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August 19, 2020

VIA E_MAIL (IMshareholderproposals@sec.gov)

Office of Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20249

Re: Shareholder Proposal Submitted by Kani Ilangovan and Mary Lou Rosczyk for Inclusion in the Vanguard Funds' 2020 Proxy Materials

Dear Sir or Madam:

On behalf of Kani Ilangovan and Mary Lou Rosczyk, the proponents of the shareholder proposals, I submit this letter in response to the August 14, 2020 letter (the "Second Letter") from Stephen Bier of Dechert LLP submitted on behalf of various Vanguard Funds ("Vanguard" and the "Funds") which was a follow up to their July 27, 2020 letter (the "Initial Letter") requesting No-Action confirmation from the staff (the "Staff") of the Division of Investment Management of the U.S. Securities and Exchange Commission (the "Commission") for omitting the shareholder proposal (the "Proposal") from Vanguard's proxy materials for its 2020 Special Meeting of Shareholders.

We will reference the Proposal by its title ("Genocide-free Investing") and reference Kani Ilangovan and Mary Lou Rosczyk collectively as proponents (the "Proponents").

As discussed in our response letter of August 3, 2020 (the "Initial Response") to Vanguard's Initial Letter, we continue to believe that Vanguard has not met its burden under Rule 14a-8(g) to demonstrate that it is entitled to exclude the Proposal on either of the two bases it proposed in its Initial Letter: Vanguard's claim of micromanagement and Vanguard's claim that the Proposal has already been substantially implemented by the Funds.

This letter responds to the four specific arguments presented in Vanguard's Second Letter.

For reference, the Proposal resolution states:

> "Shareholders request that the Board institute transparent procedures to avoid holding or recommending investments in companies that, in management's judgment, substantially contribute to genocide or crime against humanity, the most egregious violations of human rights."

The **first argument** in Vanguard's Second Letter claims the Proposal micromanages because it "requires a specific action to be taken by Vanguard — avoid recommending or investing" which Vanguard asserts is "a specific method for implementing a complex policy" and therefore impermissible micromanagement.

Vanguard's argument confuses the Proposal's objective, "avoid holding" which addresses a significant social policy concern (genocide-free investing), with a "method" of the procedures which address the policy. The Proposal states the objective and asks for procedures, but does not define the procedures in any way, leaving the definition of "method" up to Vanguard. The dictionary definition of "method" clearly shows the difference between the methods in the procedure and the objective of the method and procedures. For example, Merriam-Webster defines "method"[1] as "a procedure or process for attaining an object," "a way, technique, or process of or for doing something." Note that the Proposal does not preclude Vanguard from including "adjustments [with] regard to specific circumstances or the possibility of reasonable exceptions"(as required in SLB 14K[2]) in the methods and procedures that Vanguard may choose to implement the proposal.

Vanguard's argument is overly broad. The test for micromanagement is not purely on whether the policy may be complex, but whether the proposal is inappropriately defining the methods to implement complex policies.

As we noted in our Initial Response:

> The details of checking securities for investments that contribute to genocide are beyond the abilities and resources of a typical investor. However, selecting securities is Vanguard's business and is not too complex for the Funds. Avoiding genocide-related securities may introduce some complications into a fund's security selection process but the Proposal appropriately leaves these details to the technical experts within the Fund who are entirely capable of successfully and efficiently implementing them.

The **second argument** in Vanguard's Second Letter is in reference to the No-Action case of JPMorgan (Rosenfeld) (2019).[3]

We discussed the JPMorgan (2019) case in our Initial Response and summarize here.

We believe the Corporation Finance division incorrectly decided the JPMorgan No-Action request in 2019 when it upended a long line of decisions allowing shareholders to be heard on Genocide-free Investing. JPMorgan made no new substantive argument.

Reliance on the doctrine of *stare decisis* should have generated a different determination, with the Staff ruling against JPMorgan as it had repeatedly in the past, including the Staff's explicit judgment in Franklin Resources (Rosenfeld) (2013) that the Genocide-free Investing **"proposal focuses on the significant policy issue of human rights and does not seek to micromanage the company to such a degree that exclusion of the proposal would be appropriate."**

Given the conflicting precedents by the Staff on Genocide-free Investing, from 2008 through 2018 ruling four times that Genocide-free Investing does not seek to micromanage, and once in 2019 ruling the opposite, we request that the Staff reconsider the matter.

One possibility that may explain the surprising No-Action determination in 2019 is that the defense of Genocide-free Investing provided to the Staff in response to JPMorgan's No-Action

1 https://www.merriam-webster.com/dictionary/method
2 https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals
3 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/rosenfeld031319-14a8.pdf

letter was insufficiently robust, relying too heavily on the multiple precedents and the principle of *stare decisis.*

Therefore we request that the Staff evaluate Vanguard's No-Action request on its own merits, considering the details of Vanguard's letters and our responses.

The **third argument** in Vanguard's Second Letter is that "the Proposal imposes a time frame" "evidenced by the Proponent Letter's conclusion that the Vanguard Funds' policy does not compare favorably with the Proposal because the Funds did not take the specific action desired within the Proponent's desired time frame."

Our Initial Response reviewed the "essential components" of the Proposal and analyzed the delta between Vanguard's stated policies and the Proposal, showing that Vanguard had not substantially implemented the Proposal and that Vanguard's "particular policies, practices and procedures" do not "compare favorably with the guidelines of the proposal." As an additional proof point, we reviewed the history of Vanguard's policy. In our Initial Response we observed:

> The body of the Proposal clearly identifies as a concern that Vanguard and the Funds it manages "Claim to have a policy that applied to all of its funds to consider social issues and "potential divestment" in cases of "crimes against humanity or patterns of egregious abuses of human rights," but have taken no action to avoid problem investments. However, the lack of action over the course of 14 years, from 2007 through 2020, is a clear indication that whatever Vanguard's policy may be, it **does not compare favorably with Genocide-free Investing** which requests procedures to "avoid holding or recommending investments in companies that, in management's judgment, substantially contribute to genocide or crimes against humanity." This difference is not a question of micromanaging methods, but rather reflects completely different management procedures.

Vanguard now argues that pointing out the lack of action by Vanguard over 14 years is proof that the Proposal impermissibly micromanages by imposing a time-frame. Vanguard's argument is overly broad. Following this infinitely elastic logic, a fund or company could pretend to have a policy on some subject that commits to act on some everyday issue, but <u>never</u> in fact acts, and then assert in its defense that concerns about not acting are illegitimate micromanagement. Surely, it is not the intent of the Commission or the Staff to allow or encourage policies on business operations that are merely theoretical window dressing and never executed. The plain language of the Proposal does <u>not</u> impose a time-frame. Further, Vanguard's lack of action over 14 years is evidence that Vanguard's policy, in actuality, does not compare favorably with Genocide-free Investing, rather than being support for Vanguard's claim of micromanagement.

The **fourth argument** in Vanguard's Second Letter is that "by specifically interfering with the Funds' investment decision making process, the Proposal is fundamentally aimed at micromanaging an investment company's ordinary business operations." Vanguard made this same argument in its Initial Letter. See our Initial Response for a detailed response to this inaccurate claim.

Vanguard's argument is overly broad, incorrectly claiming that a proposal that involves "ordinary business operations" must be regarded as impermissible micromanagement.

Vanguard's Second Letter properly quotes the established exception for "policy issues that are significant because they transcend ordinary business and would be appropriate for a shareholder vote." Genocide-free Investing is just such a policy issue, as we demonstrated in our Initial Response. Accepting Vanguard's argument would mean that that any proposal that touched but transcended ordinary business could be excluded as micromanagement. Surely that is not the intent of the Rule 14a-8(i)(7) regarding shareholder proposals and ordinary business, which is why there are additional tests for "micromanagement," rather than merely involving ordinary business.

Vanguard does not succeed in demonstrating in its Initial Letter or Second Letter that the Proposal fails the tests for micromanagement.

As we noted in our Initial Response, Vanguard's Initial Letter, and now its Second Letter, misses the overarching principle that governs the question of whether a proposal impermissibly seeks to micromanage -- whether shareholders considering the proposal have the ability to make an "informed judgment" about the proposal. Vanguard quotes part of SLB 14J[4] but fails to quote that key part which states:

> the degree to which the proposal "micromanages" the company "by probing too deeply into matters of a complex nature **upon which shareholders, as a group, would not be in a position to make an informed judgment** [emphasis added]."

Shareholders have not had difficulty in understanding and making an informed judgment on Genocide-free Investing, as we detailed in our Initial Response, and which included an explicit determination from the Staff to that effect.

The Proposal seeks to enable shareholders, by their votes, to ask Vanguard to make an effort to avoid investments in companies substantially contributing to genocide.

We respectfully request that the Staff deny Vanguard's request for No-Action relief and allow shareholders to vote on this significant social policy.

Sincerely,

[redacted]

Eric Cohen, Chairperson
Investors Against Genocide

Cc: Vanguard
Kani Ilangovan
Mary Lou Rosczyk

4 https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals#_ednref6