). The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility? *The Journal of Corporation Law*. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=993866

short seller can sometimes both receive voting requests, which can lead to inaccuracy and confusion with the vote counts. To create a more transparent and accurate proxy voting system, the Commission should consider requiring broker-dealers to reconcile beneficial owner positions legally eligible to vote as of a record date prior to mailing the voter instruction form and/or proxy materials. This would help prevent over-voting and under-voting resulting from instructions and proxy cards being mailed in by shareholders who are not entitled to vote and who should not have received materials. It would also reduce the associated waste.

Create Competition Among Proxy Service Providers. Business Roundtable continues to believe that opening proxy services to free market competition would foster innovation and help to create a more efficient and cost-effective shareholder communication and proxy system. One possibility warranting further consideration is the separation of the functions of beneficial owner data aggregation and proxy communications distributions, which the Commission discussed in the 2010 Concept Release.[58] In this system, a data aggregator selected in a competitive bidding process by a Self-Regulatory Organization or other independent body would maintain lists of beneficial owners used for shareholder meetings and other communications purposes involving the corporate or business affairs of the company. This beneficial owner information would also be available to service providers who could offer proxy distribution and tabulation services to the company. Such an approach to proxy distribution would allow competitive market forces to dictate prices for beneficial owner proxy services in place of the current standardized fees set by Self-Regulatory Organizations. It would also allow companies to directly distribute proxy materials to all shareholders and select the service providers themselves, rather than placing the decision in the hands of intermediaries who have no incentive to negotiate lower costs for shareholders.

Consider Enhancing Investor Disclosure Requirements. We continue to share the Commission's concern raised in the 2010 Concept Release about hedging strategies and share lending practices that decouple voting power from economic interest and agree that as they relate to proxy voting these practices require additional study. As further evaluation is pending, we believe the Commission should consider requiring increased disclosure by investors holding voting power decoupled from an economic interest.[59]

Evaluate and Provide for the Use of Technological Advancements. There have been substantial developments in technology since the 2010 Concept Release. To the extent technology can be employed to further the efficiency of reforms, we believe it should be considered and explored. For instance, if omnibus proxies are used to authorize beneficial owners to vote directly, beneficial owners should be permitted to use the same internet voting platforms available to registered owners.

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[58] SEC Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42982, at 42997 (July 22, 2010).

[59] As a note, in the context of Section 13(d) disclosures, Business Roundtable supports expanding disclosure of derivatives that decouple economic interests from voting and investment control, as is discussed later in this comment letter.

Business Roundtable also believes that blockchain technology and smart contracts warrant study and consideration as potential tools to help modernize and simplify the proxy process. Proponents of the technology believe blockchain platforms could provide faster and more accurate vote tabulations with the potential for equal, real-time transparency, and service providers have already begun testing blockchain technology applications in the proxy process. For instance, Nasdaq has created a blockchain-based voting and proxy assignment application that has been tested in its Estonia and South Africa markets, which allows for, among other things, more transparency and auditability of voting results.[60,61] In addition, Broadridge (partnering with JPMorgan Chase and Northern Trust as custodian banks) used blockchain technology to allow certain shareholders of Banco Santander to participate in a shadow vote run parallel to the official vote for Santander's annual general meeting in March 2018. Broadridge noted that the shadow vote allowed institutional investors the opportunity to see how their votes could be counted and confirmed much more quickly with blockchain technology — stating it will be possible to do this instantaneously as opposed to the two-week wait time with the current process.[62]

The specific uses of blockchain technology in the proxy process are still being developed, and many questions still need to be answered regarding how a transition to a blockchain-based proxy system could work. However, we believe that these and other developing technologies show great promise and warrant consideration as additional tools to enhance the current proxy process.

<u>Other Proposed Reforms Related to the Proxy Process</u>

Universal Proxy Cards

In October 2016, the SEC proposed rules that, if adopted, would create a universal proxy card distributed by both the company and the dissident shareholder that would list all director nominees regardless of whether they were nominated by the board or the dissident. In January

[60] Nasdaq Corporate Solutions (November 22, 2017). *Nasdaq to Deliver Blockchain e-Voting Solution to Strate*. Retrieved from http://ir.nasdaq.com/news-releases/news-release-details/nasdaq-deliver-blockchain-e-voting-solution-strate

[61] Nasdaq, Inc. (2018). *Nasdaq Blockchain Strategy: Moving Beyond the POC*. Retrieved from https://business.nasdaq.com/media/Blockchain%20Mutual%20Fund%20Strategy%20SEB%20and%20Nasdaq%202018_tcm5044-61791.pdf

[62] Broadridge Financial Solutions, Inc. (May 17, 2018). *Press Release: Santander and Broadridge Complete a First Practical use of Blockchain for Investor Voting at an Annual General Meeting*. Retrieved from Broadridge website: https://www.broadridge.com/press-release/2018/santander-and-broadridge-completed-practical-use-of-blockchain

2017, Business Roundtable wrote a comment letter to the SEC in response to the proposed universal proxy rules noting its concerns with the rules as proposed.[63] In the event that universal proxy cards are reconsidered at the upcoming roundtable, Business Roundtable would like to reiterate its concerns with rules that would mandate their use.

The use of universal proxy cards has the potential to create information inequities that disadvantage and disenfranchise shareholders. The SEC's proposed rules did not include a requirement for a dissident shareholder to send its proxy materials to all shareholders, instead only requiring distribution of materials to a voting majority. As a result, many shareholders, including many retail and small institutional shareholders, could receive a "universal" proxy card that lists the names of the company's and the dissident's nominees but would not receive the dissident's proxy materials, including the biographies of its nominees. This may lead to an information disadvantage for shareholders and discourage shareholders from participating in the election. Further, the inclusion of all director nominees on a single card creates a risk that shareholders may attempt to vote for more nominees than can be elected, resulting in the votes being entirely invalidated. Finally, the inclusion of dissident nominees alongside the company's nominees on a single card may suggest to shareholders a false equivalency between the company-vetted candidates and the dissident's slate, who may not possess the skills and qualifications necessary to be effective directors if elected.

Business Roundtable is also concerned that mandating the use of universal proxy cards could further encourage short-term focus at the expense of long-term shareholder value. Business Roundtable believes that mandated universal proxy cards would likely encourage an increase in the number of proxy contests, which are costly both in monetary terms and in the company's attention and focus, and which can put pressure on directors to de-emphasize long-term initiatives in favor of the short-term demands that dissident shareholders sometimes favor.

Exchange Act Section 13(d) Reform

Arguably the most contentious and high-profile use of the proxy system is a proxy contest. In recent years, these battles have highlighted the need for a better proxy system.[64] Proxy contests have also shed light on the broader, related issue of whether the regulations governing the build-up of beneficial ownership by activist investors prior to a fight for control are in need of reform. In undertaking an evaluation of the proxy system as a whole, Business

[63] Business Roundtable (January 9, 2017). *Letter to SEC Secretary Fields*. Retrieved from Business Roundtable website: https://www.businessroundtable.org/brt-letter-raises-concerns-over-secs-proposed-rules-for-universal-proxy-requirement

[64] For example, the 2017 proxy contest between Procter & Gamble and activist investor Trian Fund Management was the most expense proxy fight in U.S. history, costing both sides $60 million. After three weeks of evaluating disputed votes and trying to determine a winner, the proxy contest eventually ended in a settlement with Trian's CEO Nelson Peltz being appointed to the board of directors, even though he did not receive a majority of the votes; *see* Racanelli, V.J. (July 6, 2018). Proxy Voting is Broken and Needs to Change. *Barron's*. Retrieved from https://www.barrons.com/articles/proxy-voting-is-broken-and-needs-to-change-1530924318

Roundtable believes it is important for the Commission to consider potential reforms to the current 13(d) reporting system to ensure those rules and regulations continue to promote their stated goals and provide companies with adequate remedies to protect their shareholders from violations of the rules.

Adopted in 1968, Section 13(d) of the Securities Exchange Act of 1934 requires a person who indirectly or directly becomes the beneficial owner (or any such group of beneficial owners) of more than 5 percent of a company's registered equity securities to disclose his or her ownership within 10 days of acquisition. The provision was designed "to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control."[65] Business Roundtable believes modern technology and investor practices have combined to vitiate much of the statute's intended effect, leaving companies and their shareholders with little transparency and without adequate remedies.

This issue has become more pronounced as companies have faced a significant rise in hedge fund activism. Activists have been able to exploit the current disclosure rules and regulations to accumulate large positions in secret during the 10-day filing window following the date an activist chooses to cross the 5 percent disclosure threshold. Once disclosure of their ownership is required, the activist can use its new position (often aided by a loose coalition of other hedge funds and investors coordinated during the filing window) to demand changes that may not be in the long-term interests of other stockholders or company stakeholders, including employees and creditors.[66] The potential benefits of hedge fund activism are hotly debated; however, even recognizing that such activism may at times play a productive role in corporate governance, we do not believe activists should be able to conceal from the company and its shareholders their true ownership and the affiliations they have forged as they seek to affect the control of the company. Much like companies have a duty to inform the market of material developments in a timely manner, activists seeking control should be required to provide timely and transparent disclosures.

Business Roundtable is also concerned that the threat of shareholder activism can deter companies from going public, especially in the technology sector where projects may require longer lead times for completion. Reforming the current disclosure rules could help make going public more attractive.

Calls for reforming the 13(d) reporting system are not new.[67] Given the effect the 13(d) reporting system has on the proxy system, the long-term interests of companies and the desire

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[65] GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972).

[66] Thomas, L. (October 22, 2018). Leveling the hunting fields. *Reuters Breakingviews*. Retrieved from https://www.breakingviews.com/features/guest-view-activist-wolves-at-the-window/

[67] Wachtell, Lipton, Rosen & Katz (March 7, 2011). *Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934*. Retrieved from SEC website: https://www.sec.gov/rules/petitions/2011/petn4-624.pdf

for companies to become and remain public, as part of its evaluation of the larger proxy system, we believe the Commission should consider reforms to this reporting system, including the following.

Reforms to Address the Undisclosed, Rapid Accumulation of Shares. As a result of advancements in technology, the 10-day filing period for Schedule 13D instituted in the 1960s has become outdated. Transactions that used to take days now take a matter of minutes. As other regulations have been updated to reflect the new reality, the 10-day period for Schedule 13D filings has remained unchanged for decades.[68]

Reports and studies indicate that the 10-day filing window currently allows activist investors to accumulate substantial positions in secret before disclosure is required.[69] This undisclosed buildup of ownership by a lead activist would be problematic on its own, but purchases by lead activists are frequently magnified by simultaneous purchases by other investors and hedge funds. Reports indicate that activists share their plans with other hedge funds and favored investors prior to disclosing the increase in their beneficial ownership.[70] These other investors who trade based on their knowledge of the activist's intentions (referred to as members of a "wolf pack") typically stand to profit when the lead activist's Schedule 13D is filed, as the filing of the Schedule 13D alone has been shown to increase a company's stock price by 6 to 8 percent.[71,72] However, these other investors are generally not required to aggregate their beneficial ownership with the lead activist for disclosure as a "group" under Section 13(d). As a result, the Schedule 13D filed by a lead activist frequently does not reflect the total stock ownership of a target company that is aligned with (and arguably beholden to) the lead activist.

The Commission has the authority and the means to fix this problem. Dodd-Frank specifically authorized the SEC to shorten the Schedule 13D filing window, and the Commission could clarify that wolf pack members should be required to disclose their beneficial ownership on

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[68] For instance, broker-dealer settlement periods were reduced to two days in 2017 and deadlines for other disclosure filings have been shortened: Form 8-K deadline cut from 15 calendar days to four business days in 2004; Section 16 filings are down to two business day deadlines; and Regulation FD imposes same-day disclosures on companies.

[69] Pulliam, S., Chung, J., Benoit, D., & Barry, R. (March 26, 2014). Activist Investors Often Leak Their Plans to a Favored Few. *The Wall Street Journal*. Retrieved from https://www.wsj.com/articles/activist-investors-often-leak-plans-to-peers-ahead-of-time-1395882780

[70] Wong, Y.T.F. (January 8, 2016). *Wolves at the Door: A Closer Look at Hedge Fund Activism* (Columbia Business School Research Paper No. 16-11). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721413

[71] Coffee, J.C. (January 25, 2016). Hedge Fund Activism: A Guide for the Perplexed [Blog post]. Retrieved from Columbia Law School website: http://clsbluesky.law.columbia.edu/2016/01/25/hedge-fund-activism-a-guide-for-the-perplexed/

[72] Brav, A., Jiang, W., Partnoy, F. & Thomas, R.S. (2008). Hedge Fund Activism, Corporate Governance and Firm Performance. *Journal of Finance.* Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=948907

Schedule 13D.[73] Business Roundtable believes the filing window should be shortened to a period more consistent with current filing deadlines under other reporting requirements. In addition, the Commission should revise the Section 13(d) beneficial ownership definitions to make it clear that "group" includes members of a wolf pack.

Finally, to cut down on wolf pack formation during the period between crossing the 5 percent reporting threshold and filing the report, once the threshold is crossed, trading in the company's equity by the investor (or group of investors) beneficially owning more than 5 percent should be prohibited until the Schedule 13D filing is made. Such a change would align rules imposed on Schedule 13D filers with the 10-day cooling-off period currently imposed on investors when they switch from being passive Schedule 13G filers to Schedule 13D filers.[74]

Reforms to Address Hidden Ownership. Even once an activist is required to file a Schedule 13D, the filing may not fully reflect its true economic interest in the company. Beneficial ownership under Section 13(d) only picks up equity securities over which the investor has voting or investment control. As a result, there are a number of derivatives and non-traditional investments, such as cash-settled equity swaps, that fall outside the reporting obligations because the economic ownership is decoupled from investment and voting rights. The definition of beneficial ownership for purposes of Section 13(d) should be expanded to cover derivatives pursuant to which an investor does not technically control the voting or investment power but does stand to profit from the change in the value of the company's equity.

In addition to derivative and other investment disclosures that are not required to be made, there is currently a gap in the regulation of short sellers and those holding long positions. Since short positions are not required to be disclosed under Section 13(d), activist investors are able to use net short positions to secretly vote against company interests. Taking advantage of this gap enables a net short-selling investor to profit from losses on a company's shares — without required disclosure — while leveraging a smaller long position to influence a company's policies or corporate governance. The lack of disclosure of short positions blocks companies' view of trading in their securities and hampers effective communication with their investors. As a result, Business Roundtable believes the Commission should consider adding a requirement that activist investors must report a direct or indirect short investment position that represents more than 5 percent of a registered class of equity securities. In this instance, investors would not be permitted to use a net calculation of short and long positions.

Reforms to Provide More Effective Protections for Companies and Their Shareholders. Another problematic aspect of the current Section 13(d) reporting system is that companies do not have adequate options for redress when an investor has violated Section 13(d) disclosure rules and, therefore, are limited in helping protect their other shareholders. Currently, companies have a

[73] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, §929R (2010).

[74] 17 C.F.R. §240.13d-1 (e)(2) (2018).

private right of action for injunctions, but once a lawsuit is filed, if the violating party takes corrective action (such as filing a new or updated Schedule 13D), the suit is generally made moot.[75] A main issue for companies in obtaining more relief is that courts have held that failure to file a timely Schedule 13D cannot, alone, establish irreparable injury sufficient to justify equitable relief.[76] Companies need more effective means to protect their shareholders from violations of Section 13(d) and to deter future violations. To that end, it would be beneficial to more readily provide companies with effective protections, such as sterilization of shares in connection with an investor's violation of Section 13(d).

Conclusion

The proxy system is as important as it is complex. The savings of America's workers and retirees — indeed, much of the world's workers — depend on the long-term success of publicly traded companies, as do the economic fates of their employees and trade partners. Because of the essential role the proxy system plays in setting the course of public companies, the proxy system should be continuously monitored and improved. Business Roundtable believes the recommendations discussed above have the potential to meaningfully increase the efficiency and accuracy of proxy voting, and to give companies better means to communicate with their ultimate owners.

Thank you for considering our comments and recommendations. We would be happy to discuss our concerns or any other matters that you believe would be helpful, at the upcoming Roundtable or in another venue. Please contact Maria Ghazal, Senior Vice President and Counsel of Business Roundtable, at [redacted] or [redacted].

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[75] Colombo, R.J. (2011). *Effectuating Disclosure Under the Williams Act*. Retrieved from https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1186&context=faculty_scholarship

[76] CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 654 F.3d 276 (2d Cir. 2011).