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VIA E-MAIL

September 3, 2024

Office of Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549
IMshareholderproposals@sec.gov

Re: Notice of Intent to Exclude Shareholder Proposal from Proxy Materials

Dear Sir or Madam:

We are counsel to the Vanguard Funds listed on Appendix A of the attached letter (collectively, the "Funds"). Back in 2018, Vanguard received identical shareholder proposals and supporting statements (together, the "Proposal") from the shareholders listed in Appendix A (the "Proponents") for inclusion in the Funds' proxy statement and form of proxy (the "Proxy Materials") in connection with the Funds' next special meeting of shareholders. The purpose of this letter is to notify the U.S. Securities and Exchange Commission (the "Commission") of the Funds' intent to exclude the Proposal from its Proxy Materials. We respectfully request confirmation that the Commission staff ("Staff") will not recommend any enforcement action to the Commission if, in reliance on certain provisions of Rule 14a-8 under the Securities Exchange Act of 1934, as amended, the Funds exclude the Proposal from their Proxy Materials.

In accordance with Rule 14a-8(j) and Staff Legal Bulletin No. 14D ("SLB 14D"), we are emailing this letter to IMshareholderproposals@sec.gov. Additionally, in accordance with Rule 14a-8(j), we have copied the Proponents on the email and are simultaneously forwarding a copy of this letter via overnight mail to the Proponents and to their designated representatives.

Rule 14a-8(k) and SLB 14D provide that shareholder proponents are required to send issuers a copy of any correspondence that the proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to inform the Proponents that if the Proponents elect to submit additional correspondence to the Commission or Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Funds pursuant to Rule 14a-8(k) and SLB 14D.

*** FISMA & OMB Memorandum M-07-16

Please send any response to this letter to my attention by email (stephen.bier@dechert.com) and send a copy of the response to the attention of the Proponents at the mailing address and/or email address set forth in the Proposal.

I. The Proposal

In 2018, the Funds received the following Proposal for inclusion in the Funds' Proxy Materials:

We believe that:

1. While reasonable people may disagree about socially responsible investing, few want their investments to help fund genocide. KRC Research's 2010 study showed 88% of respondents want their mutual funds to be genocide-free.

2. Millions of Vanguard investors voted for genocide-free investing proposals, submitted by supporters of Investors Against Genocide. Details on genocide-free investing are available at http://bit.ly/2AiqPWD.

3. Vanguard has opposed genocide-free investing since the issue was raised in 2007.

4. Genocide-free investing is consistent with the company's values. Notably, Vanguard

a) Signed the UN Principles for Responsible Investment in 2014, agreeing to incorporate social issues into investment decision-making processes and "better align investors with broader objectives of society."

b) Claims "Our PRI membership is a natural extension of the Vanguard mission" and "we've always sought to take a stand for all investors and advocate for their best interests."

c) Publishes its pledge to "Align our interests with our clients' interests" and "Hold ourselves to the highest standards of ethical behavior and stewardship."

d) Should protect shareholder interests in avoiding investments substantially contributing to genocide.

5. Examples demonstrate that Vanguard's policies inadequately support genocide-free investing because Vanguard and funds it manages:

a) Have for many years been one of the world's largest holders of both PetroChina and Sinopec. PetroChina's controlling parent, CNPC, is Sudan's largest oil partner, thereby helping fund genocide there. CNPC/PetroChina also partners with Syria. Sinopec, another oil company, also operates in both countries.

b) 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.

6. Individuals, by owning Vanguard funds, may inadvertently invest in companies that help support genocide. With no policy to prevent these investments, Vanguard may at any time increase holdings in problem companies.

7. Vanguard can implement a genocide-free investing policy because:

a) Ample alternative investments exist.

b) Avoiding problem companies need not significantly affect investment performance, as shown in Gary Brinson's classic asset allocation study.

c) Appropriate disclosure can address any legal concerns regarding exclusion of problem companies, even in index funds that sample rather than replicate their index.

d) Management can easily obtain independent assessments to identify companies connected to genocide.

e) Other large financial firms (including T. Rowe Price and TIAA) have policies to avoid such investments.

f) Procedures may include time-limited engagement with problem companies if management believes that their behavior can be changed.

g) In the rare case that the company believes it cannot avoid an investment tied to genocide, it can prominently disclose the issue to shareholders.

h) Only a handful of Vanguard's funds would be affected.

RESOLVED

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 crimes against humanity, the most egregious violations of human rights.

II. Exclusion of the Proposal

A. Exclusion of the Proposal is Consistent with Commission Guidance and Recent Staff Precedent

The Funds believe they may properly omit the Proposal from their Proxy Materials because the Proposal interferes with the Funds' ordinary business operations. This is the same reason an identical proposal was omitted from the proxy statements of certain Vanguard funds in 2020, with the concurrence of the Staff ("2020 Letter").[1]

The Commission has explained that the policy underlying the ordinary business exception rests on two central considerations. The first consideration is that certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that the tasks could not, as a practical matter, be subject to direct shareholder oversight. The second consideration relates to "the degree to which the proposal seeks to 'micro-manage' 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."[2]

Applying these considerations, the Staff in 2020 agreed with the Vanguard funds that the Proposal sought to micromanage the funds "by seeking to impose specific methods for implementing complex policies," and thus could be excluded pursuant to Rule 14a-8(i)(7), the ordinary business exception.[3] A copy of the 2020 Letter and the related correspondence with the Staff are included here as Appendix B and are incorporated herein by reference.

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1 *See* Vanguard Funds, SEC No-Action Letter (pub. avail. Sept. 11, 2020).

2 Securities Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

3 In addition to the relief provided to Vanguard in the 2020 Letter, the Staff has agreed the Proposal may be excluded from the proxy statements of other financial services firms. *See, e.g.*, JPMorgan Chase & Co., SEC No-Action Letter (pub. avail. March 13, 2019).

B. Subsequent Staff Guidance Does Not Impact the Conclusion Reached in the 2020 Letter

Following Vanguard's receipt of the 2020 Letter, the Staff published Staff Legal Bulletin No. 14L ("SLB 14L"), which rescinded and replaced certain guidance with respect to the ordinary business exception.[4] SLB 14L stated that "proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement." However, SLB 14L reiterated the essence of the micromanagement concept outlined by the Commission, noting that the Staff would focus on "the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."

SLB 14L does not change the conclusion that the Proposal impermissibly micromanages the Funds. The Proposal inappropriately interferes with the discretion of the Funds' Board of Trustees ("Board") and management by seeking to impose specific selection criteria in making (or recommending) investment decisions on behalf of the Funds, including avoiding investments in (or divesting from) specific categories of companies disfavored by the Proposal's proponents. The selection of investments is fundamental to the business and operations of the Funds as investment companies.[5] It constitutes a core management function involving the evaluation and selection of investment opportunities for each of the Funds and is intended to be separate from direct shareholder oversight. The Proponents nonetheless seek to impose a specific outcome for investment decision-making without considering a Fund's established investment objective or any other investment criteria established by the Funds' Board, implemented by management and disclosed to investors. Such action inappropriately limits the discretion of the Board and management, and thus constitutes micromanagement of the Funds.

The Proposal raises particular micromanagement concerns for those Funds that have an investment objective to seek to track the investment performance of a specified benchmark index ("Index Funds"). Vanguard's management does not determine the components of an Index Fund's benchmark. Instead, benchmarks are constructed and maintained by independent third parties with stated methodologies for representing specific markets or subsets of those markets. As a manager of index funds, Vanguard does not make active, fundamental assessments of companies to inform the Index Funds' portfolio holdings. Rather, Vanguard is obligated to invest an Index Fund's assets in a manner that closely tracks its benchmark. The Proposal nonetheless seeks to cause an Index Fund to incorporate actively managed fund approaches into its business operations and to avoid

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[4] Shareholder Proposals: Staff Legal Bulletin No. 14L (CF), *available at* https://www.sec.gov/newsroom/whats-new/shareholder-proposals-staff-legal-bulletin-no-14l-cf.

[5] The Staff has consistently recognized that "the ordinary business operations of an investment company include buying and selling portfolio securities." *See* College Retirement Equities Fund, SEC No-Action Letter (pub. avail. May 3. 2004); *see also*, Morgan Stanley Africa Investment Fund, Inc., SEC No-Action Letter (pub. avail. Apr 26, 1991) (noting that an investment company's ordinary business operations include "the purchase and sale of securities and the management of the fund's portfolio securities").

investments in companies that may be components of an Index Fund's benchmark. This would interfere with an Index Fund's investment objective, as disclosed to Index Fund shareholders.

Our conclusion that the Proposal seeks to micromanage the Funds is consistent with the conclusion reached by the Staff in other contexts since the publication of SLB 14L. For example, in *Chubb Ltd.*, the company argued that a shareholder proposal requiring the company's board to "adopt and disclose a policy for the timebound phase out of the [c]ompany's underwriting risks associated with new fossil fuel exploration and development projects" micromanaged the company by delving too deeply into a complex issue about which shareholders would not be qualified to make an informed decision.[6] The company noted that the proposal inappropriately interfered with the discretion of the company's board and management in managing its environmental commitments, and that the proposal interfered with underwriting decisions – which is Chubb's core business. Similarly, the Proposal here seeks to impose upon the Funds a particular policy that precludes investments in a specific group of companies, interfering with the judgment of the Board and Vanguard management. It also interferes with the core business of the Funds – the day-to-day management of the Funds' investments, consistent with a Fund's defined investment objective.[7]

C. The Significant Social Policy Exception is Inapplicable

The Proposal also does not qualify for the significant social policy exception. In granting the 2020 Letter, the Staff necessarily concurred that the exception does not apply to the Proposal.

SLB 14L also included new guidance about the scope of the significant social policy exception. It stated that the Staff "will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal." SLB 14L added that, "[i]n making this determination, the [S]taff will consider whether the proposal raises issues with a broad societal impact, such that they *transcend the ordinary business of the company*."[8]

SLB 14L aligns with the 1998 Release, where the Commission explained that proposals focusing on significant social policy issues "generally would not be considered to be excludable, because the proposals would *transcend the day-to-day business matters* and raise policy issues so

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6 SEC No-Action Letter (pub. avail. Mar. 27, 2023).

7 *See also* Kroger Co., SEC No-Action Letter (pub. avail. Apr. 25, 2023) (concurring with the exclusion of a proposal that micromanaged the company even though the objective of the proposal was to "mitigate severe risks of forced labor and other human rights violations in the [c]ompany's produce supply chain"); Amazon.com, Inc., SEC No-Action Letter (pub. avail. Apr. 7, 2023), recon. denied (Apr. 20, 2023) (concurring with the exclusion of a proposal addressing climate change goals due to micromanagement); Chubb Ltd., SEC No-Action Letter (pub. avail. Mar. 27, 2023) (same).

8 Emphasis added.

significant that it would be appropriate for a shareholder vote."[9] In Staff Legal Bulletin No. 14H, the Staff explained that proposals focusing on a significant social policy issue are not excludable under the ordinary business exception "*because* the proposals would transcend the day-to-day business matters…."[10]

We agree that genocide and crimes against humanity raise significant social policy issues. However, the Proposal here relates *specifically to the Funds' investment operations*, and thus does not "transcend the day-to-day" business of the Funds. This is demonstrated through the text of the Proposal itself, which focuses on the proponents' interpretation of Vanguard's corporate values. By way of example, the Proposal states that "[g]enocide-free investing is consistent with [Vanguard's] values," noting Vanguard's signing of the UN Principles for Responsible Investment, and Vanguard's "pledge to 'Align our interests with our clients' interests' and '[h]old ourselves to the highest standards of ethical behavior and stewardship.'" It then claims that "Vanguard's policies inadequately support genocide-free investing," noting the Funds' holdings in particular companies objectionable to the Proponents. By focusing on a perceived contradiction between Vanguard's corporate values and Fund investments, and by prescribing a specific change to day-to-day management of the Funds, the Proposal fails to "transcend the day-to-day" business of the Funds, as required for a proposal to qualify for the significant social policy exception.

Our view is consistent with recent Staff precedent. For example, in *Bank of America Corporation*, the Staff recently considered a proposal requesting the board to "conduct and publish a review … of whether and to what extent Bank of America requested that Company clients deny their products or services to certain customers or categories of customers…"[11] In correspondence with the Staff, the proponent argued that the proposal dealt with multiple significant policy issues, including the adoption of a social credit system in the United States. The company argued, however, that the proposal did not transcend the company's ordinary business operations because the proposal focused on "the terms upon which the [c]ompany offers its products and services to clients as well as management of its customer relations." The company noted that the central focus of the proposal was the company's "policies, practices and procedures for determining the terms on which it engages with clients and how to manage its customer relations." After considering these arguments, the Staff granted no-action relief, concluding that the proposal related to ordinary business matters.

Similarly here, the Proposal relates to the Funds' ordinary business of purchasing and selling Portfolio securities, with multiple references to Vanguard and its internal policies.

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[9] 1998 Release (emphasis added).

[10] Shareholder Proposals: Staff Legal Bulletin No. 14H (CF), *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14h-shareholder-proposals (emphasis in original).

[11] SEC No-Action Letter (pub. avail. Feb. 29, 2024).

Accordingly, the Proposal does not transcend the Funds' ordinary business operations, and thus does not qualify for the significant social policy exception.

III. Conclusion and Request for Confirmation

As the Staff noted in the 2020 Letter, because the Proposal seeks to micromanage the funds "by seeking to impose specific methods for implementing complex policies," the Proposal interferes with the Funds' ordinary business operations, and thus is properly excludable pursuant to Rule 14a-8(i)(7).

Should you have any questions regarding any aspect of this letter or require any additional information, please contact the undersigned at 212-698-3889 or stephen.bier@dechert.com. If the Staff disagrees with our conclusion that the Proposal may be excluded from the Proxy Materials, we would appreciate an opportunity to discuss the matter with the Staff prior to issuance of its formal response.

Sincerely,

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Stephen H. Bier

cc: Judith Blanchard
Janet Diamond
Camille Dull
Shoshana Grossman-Crist
Mary Haskell
Kani Ilangovan
David Leon
Marjorie A. McDiarmid (as executor for John McDiarmid)
Patrick Mehr
Robert S. Nelson & Bonnie R. Nelson
Mary Lou Rosczyk
William L. Rosenfeld

Appendix A

Fund	Active/Index	Shareholder Proponent(s)
Vanguard 500 Index Fund	Index	Diamond; Ilangovan; Mehr
Vanguard Capital Opportunity Fund	Active	Ilangovan
Vanguard Cash Reserves Federal Money Market Fund (f/k/a Vanguard Prime Money Market Fund)	Active	Leon; Diamond
Vanguard Dividend Appreciation Index Fund	Index	Blanchard
Vanguard Dividend Growth Fund	Active	Rosczyk
Vanguard Equity Income Fund	Active	Ilangovan; Rosenfeld
Vanguard European Stock Index Fund	Index	Rosenfeld
Vanguard Federal Money Market Fund	Active	Diamond
Vanguard FTSE All-World Ex-US Index Fund	Index	Blanchard
Vanguard FTSE Social Index Fund	Index	Grossman-Crist; Rosczyk; Nelson(s)
Vanguard Global Equity Fund	Active	Leon
Vanguard GNMA Fund	Active	Diamond; Mehr; McDiarmid (deceased)
Vanguard Growth Index Fund	Index	Mehr
Vanguard High-Yield Corporate Fund	Active	Dull; Leon
Vanguard Inflation-Protected Securities Fund	Active	McDiarmid (deceased)
Vanguard Intermediate-Term Bond Index Fund	Index	Mehr
Vanguard Intermediate-Term Investment-Grade Fund	Active	McDiarmid (deceased)
Vanguard Intermediate-Term Tax-Exempt Fund	Active	Diamond
Vanguard Intermediate-Term Treasury Fund	Active	Mehr
Vanguard International Growth Fund	Active	Rosczyk; Rosenfeld
Vanguard LifeStrategy Moderate Growth Fund	Active	Blanchard
Vanguard Long-Term Investment-Grade Fund	Active	McDiarmid (deceased)
Vanguard Long-Term Treasury Fund	Active	McDiarmid (deceased)
Vanguard Mid-Cap Index Fund	Index	Dull; Diamond
Vanguard Mid-Cap Value Index Fund	Index	Ilangovan
Vanguard New York Long-Term Tax-Exempt Fund	Active	Diamond

Fund	Active/Index	Shareholder Proponent(s)
Vanguard Pacific Stock Index Fund	Index	Rosenfeld
Vanguard PRIMECAP Fund	Active	Diamond; Rosczyk
Vanguard Real Estate Index Fund	Index	Blanchard; Rosenfeld
Vanguard Short-Term Corporate Bond Index Fund	Index	Blanchard
Vanguard Short-Term Federal Fund	Active	McDiarmid (deceased)
Vanguard Short-Term Investment-Grade Fund	Active	Grossman-Crist
Vanguard Short-Term Treasury Fund	Active	McDiarmid (deceased)
Vanguard Small-Cap Index Fund	Index	Diamond; Rosenfeld
Vanguard Small-Cap Value Index Fund	Index	Blanchard
Vanguard STAR Fund	Active	Blanchard
Vanguard Strategic Equity Fund	Active	Ilangovan
Vanguard Target Retirement Income Fund	Active	Haskell
Vanguard Tax-Managed Capital Appreciation Fund	Active	Leon
Vanguard Tax-Managed Small-Cap Fund	Active	Rosczyk
Vanguard Total Bond Market Index Fund	Index	Blanchard; Diamond; Dull; McDiarmid (deceased); Mehr
Vanguard Total International Stock Index Fund	Index	Grossman-Crist; Mehr
Vanguard Total Stock Market Index Fund	Index	Blanchard; Diamond; Dull; Grossman-Crist; Ilangovan; Mehr; Rosenfeld
Vanguard Value Index Fund	Index	Rosczyk
Vanguard Wellesley Income Fund	Active	Rosczyk; Diamond
Vanguard Wellington Fund	Active	Rosczyk; Diamond
Vanguard Windsor Fund	Active	Mehr
Vanguard Windsor II Fund	Active	Dull; Diamond

Appendix B

Dechert LLP

VIA E-MAIL

July 27, 2020

Office of Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549
IMshareholderproposals@sec.gov

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

Dear Sir or Madam:

We are counsel to the Vanguard Funds listed on Appendix A of the attached letter (collectively, the "Funds"). On October 17, 2018 and November 1, 2018, Vanguard received a shareholder proposal and supporting statement (together, the "Proposal") from Kani Illangovan and Mary Lou Rosczyk (the "Proponents") for inclusion in the Funds' 2020 proxy statement and form of proxy (the "2020 Proxy Materials") to be distributed to the Funds' shareholders in connection with a 2020 Special Meeting of Shareholders.

The purpose of this letter is to notify the U.S. Securities and Exchange Commission (the "Commission") of the Funds' intent to exclude the Proposal from its 2020 Proxy Materials. We respectfully request confirmation that the staff of the Division of Investment Management (the "IM Division") will not recommend any enforcement action to the Commission if, in reliance on certain provisions of Rule 14a-8 under the Securities Exchange Act of 1934, as amended, the Funds exclude the Proposal from their 2020 Proxy Materials.

In accordance with Rule 14a-8(j) and Staff Legal Bulletin No. 14D ("SLB 14D"), we are emailing this letter to IMshareholderproposals@sec.gov. Additionally, in accordance with Rule 14a-8(j), we have copied the Proponents on the email and are simultaneously forwarding a copy of this letter via overnight mail to the Proponents and to their agents. The Funds presently intend to file their definitive 2020 Proxy Materials with the Commission on or about October 15, 2020, or as soon as possible thereafter. Accordingly, pursuant to Rule 14a-8(j), this letter is being submitted not less than 80 calendar days before the Funds will file their definitive 2020 Proxy Materials.

Rule 14a-8(k) and SLB 14D provide that shareholder proponents are required to send issuers a copy of any correspondence that the proponents elect to submit to the Commission or the IM Division. Accordingly, we are taking this opportunity to inform the Proponents that if the

Proponents elect to submit additional correspondence to the Commission or the IM Division with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Funds pursuant to Rule 14a-8(k) and SLB 14D.

Please send any response by the IM Division to this letter to my attention by email (stephen.bier@dechert.com) or by fax (212-698-0682) and send a copy of the response to the attention of the Proponents at the mailing address and/or email address set forth in the Proposal.

I. The Proposal

On October 17, 2018 and November 1, 2018, Vanguard received from the Proponents the Proposal for inclusion in the Funds' 2020 Proxy Materials. The Proposal reads as follows:

> **WHEREAS**
>
> We believe that:
>
> 1. While reasonable people may disagree about socially responsible investing, few want their investments to help fund genocide. KRC Research's 2010 study showed 88% of respondents want their mutual funds to be genocide-free.
>
> 2. Millions of Vanguard investors voted for genocide-free investing proposals, submitted by supporters of Investors Against Genocide. Details on genocide-free investing are available at http://bit.ly/2AiqPWD.
>
> 3. Vanguard has opposed genocide-free investing since the issue was raised in 2007.
>
> 4. Genocide-free investing is consistent with the company's values. Notably, Vanguard:
>   a) Signed the UN Principles for Responsible Investment in 2014, agreeing to incorporate social issues into investment decision-making processes and "better align investors with broader objectives of society."
>   b) Claims "Our PRI membership is a natural extension of the Vanguard mission" and "we've always sought to take a stand for all investors and advocate for their best interests."
>   c) Publishes its pledge to "Align our interests with our clients' interests" and "Hold ourselves to the highest standards of ethical behavior and stewardship."
>   d) Should protect shareholder interests in avoiding investments substantially contributing to genocide.

5. Examples demonstrate that Vanguard's policies inadequately support genocide-free investing because Vanguard and funds it manages:
    a) Have for many years been one of the world's largest holders of both PetroChina and Sinopec. PetroChina's controlling parent, CNPC, is Sudan's largest oil partner, thereby helping fund genocide there. CNPC/PetroChina also partners with Syria. Sinopec, another oil company, also operates in both countries.
    b) 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.

6. Individuals, by owning Vanguard funds, may inadvertently invest in companies that help support genocide. With no policy to prevent these investments, Vanguard may at any time increase holdings in problem companies.

7. Vanguard can implement a genocide-free investing policy because:
    a) Ample alternative investments exist.
    b) Avoiding problem companies need not significantly affect investment performance, as shown in Gary Brinson's classic asset allocation study.
    c) Appropriate disclosure can address any legal concerns regarding exclusion of problem companies, even in index funds that sample rather than replicate their index.
    d) Management can easily obtain independent assessments to identify companies connected to genocide.
    e) Other large financial firms (including T. Rowe Price and TIAA) have policies to avoid such investments.
    f) Procedures may include time-limited engagement with problem companies if management believes that their behavior can be changed.
    g) In the rare case that the company believes it cannot avoid an investment tied to genocide, it can prominently disclose the issue to shareholders.
    h) Only a handful of Vanguard's funds would be affected.

RESOLVED

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 crimes against humanity, the most egregious violations of human rights.

II. Exclusion of the Proposal

A. Bases for Excluding the Proposal

As discussed more fully below, the Funds believe they may properly omit the Proposal from their 2020 Proxy Materials in reliance on Rule 14a-8(i)(7), as the Proposal deals with matters related to the Funds' ordinary business operations and seeks to impermissibly micromanage the Funds; and Rule 14a-8(i)(10), as the Proposal has already been substantially implemented by the Funds. The Funds believe that the Proposal's goal of dictating the day-to-day decision-making of the Funds' management personnel with regard to the selection of investment opportunities constitutes a clear case of micromanagement, as supported by recent Staff decisions. As discussed in greater detail below, the Funds have already substantially implemented the Proposal through procedures requiring Vanguard to monitor and advise the Funds on the human rights practices of portfolio companies. By conceding that the Funds already have a policy that addresses the issues presented in the Proposal, but objecting that the Funds do not use the specific methods outlined in the Proposal, the Proponents have acknowledged their intent to micromanage the Funds. As such, the Funds believe the Proposal can be properly omitted under both Rule 14a-8(i)(7) and Rule 14a-8(i)(10).

B. The Proposal May Be Omitted Under Rule 14a-8(i)(7), as it Seeks to Micromanage the Funds

A proposal may be omitted under Rule 14a-8(i)(7) if it "deals with a matter relating to the company's ordinary business operations." The Commission has explained that the policy underlying the ordinary business exclusion under Rule 14a-8(i)(7) rests on two central considerations. The first consideration is that certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that the tasks could not, as a practical matter, be subject to direct shareholder oversight. The second consideration relates to "the degree to which the proposal seeks to 'micro-manage' 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."[1]

The Commission has repeatedly recognized that a proposal that seeks to micromanage the determinations of a company's management regarding day-to-day decisions is excludable under Rule 14a-8(i)(7) as a component of "ordinary business." The Commission has provided extensive guidance through staff bulletins and no-action precedent supporting the exclusion of shareholder proposals on micromanagement grounds. For example, the 1998 Release stated that the micromanagement consideration "may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods of implementing complex policies." In Staff Legal Bulletin No. 14J (Oct. 23, 2018) ("SLB 14J"), the Staff stated that "it is the manner in which a proposal seeks to address an issue that results in

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[1] Securities Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

exclusion on micromanagement grounds." SLB 14J also provides that proposals "seek[ing] to impose specific time-frames or methods for implementing complex policies" are excludable under Rule 14a-8(i)(7) as seeking to micromanage a company. The Staff has also repeatedly recognized that "the ordinary business operations of an investment company include buying and selling portfolio securities."[2]

The staff of the Division of Corporation Finance (the "Staff") has already considered this issue and concluded that a nearly identical proposal, submitted by William Rosenfeld, may be omitted because it "micromanages the [c]ompany by seeking to impose specific methods for implementing complex policies.[3] The Proposal at hand is a nearly verbatim submission of Mr. Rosenfeld's proposal in the JPM/IAG Letter and seeks to micromanage the Company by subverting the day-to-day decision-making of management with regard to the selection of investment opportunities in the exact same way. The request in the JPM/IAG Letter specifically sought to require a prohibition on certain investments and to require a policy that would prohibit the company from making investments in certain companies.[4] The Staff agreed in the JPM/IAG Letter that such demands clearly constitute micromanagement and may be properly omitted pursuant to Rule 14a-8(i)(7). That the Proposal clearly seeks to micromanage the Funds' management of specific investment decisions is evidenced by its identification of the Funds' holdings in PetroChina and Sinopec as inconsistent with the Proposal's goals, thereby seeking to cause the Funds' divestment from those investments. The Proposal attempts to mandate a policy that would exclude specific investments from the Funds' ordinary business decisions. Just as the Staff agreed in the JPM/IAG Letter, the Proposal constitutes micromanagement because it seizes the ordinary decision-making functions of the Company and imposes a specific method for implementing complex policies.

The Proposal seeks to impose upon the Funds a method for implementing a complex policy that specifically addresses the securities in which the Funds would be permitted to invest. This is precisely the type of management function that Rule 14a-8(i)(7) recognizes as improper for direct shareholder oversight. Specifically, the Proposal requests that the Funds "institute transparent procedures to avoid holding or recommending investments in companies

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2 *See* College Retirement Equities Fund, SEC No-Action Letter (pub. avail. May 3. 2004) ("2004 CREF Letter"); *see also*, Morgan Stanley Africa Investment Fund, Inc.; SEC No-Action Letter (pub. avail. Apr 26, 1991) ("Morgan Stanley Letter") (noting that an investment company's ordinary business operations include "the purchase and sale of securities and the management of the fund's portfolio securities"); State Street Corp., SEC No-Action Letter (pub. avail. Feb. 24, 2009).

3 JPMorgan Chase & Co., SEC No-Action Letter (pub. avail. March 13, 2019) ("JPM/IAG Letter")

4 The proposal in the JPM/IAG Letter sought to micromanage the overarching investment policies and decisions of JPMorgan Chase & Co. as a bank holding company; similarly, the Proponents' Proposal seeks to micromanage the investment decision making and portfolio composition of certain Vanguard Funds.

that…substantially contribute to genocide or crimes against humanity." In so doing, the Proposal impermissibly seeks to micromanage the Funds by (i) explicitly restricting its day-to-day decision making with respect to the complex matters of selecting investments for the investment portfolios of its mutual and other funds and (ii) establishing criteria for excluding specific categories of investments. The selection and analysis of investments is fundamental to the business and operations of the Funds as investment companies; it constitutes a core management function involving the daily, complex evaluation and selection of investment opportunities for each of the Funds and is intended to be separate from direct shareholder oversight pursuant to Rule 14a-8(i)(7). The Proponents seek to impose a specific outcome for this analysis without considering any other investment criteria established and followed by management.

In two 2018 letters submitted by JPMorgan Chase & Co., the Staff likewise agreed that similar proposals may be excluded because they sought to "impose specific methods for implementing complex policies."[5] In the JPM Christensen Letter, the Staff concurred in the exclusion of a proposal which would have required a report on the reputational, financial and climate risks associated with project and corporate lending, underwriting, advising and investing for tar sands production and transportation. While that proposal did not explicitly dictate an alteration of company policy, the Staff found that it nevertheless sought to micromanage the company by imposing "specific methods for implementing complex policies." In the JPM Harrington Letter, the Staff concurred that JPMorgan Chase & Co. may exclude a proposal which would have required the company to establish a human and indigenous peoples' rights committee that, among other things, would adopt policies and procedures to require consideration of human and indigenous peoples' rights in connection with certain financing decisions. The Staff likewise agreed that such proposal would also micromanage the Company by seeking to "impose specific methods for implementing complex policies."[6] Like the request in the JPM/IAG Letter, the Proposal, micromanages even more than the proposals addressed in the JPM 2018 Letters by requiring prohibitions on specific companies from investment by the Funds rather than merely requiring a consideration of certain factors.

The Proposal interferes with the ability of the Funds' Board to oversee the day-to-day operations of the Funds by requiring the Board to adopt a specific policy position that imposes mandates on the core business of the Funds. Furthermore, as discussed in greater detail below, the Funds' management has adopted and developed policies and procedures to govern the monitoring and reporting of portfolio company human rights practices. The development and implementation of these policies and procedures are fundamental to the management of the day-to-day operations of the Funds. As illustrated by the Staff's recent precedent, the Proposal impermissibly seeks to

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5 *See* JPMorgan Chase & Co., SEC No-Action Letter (pub. avail. March 30, 2018) ("JPM Christensen Letter") and JPMorgan Chase & Co., SEC No-Action Letter (pub. avail. Mar. 30, 2018) ("JPM Harrington Letter" and together with the JPM Christensen Letter, the "JPM 2018 Letters").

6 *See* JPM Harrington Letter, *supra* note 4.

micromanage the Funds by replacing the informed and reasoned judgments of management with respect to the Funds' day-to-day operations, and therefore may be properly excluded under Rule 14a-8(i)(7).

The Vanguard Group, Inc. ("Vanguard") is a global financial services firm which offers more than 400 investment products with total assets of approximately $5 trillion. In order to manage the investments made by the Funds, Vanguard's management relies on its deep understanding of complex financial markets, products and companies, including information to which the Funds' shareholders do not have access. The Funds' management expends significant effort determining how to manage investments in order to satisfy its fiduciary obligation to its investors, while also taking into account complex public policy matters relating to its investments. This includes the development and implementation of policies and procedures such as the Funds' Procedures and Guidelines for Monitoring and Reporting on Portfolio Company Human Rights Practices. The investment decisions made by the Funds' management require complex analysis and industry expertise at many levels. While social and public policy issues are given due consideration within the Funds' operating model, they are one of many factors considered in an evaluation of the best interests of the Funds and its shareholders. As noted above, the Funds' management focuses extensively on establishing appropriate standards for making investment decisions, which are then implemented on a day-to-day basis when selecting investments. Per the guidance in SLB 14J, a proposal is excludable on the basis of micromanagement, even with a proper subject matter, if it "probe[s] too deeply into matters of a complex nature," which the Proposal seeks to do.

By seeking to prohibit the Funds from making investments in particular companies and forcing them to divest from others, the Proposal seeks to micromanage the Funds in a manner consistent with other Commission decisions. For example, in *Exxon Mobil*, a proposal sought the specific outcome of a new board committee devoted to climate risk to evaluate the board and management's climate strategy and to better inform board decision making on climate risks and opportunities.[7] The company argued, among other things, that the proposal unduly interfered with the company's board processes by assigning a specific set of responsibilities for how a new board committee should assess and manage climate related risks, thereby removing flexibility for the board in overseeing, assessing and managing those risks. The Staff agreed that the proposal "micromanages the [c]ompany by dictating that the board charter a new board committee on climate risk. As a result, the [p]roposal unduly limits the board's flexibility and discretion in determining how the board should oversee climate risk." In requiring a specific policy prohibiting certain types of investments, the Proposal similarly seeks to dictate specific actions to be taken by the Funds with respect to complex matters (investment policies and decisions) that the management of the Funds is well positioned to consider, whereas shareholders as a group are not.

In *Intel Corporation*, the Staff concurred with the omission of a proposal under Rule 14a-8(i)(7) that would have required Intel to: "update its "Global Human Rights Principles" to include

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[7] Exxon Mobil Co., SEC No-Action Letter (pub. avail. Mar. 6, 2020).

the following statement, as well as displaying said statement on all websites and communications which have Diversity and/or Inclusion as their primary subject matter: "Intel affirms and believes all that the Pride flag and the Gay Pride movement it is associated with represent or assert to be right and true."" [8] The Staff agreed with Intel that the proposal micromanaged the company by dictating that it must adopt a certain policy position and adopt specific measures on how to implement that position. In *Apple Inc.* (December 21, 2017), the Staff likewise concurred with the company that a shareholder proposal requiring the company's board to prepare a "report that evaluates the potential for the [c]ompany to achieve, by a fixed date, "net-zero" emissions of greenhouse gases relative to operations directly owned by the [c]ompany and major suppliers" micromanaged the company by delving too deeply into a complex issue about which shareholders would not be qualified to make an informed decision.[9]

Similar to the excluded proposals in the Staff decisions cited above, the Proposal seeks to impose upon the Funds a particular policy that precludes investments in a specific group of companies, thereby significantly impacting the Funds' day-to-day investment selection. Further, as the Proposal specifically identifies investments in PetroChina and Sinopec as inconsistent with the Proposal's goals, the Proposal seeks to force the Funds to divest themselves of certain prior investments that do not meet the policies requested by the Proposal. As the Proposal seeks to dictate the day-to-day management decisions of the Funds by overlaying a specific policy consideration, the Funds are of the view that the Proposal seeks to micromanage the Funds by probing too deeply into a complex issue about which shareholders would not be qualified to make an informed decision. As a result, the Proposal may be properly omitted pursuant to Rule 14-8(i)(7).

C. The Proposal May Be Omitted Under Rule 14a-8(i)(10), As It Has Been Substantially Implemented By The Funds

Rule 14a-8(i)(10) permits omission of a shareholder proposal if "the company has already substantially implemented the proposal." The ability to omit proposals that have been "substantially implemented" is designed to "avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management."[10] Initially, the Staff interpreted the predecessor to Rule 14a-8(i)(10) narrowly and granted no-action relief only when the proposals were "fully effected" by the company. However, in 1983, the Staff acknowledged that the "previous formalistic application of [Rule 14a-8(i)(10)] defeated its purpose" because there was a pattern of proponents successfully convincing the Commission to deny no-action relief by submitting proposals that differed from a company's existing policies only by a few words. Therefore, a proposal need not be implemented completely or precisely as

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8 Intel Corporation, SEC No-Action Letter (pub. avail. Mar. 15, 2019).

9 Apple Inc., SEC No-Action Letter (pub. avail. Dec. 21, 2017).

10 SEC Release No. 34-12598 (July 7, 1976).

presented for the Staff to determine that the subject of the proposal has been acted upon favorably by management.[11] Instead, the company's actions must address the essential objectives of the proposal. Because the Funds have already implemented procedures to escalate allegations of the most egregious violations that substantially contribute to genocide or crimes against humanity, the Funds have substantially implemented the Proposal, and it may be excluded from the 2020 Proxy Materials.

The Funds have already substantially implemented the Proposal as each Fund's Board of Trustees ("Board") has implemented the procedures called for by the Proposal. The Proposal requests that each Board "institute transparent procedures to avoid holding or recommending investments in companies that, in management's judgment, substantially contribute to genocide or crimes against humanity, the most egregious violations of human rights." In this case, the Funds have implemented procedures requiring Vanguard to monitor and advise the Funds on the human rights practices of portfolio companies. With respect to the Funds, these policies, procedures and controls include: (i) assessing human rights violations based on the United Nations' Universal Declaration of Human Rights, securities filings, proxy reports, news reports, and other third-party materials that assist Fund analysts in identifying both companies and their specific business practices that may violate human rights; (ii) direct communication to the company in question to convey the expectation that human rights violations cease and to communicate possible divestment; (iii) publicly advocating and leveraging other industry resources to effect change; and (iv) recommending divestment if the company actively disregards prior steps, and if doing so is in the best interest of Fund shareholders. In the judgment of management and the Board, these policies, procedures and controls meet the Proposal's request that the Funds "institute transparent procedures to avoid holding or recommending investments in companies that . . . substantially contribute to genocide or crimes against humanity, the most egregious violations of human rights."

Specifically, Vanguard's "Investment Stewardship" analysts review third-party materials and communicate with the Funds to determine whether a particular portfolio company is engaged in business practices that may violate human rights or otherwise constitute a crime against humanity. If a violation is deemed to exist, Investment Stewardship will consider a variety of actions, including further engagement with the portfolio company, votes on related ballot items or against directors, and recommending further action to Vanguard's Investment Stewardship Oversight Committee ("ISOC"). ISOC will then consider the recommendations made by Investment Stewardship and, based on their assessment of the violations, authorize further action to the extent necessary. Such action may include formal letters to company leadership, participation in industry efforts, public advocacy, and ultimately, recommending divestment to the Board. Investment Stewardship prepares updates for the Board on portfolio company human rights practices and any recommended changes to the Funds' procedures at least annually. Consistent with its oversight responsibilities, ISOC may report to the Board on matters it has considered under Vanguard's procedures. If ISOC believes divestment is warranted (or that

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11 SEC Release No. 20091 (August 16, 1983).

escalation to the Board is otherwise appropriate) ISOC will report to the Board and recommend the appropriate course of action (including divestment of a Fund's shares of the company).

Although the Proposal defers to the judgment of the Board to "institute transparent procedures" to prevent the Funds from holding investments in companies that substantially contribute to genocide or crimes against humanity, the Board has already exercised its judgment by directing management to develop and implement robust procedures directly addressing the ways in which the Funds will monitor and address the human rights practices of its portfolio companies. The Staff has previously stated that "a determination that [a] [c]ompany has substantially implemented the proposal depends upon whether its particular policies, practices and procedures compare favorably with the guidelines of the proposal."[12] Where a company has implemented the essential objectives of a shareholder proposal or has policies and procedures concerning the subject matter already in place, the Commission staff has consistently found that the proposal has been substantially implemented and could be properly excluded from the company's proxy materials.[13] In *Freeport-McMoran Copper & Gold, Inc.*,[14] the Staff agreed that a company may exclude a proposal requesting that the company make certain enhancements to its human rights policy, even where the specific elements of the company's policy were not identical with the shareholder proponents' objectives.[15] Similarly, in *The Talbots, Inc.*, a shareholder requested implementation of a code of corporate conduct based on human rights standards of the United Nations' International Labor Organization.[16] The proposal was found to have been substantially implemented because the company had established and implemented similar human rights standards, even though those standards did not precisely comply with the standards referenced in the shareholder proposal.[17] Additionally, in *The Boeing Co.*, the Commission

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12 *See* Texaco Inc., SEC No-Action Letter (pub. avail. March 28, 1991).

13 *See, e.g.*, Exxon Mobil Co., SEC No-Action Letter (pub. avail. Apr. 2, 2019); The TJX Companies, Inc., SEC No-Action Letter (pub. avail. February 4, 2019); Verizon Communications Inc., SEC No-Action Letter (pub. avail. Dec. 19, 2018); Apple Inc., SEC No-Action Letter (pub. avail. Nov. 19, 2018); Sun Microsystems, Inc., SEC No-Action Letter (pub. avail. Aug. 28, 2008); Anheuser-Busch Cos., Inc., SEC No-Action Letter (pub. avail. Jan. 17, 2007); ConAgra Foods, Inc., SEC No-Action Letter (pub avail. July 3, 2006); Johnson & Johnson, SEC No-Action Letter (pub. avail Feb. 17, 2006); Freeport-McMoran Copper & Gold, Inc., SEC No-Action Letter (pub. avail. Mar. 5, 2003).

14 *See supra* note 14.

15 SEC No-Action Letter (pub. avail. Mar. 5, 2003). *See also,* AMR Corp., SEC No-Action Letter (pub. avail. April 17, 2000); Kmart Corp., SEC No-Action Letter (pub. avail. Mar. 12, 1999).

16 SEC No-Action Letter (pub. avail. Apr. 5, 2002).

17 *Id.*; *see also* The Gap, Inc., SEC No-Action Letter (pub. avail. Mar. 16, 2001) (concerning a proposal relating to child labor practices where the company already implemented related procedures); Kmart Corp., SEC No-Action Letter (pub. avail. Feb. 23, 2000) (concerning vendor

concurred with the exclusion of a proposal requesting that the company "review its policies related to human rights" and report its findings, because the company had already adopted human rights policies and also provided an annual report regarding corporate citizenship.[18]

As in the precedent letters cited above, the Funds have already addressed and substantially implemented the Proposal's essential objectives by adopting procedures that provide avenues to address human rights violations by portfolio companies. These procedures, which include a detailed, robust process, are routinely carried out by management, provide for analysis, public advocacy, and, if the Board determines it to be in the best interest of the Funds' shareholders, divestment of investments in companies that engage in crimes against humanity. They clearly and plainly address all of the essential objectives of the Proposal. Accordingly, the Proposal may be properly omitted from the 2020 Proxy Materials pursuant to Rule 14a-8(i)(10), as the Board has already exercised its judgment and approved procedures designed to address companies that substantially contribute to genocide or crimes against humanity.

III. Conclusion and Request for Confirmation

For the foregoing reasons, the Funds respectfully request that the IM Division confirm that it will not recommend any enforcement action to the Commission, if the Funds exclude the Proposal from their 2020 Proxy Materials.

Should you have any questions regarding any aspect of this letter or require any additional information, please contact the undersigned at 212-698-3889 or stephen.bier@dechert.com. If the IM Division disagrees with our conclusion that the Proposal may be excluded from the 2020 Proxy Materials, we would appreciate an opportunity to discuss the matter with the IM Division prior to issuance of its formal response.

Sincerely,

[redacted]

Stephen H. Bier

cc: Kani Illangovan
Mary Lou Rosczyk

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oversight practices where the company already implemented vendor monitoring policies and procedures).

18 SEC No-Action Letter (pub. avail. Feb. 17, 2011).

Appendix A

Vanguard U.S. Value Fund
Vanguard Health Care Fund
Vanguard Energy Fund

[redacted]

August 3, 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 Proposals 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 July 27, 2020 letter (the "Letter") from Stephen Bier of Dechert LLP submitted on behalf of various Vanguard Funds ("Vanguard" and the "Funds") which requests 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.

Though Vanguard's Letter does not mention it, the title of the Proposal is Genocide-free Investing. We will reference the Proposal by its title ("Genocide-free Investing") and reference Kani Ilangovan and Mary Lou Rosczyk collectively as proponents (the "Proponents").

Vanguard's Letter presents two bases for exclusion of the Proposal under Rule 14a-8 under the Securities Exchange Act of 1934, as amended. This letter sets forth our response to each of the two bases for exclusion identified in the Letter and demonstrates that the Proposal should not be excluded because Vanguard has not met its burden under Rule 14a-8(g) to demonstrate that it is entitled to exclude the Proposal. Section 1 responds to Vanguard's claim of micro-management. Section 2 responds to Vanguard's claim that the Proposal has already been substantially implemented by the Funds.

Background

In reviewing this response, please put the Proposal in the following context. After the founders and supporters of Investors Against Genocide understood about the genocide being committed by the government of Sudan in Darfur and that substantial resources supporting the genocide were provided to the government of Sudan by a limited number of publicly-held companies, we resolved not to invest in any of those companies. However, after much effort, we discovered that some mutual funds we held invested in those companies and as a result we had done so indirectly. Our objective as individuals and investors is to do what we can so that investors do

not inadvertently invest in companies that support genocide. The Proponents share these concerns which is why they submitted Genocide-free Investing Proposals to various Vanguard Funds.

We have good reason to expect that Vanguard shares these values because, as stated in the body of the Proposal:

> Genocide-free investing is consistent with the company's values. Notably, Vanguard:
>
> a) Signed the UN Principles for Responsible Investment in 2014, agreeing to incorporate social issues into investment decision making processes and "better align investors with broader objectives of society."
>
> b) Claims "Our PRI membership is a natural extension of the Vanguard mission" and "we've always sought to take a stand for all investors and advocate for their best interests."
>
> c) Publishes its pledge to "Align our interests with our clients' interests" and "Hold ourselves to the highest standards of ethical behavior and stewardship."

The overriding issue and concern behind Genocide-free Investing is that the Proposal represents a significant social policy issue. Rule 14a-8(i)(7) states that a proposal may not be excludable if it "would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." Genocide-free Investing is clearly such an issue.

Here are just a few of the highlights of the public interest in Genocide-free Investing, compiled in a whitepaper from 2014:[1]

- Beginning in 2005 there has been a broad, public campaign to respond to the genocide in Sudan.
- Many millions of shareholders have voted for Genocide-free investing when it has been on the ballot.
- In 2012 when shareholders were presented with the proposal and management took a neutral position, shareholders overwhelmingly voted in favor of the proposal (85% of the yes/no votes were in favor, with 59.8% for, 10.7% against, and 29.5% abstaining).[2]
- 30 states[3] and 61 colleges[4] decided to divest from oil companies involved with Sudan.
- Both houses of Congress unanimously passed the Sudan Accountability and Divestment Act of 2007.[5]

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1 https://www.investorsagainstgenocide.org/files/2014-0716-White-Paper-on-genocide-free-investing.pdf

2 ING Emerging Countries proxy voting results from June 28, 2012 , http://www.sec.gov/Archives/edgar/data/895430/000117152012001135/ex99-77c.htm

3 "States that divested from Sudan," http://www.investorsagainstgenocide.org/statesthat-divested-from-sudan/

4 "Colleges and universities that divested from Sudan," http://www.investorsagainstgenocide.org/colleges-and-universities-that-divested-from-sudan

5 http://www.govtrack.us/congress/bill.xpd?bill=s110-2271

- During the 2008 presidential election, candidates from both parties divested from mutual funds holding stock in one or more of the oil companies supporting the government of Sudan, including President Obama,[6] Senator McCain,[7] and other candidates for president.[8]
- Market research has confirmed the importance of the issue to the public, with 88% of Americans indicating they would like their mutual funds to be Genocide-free.[9]

Ordinary investors understand the issue and support both the idea of Genocide-free investing and many millions have voted in favor of the Proposals when they had a chance to vote on a proxy ballot, even against the strong recommendation against the proposal from Vanguard management (and others).

The significant social policy issue remains current. Although the crisis in Sudan has subsided and is not often in the news in recent days, the other example cited in the Proposal is Syria. If the Proposal was submitted more recently, we might also have cited the example of Burma, which exploded in the news in 2018 due to the genocide against the Rohingya.

We were glad to see that Vanguard's Letter does not dispute the Staff's earlier rulings (referenced below) that confirmed that the Genocide-free Investing Proposal "focuses on the significant policy issue of human rights."

1. Vanguard's claim that the Proposal can be excluded because it seeks to micromanage the Funds is incorrect

Vanguard is incorrect in its claim that the Proposal seeks to micromanage the Funds.

Vanguard cited five No-Action cases on proposals other than the subject of Genocide-free Investing to support their claim of precedents of micromanagement. However, none of these five No-Action cases apply to Genocide-free Investing because the proposal language in those cases, as highlighted by the Staff, fails the established tests for micromanagement in ways that are not defects in the substance and language of the Genocide-free Investing Proposal. The details of each of five six cases are discussed in **Section 1B** below.

Vanguard's Letter failed to include the six No-Action cases beginning in 2008 through 2018 that are directly about Genocide-free Investing. These are discussed in **Section 1A** below and show that the substance of the arguments that Vanguard presents in its No-Action Letter have been previously made and rejected by the Staff.

Vanguard's Letter cites one additional No-Action case from 2019. That case, JPMorgan (Rosenfeld) (March 13, 2019) is discussed in **Section 1C** below.

Section 1D responds to additional arguments Vanguard makes to support its claim that the Proposal seeks to micromanage the Funds.

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6 https://blogs.wsj.com/washwire/2007/05/16/obama-sells-investment-with-link-to-sudan/
7 https://abcnews.go.com/Blotter/story?id=4861297
8 https://www.foxnews.com/story/giuliani-edwards-discover-darfur-related-holdings
9 https://www.investorsagainstgenocide.org/files/KRC-research-results-from-2010-and-2007.pdf

1A. Additional No-Action cases that are directly about the Genocide-free Investing Proposal

People concerned with Genocide-free Investing have been submitting shareholder proposals since 2007 and companies have also been asking the Staff to exclude these proposals since then. The Staff has considered and made determinations in six No-Action cases beginning in 2008 through 2018 that are directly about Genocide-free Investing.

1. The Staff ruled against **Fidelity (various proponents) (January 22, 2008)**[10] which claimed that the Genocide-free Investing proposal should be excluded because it dealt with ordinary business, sought to micromanage the company, and contained contain false and misleading statements.

2. The Staff ruled against **JPMorgan (Rosenfeld) (March 8, 2011)**[11] which claimed that the Genocide-free Investing proposal should be excluded because it was materially false and misleading, inherently vague.

   The Staff determination stated, "We are unable to conclude that the proposal is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company in implementing the proposal, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."

3. The Staff ruled against **ING (Rosenfeld) (May 7, 2012)**[12] which claimed the proposal should be excluded because it dealt with ordinary business, sought to micromanage the company, directly conflicted with a proposal of the fund, and because the fund had already substantially implemented the proposal.

4. The Staff ruled against **Franklin Resources (Rosenfeld) (December 30, 2013)**[13] which claimed the proposal should be excluded because it dealt with ordinary business, sought to micromanage the company, was materially false and misleading, and because the company had already substantially implemented the proposal.

   Significantly, the Staff determination stated, **"the 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."** In addition, the Staff stated, "Franklin's policies, practices, and procedures do not compare favorably with the guidelines of the proposal and that Franklin has not, therefore, substantially implemented the proposal."

5. The Staff ruled against **JPMorgan (Rosenfeld) (April 15, 2014)**[14] which claimed the proposal should be excluded because it was not significantly related to the fund's business.

6. The Staff ruled against **JPMorgan (Rosenfeld) (March 29, 2018)**[15] which claimed that the proposal to Report on Investments Tied to Genocide (closely related to the Genocide-

10 https://www.sec.gov/divisions/investment/noaction/2008/fidelityfunds012208-14a.htm
11 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/alicerosenfeld030811-14a8.pdf
12 https://www.sec.gov/divisions/investment/noaction/2012/ingemergingcountries050712-14a8.pdf
13 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/williamrosenfeld123013-14a8.pdf
14 https://www.sec.gov/divisions/investment/noaction/2014/jpm-muni-mmf-041514-14a8.htm

free Investing proposal) should be excluded because it dealt with ordinary business, sought to micromanage the company, did not "transcend the company's ordinary business operations," and was over the 500 word limit for shareholder proposals.

In each of these cases, the Staff ruled that the proposal could not be excluded on the stated grounds, repeatedly rejecting the claim that the Genocide-free Investing Proposal could exclude on the grounds of micromanagement. Some of these cases were decided by the Division of Investment Management and others by the Division of Corporate Finance but the rulings were consistently against exclusion of the proposals.

As noted above, the Staff made its view explicit in its response to Franklin Resources (December 30, 2013) stating,

> "In our view, the proposal focuses on the significant policy issue of human rights and does not seek to micromanage the company."

Notably, the text of this key sentence is identical in the resolved clause in the Genocide-free Investing proposal of Franklin Resources in 2013 and the Genocide-free Investing Proposal to Vanguard in 2020.

> "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."

We do not believe that Vanguard has raised any issues or concerns of substance which have not previously been reviewed and ruled on by the Staff in the cases cited above.

The Proposal does not seek to micromanage Vanguard. The Proposal asks Vanguard to:

> "institute transparent procedures to avoid holding or recommending investments in companies that, in management's judgment, substantially contribute to genocide or crimes against humanity."

The Proposal leaves the structure, definition, and method of implementation up to Vanguard to determine.

Further, the Proposal explicitly leaves it to "management's judgment" to determine which companies "substantially contribute." The background discussion of PetroChina and Sinopec are provided as examples to explain to shareholders that there is a current problem which is relevant and important to address by implementing a Genocide-free investment policy.

More significantly, the clear intent of the Proposal is to encourage Vanguard to implement long term, systemic procedures. Such an investment policy would apply to Sudan today and to future cases of genocide and crimes against humanity wherever they may occur.

1B. Other Staff rulings on micromanagement cited by Vanguard are not on the subject of Genocide-free Investing and do not apply

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15 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/williamrosenfeld032918-14a8.pdf

Vanguard cites five Staff rulings, since the Franklin Resources (2013) ruling, that are not directly on the subject of Genocide-free Investing, but which support excluding other proposals because of micromanagement. None of the five rulings apply to the Genocide-free Investing Proposal that Vanguard now seeks to exclude.

The three micromanagement factors highlighted by the Staff in 1998 and 2018 as potentially allowing a proposal to be excluded on the basis of micromanagement are when the proposal:

1. "involves intricate detail"
2. "seeks to impose specific time-frames"
3. "seeks to impose methods for implementing complex policies"

In **JPMorgan Chase & Co. (The Christensen Fund)** (Mar. 30, 2018),[16] the Staff noted that the proposal required a litany of specific elements and concluded that the proposal "micromanages the Company by seeking to impose specific methods for implementing complex policies." The Staff specifically noted that the proposal "specifies that the report should include assessments of: Short- and medium-term risk of portfolio devaluation due to stranding of high-cost tar sand assets. Whether the Company's tar sands financing is consistent with the Paris Agreement's goal of limiting global temperature increase to "well below 2 degrees Celsius." How tar sands financing aligns with the Company's support for Indigenous Peoples' rights. Reducing risk by establishing a specific policy, similar to that of other banks, restricting financing for tar sands projects and companies."

Clearly, this proposal failed two of the three tests (#1 on "intricate detail" and #3 on "methods for implementing complex policies") established by the Staff. Neither of these factors are defined or required by the Genocide-free Investing Proposal. There are no such specific elements and certainly no litany of details in the investment policy requested by the Genocide-free Investing Proposal.

In **JPMorgan Chase & Co. (Harrington) (Mar. 30, 2018),**[17] the Staff noted that the proposal would not only establish a human and indigenous peoples' rights committee, but also "would adopt policies and procedures to require the Company and its fiduciaries in all relevant instances of corporate level, project or consortium financing, ensure consideration of finance recipients' policies and practices for potential impacts on human and indigenous peoples' rights, and ensure respect for the free, prior and informed consent of indigenous communities affected by all Company financing." This proposal required consideration of all aspects of the business, not only owned by the company, but also all potential finance recipients. Further, it required that third parties provide "informed consent." Clearly, this proposal failed two of the three tests (#1 on "intricate detail" and #3 on "methods for implementing complex policies") established by the Staff. Neither of these factors are defined or required by the Genocide-free Investing Proposal.

16 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/christenfundetal033018-14a8.pdf
17 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/johnharrington033018-14a8.pdf

In **Exxon Mobil Corporation (Seitchik) (March 6, 2020)**,[18] the Staff stated that "the Proposal micromanages the Company by dictating that the board charter a new board committee on climate risk. As a result, the Proposal unduly limits the board's flexibility and discretion in determining how the board should oversee climate risk." The proposal explicitly requested the Board to "charter" a new committee and went on to define in detail significant parts of that charter. The proposal failed two of the three tests (#1 on "intricate detail" and #3 on "methods for implementing complex policies). Neither of these factors are defined or required by the Genocide-free Investing Proposal.

The proposal's resolved clause stated, "The charter should explicitly require the committee to report to the full board on corporate strategy, above and beyond matters of legal compliance, assessing the company's responses to climate related risks and opportunities, including the potential impacts of climate change on business, strategy, financial planning, and our company's operating environment." As the Staff indicated, there could be many other methods to oversee climate risk, other than chartering a committee at the Board level.

In **Intel Corporation (Hotz) (March 15, 2019)**,[19] the Staff stated that "Proposal seeks to micromanage the Company by dictating that the Company must adopt a specific policy position and prescribing how the Company must communicate that policy position." The Staff clearly saw that prescribing how the Company should communicate the policy was improper micromanaging. It is not clear from the Staff determination and the No-Action filings what the Staff determined regarding whether there was a significant social policy at the core of the proposal and how that might affect its view of having a shareholder vote on that policy. In contrast, the Staff has clearly determined that there is a significant social policy at the core of the Genocide-free Investing Proposal, and the Genocide-free Investing Proposal does not "prescribe" details on how Vanguard should create or implement the requested policy.

In **Apple Inc. (Jantz) (Dec. 5, 2016)**,[20] the proposal imposed a deadline to generate a plan to reach net-zero greenhouse gas emissions by the year 2030 and required the plan to include "all aspects of the business which are directly owned by the Company and major suppliers, including but not limited to manufacturing and distribution, research facilities, corporate offices, and employee travel." The Staff stated, "the proposal seeks to micromanage 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. Clearly, this proposal failed two of the three tests (#1 on "intricate detail" and #2 "specific time-frames") established by the Staff. No such intricate details or specific time-frames are defined or required by the Genocide-free Investing Proposal.

In the Apple Inc. (Jantz) case, the Staff could see that shareholders would have difficulty making an informed judgment about setting deadlines and requirements not only for Apple but for its entire supply chain. In contrast, Genocide-free Investing is easy for shareholders to understand and relate to.

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18 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/lambexxon030620-14a8.pdf

19 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/hotzintel031519-14a8.pdf

20 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/christinejantzapple120516-14a8.pdf

As shown by reviewing the details of the five cases cited by Vanguard, the Staff had ample reason to support excluding those proposals.

In contrast, the Proposal on Genocide-free Investing that Vanguard seeks to exclude does not impose a time-frame, does not seek to create a complex policy or impose a method to implement it, and does not require intricate detail. It therefore meets none of the criteria set by the Staff in 1998 and 2018 as potentially allowing a proposal to be excluded on the basis of micromanagement.

Instead, the Proposal asks Vanguard to "institute transparent procedures to avoid holding or recommending investments in companies that, in management's judgment, substantially contribute to genocide or crimes against humanity." The Proposal leaves the details, structure, definition, and method of implementation up to Vanguard to determine. Further, the Proposal explicitly leaves it to "management's judgment" to determine which companies "substantially contribute."

1C. The JPMorgan (2019) No-Action case

It is unclear what informed the judgment of the Staff in the Division of Corporate Finance in its determination on the No-Action case of JPMorgan (Rosenfeld) (2019).[21]

Given the extensive history of No-Action challenges to Genocide-free Investing proposals, starting in 2008 and continuing through 2018, 11 years with six No-Action cases directly about Genocide-free Investing, it was surprising to see JPMorgan make the same arguments that had been repeatedly rejected. It was even more surprising to discover that the Staff ruled in favor of JPMorgan. The Staff determination stated, "the Proposal micromanages the Company by seeking to impose specific methods for implementing complex policies." However, neither JPMorgan's No-Action letter nor the Staff's ruling explained what was new or different that would cause a different determination than that of the four earlier No-Action cases that argued unsuccessfully that Genocide-free Investing sought to inappropriately micromanage the company. JPMorgan made no new substantive argument and the Staff did not provide a clue.

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. Indeed, the Staff had provided an explicit judgment in Franklin Resources (Rosenfeld) (2013) after evaluating No-Action challenges to Genocide-free Investing repeatedly, not merely ruling against the claim of micromanagement, but explicitly stated 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 and reverse the precedent of the case from the Division of Corporate Finance in 2019.

21 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/rosenfeld031319-14a8.pdf

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 letter was insufficiently robust, relying too heavily on the multiple precedents and the principle of *stare decisis.* We trust that the detail and scope of coverage by this response to Vanguard's Letter does not make that mistake.

1D. Response to other arguments on micromanagement from Vanguard's Letter

Note that Vanguard does not claim that it would be too difficult or too complex to implement the Proposal. In fact, Vanguard claims it already has "substantially implemented the Proposal." This claim will be discussed in Section 2, below.

Requesting transparent procedures to act on a significant social issue is not micromanagement

Vanguard's Letter argues that the Proposal must be micromanaging because it would change how Vanguard does its business. Indeed, the Proposal does request a change. The Proposal asks for an investment policy that is apparently missing at Vanguard and which is important to shareholders. 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."

Vanguard's Letter makes a variety of claims and arguments about the complexity of its business, day-to-day decision-making of management, the selection of investment opportunities, excluding specific investments, and ordinary business, and how investing is the core of its business. These exact claims about micromanagement were made and rejected by the Staff, repeatedly, in the four No-Action cases on Genocide-free Investing, from 2008 through 2018, detailed above.

These claims and arguments in Vanguard's Letter should not be understood as demonstrating impermissible micromanagement, but rather as demonstrating that the Proposal asks Vanguard to implement a high-level principle, an investment policy, that Vanguard currently lacks. Requesting implementation of a high-level principle is what might well be expected from a properly framed and properly worded proposal on a "significant policy issue." Genocide-free Investing is clearly such an issue.

Vanguard should not be allowed to ignore a "significant policy issue" by claiming it would affect their decision-making or operations. Indeed, as the SLB 14K[22] makes clear, proper proposals dealing with a significant policy issue must be significant for the company. Vanguard's arguments prove the point that Genocide-free Investing is a significant policy issue that applies to Vanguard.

Vanguard does not show that Genocide-free Investing fails the tests for micromanagement

22 https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals

Vanguard cites five Staff rulings, since the Franklin Resources (2013) ruling, that are not directly on the subject of Genocide-free Investing, but which support excluding other proposals because of micromanagement. Vanguard claims that Genocide-free Investing should be excluded because it is somehow like those cases. However, as reviewed in detail in Section 1B, above, it is clear that, unlike Genocide-free Investing, these proposals could be excluded based on long-standing factors established by the Staff, failing one or more of the three factors as potentially allowing a proposal to be excluded on the basis of micromanagement:

1. "involves intricate detail"
2. "seeks to impose specific time-frames"
3. "seeks to impose methods for implementing complex policies"

In contrast, the Genocide-free Investing Proposal does not involve "intricate detail," does not "impose specific time-frames," and does not involve implementing "complex policies" or "impose methods" for implementation. Genocide-free Investing does ask for "transparent procedures" to act on a significant social policy, that Vanguard misrepresents as imposing a "method." Despite Vanguard's claim of similarity, Vanguard's Letter does not explain how the Proposal includes one or more of these three defects.

Vanguard's business may involve intricate details, complex policies and decisions, many methods, and time-frames. However, none of those are defects in the Proposal. In short, none of the five cases that Vanguard cites supports its claim that Genocide-free Investing fails one of the three tests.

Beyond referencing earlier No-Action cases and quoting the three factors of potential micromanagement, Vanguard's letter gives no examples of how Genocide-free Investing might fail the test of "involves intricate detail" or "seeks to impose specific time frames."

Vanguard's Letter makes two claims about the third factor, relating to "method."

First, Vanguard incorrectly claims that the "Proposal's goal of dictating the day-to-day decision-making of the Funds' management personnel with regard to the selection of investment opportunities constitutes a clear case of micromanagement." The Proposal does not have that goal and does not dictate day-to-day decision-making. The Proposal is not about the ordinary business of buying and selling securities. Rather, it is about the management responsibilities of financial institutions, such as Vanguard, and whether shareholders should be able to expect mainstream investment funds to be "Genocide-free." That's why the Proposal is framed as asking for "transparent procedures" to address a significant social policy. The Proposal does not define the method that Vanguard should use. There are many ways that Vanguard might choose to implement the requested "transparent procedures." The Proposal <u>does not</u> limit Vanguard's choice of method. The Proposal <u>does</u> focus the requested procedures on the subject of the Proposal, Genocide-free Investing.

The Proposal seeks to instill an awareness of a significant social policy goal in connection with Vanguard's investment decisions. It does not specify the details of the procedures or their implementation on a day-to-day basis and leaves it to the Board and management's judgment to define the companies to be avoided and the procedures to be implemented. TIAA-CREF and

T. Rowe Price, companies similar to the Company, have already implemented such procedures and have done so if very different ways. Although complexities related to the specific content of the procedures should be left to management's judgment, as noted in the Proposal, the question of whether to institute such procedures is clearly not complex or beyond the capacity of shareholders to make an informed judgment.

The Proposal states a general principle that the Fund have transparent procedures to avoid holding or recommending companies that "substantially contribute to genocide or crimes against humanity." It specifically does not identify individual companies to be avoided or specify the process by which the Fund should avoid these investments. Rather it leaves the day-to-day implementation of the policy entirely up to Fund management. Fund managers would determine the securities to be avoided, the process for avoiding them, the oversight procedures for ensuring the policy is implemented, the reporting process to shareholders, and any and all other operational details. In this way, the Proposal avoids micromanaging and allows the Fund full flexibility in implementing the requested procedures in a way that does not interfere with its ordinary business operations.

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.

Second, Vanguard incorrectly claims that mentioning PetroChina and Sinopec in the body of the Proposal is evidence of micromanagement. Rather, PetroChina and Sinopec are referenced in the body of the Proposal to help shareholders understand why Genocide-free Investing is relevant today, rather than merely a theoretical problem. Neither company is mentioned in the request for "transparent procedures" to address the significant social issue of investing in companies tied to genocide. As stated in the body of the Proposal, it is the Proponent's "belief" that both PetroChina and Sinopec are tied to genocide. However, the resolved clause stating the Proposal explicitly leaves to management's judgment the determination of which companies substantially contribute. Indeed, in discussions with Vanguard starting in 2009 and continuing to 2020, we have made clear that Vanguard need not agree with our judgment about which companies "substantially contribute."

The Proposal clearly requests action to "avoid holding or recommending investments in companies" in the case of a determination by "management's judgment" of a company substantially contributing to genocide or crimes against humanity." 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. Vanguard incorrectly represents this concern as micromanaging, claiming the Proposal wants Vanguard to use a slightly different "method." 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 making an effort 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's claim that the Funds have already substantially implemented the Proposal is directly discussed in Section 2, below.)

The intent of the Proposal is not to prohibit the Company or its subsidiaries from holding or recommending investments in any specific company, but to encourage the Company to implement long term systemic procedures to avoid holding investments in companies that substantially contribute to genocide or crimes against humanity. Such an investment policy would apply to Sudan today and to future cases of genocide and crimes against humanity wherever they may occur.

Shareholders considering Genocide-free Investing are able to make an informed judgment

Most importantly, Vanguard's 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. This formal framing has been in place since 1998[23] and reinforced in October 2018 by SLB 14J[24] 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."

Shareholders have not had difficulty in understanding and making a decision on Genocide-free Investing. The goal of a "Genocide-free" Fund is not complex nor too complex for shareholders to understand. Many millions of shareholders have voted for Genocide-free investing when it has been on the proxy ballot. For example, in 2012 when shareholders were presented with the proposal and management took a neutral position, shareholders overwhelmingly voted in favor of the proposal (85% of the yes/no votes were in favor, with 59.8% for, 10.7% against, and 29.5% abstaining).[25] Market research has confirmed the importance of the issue to the public, with 88% of Americans indicating they would like their mutual funds to be Genocide-free.[26] Even when management strongly opposes Genocide-free Investing, shareholders show strong support.[27] For example, in proxy voting for five funds at Fidelity on December 8, 2017, Genocide-free Investing received as high as 39.9% and as low as 30.8% of the yes/no votes. Similarly, in proxy voting for 48 funds at Vanguard on November 15, 2017, Genocide-free Investing received as high as 46.4% of the yes/no votes and as low as 8.3% of the yes/no votes, with typical results around 20% in favor.

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23 https://www.sec.gov/rules/final/34-40018.htm

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

25 ING Emerging Countries proxy voting results from June 28, 2012 , http://www.sec.gov/Archives/edgar/data/895430/000117152012001135/ex99-77c.htm

26 https://www.investorsagainstgenocide.org/files/KRC-research-results-from-2010-and-2007.pdf

27 https://www.investorsagainstgenocide.org/about/resources/voting-results-for-genocide-free-investing-shareholder-proposals/

The Staff acknowledged that shareholders were able to make an informed judgment about Genocide-free Investing in ruling against JPMorgan (Rosenfeld) (March 8, 2011).[28] The Staff determination stated,

> "We are unable to conclude that the proposal is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company in implementing the proposal, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."

It is not surprising that shareholders are capable of making an informed judgment on the Proposal. The title succinctly expresses the purpose -- Genocide-free Investing. The body of the proposal explains why the issue is relevant today, why it is an important question for Vanguard, and why it is possible. The resolved clause is not complicated or confusing, and is easily understood:

> "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."

Note that Vanguard's Letter does not dispute the question of whether shareholders can make an informed judgment on the Proposal.

Lastly, the logic proposed by Vanguard for excluding proposals is overly broad. If the Staff accepts Vanguard's logic that Proposals touching on complex ordinary business operations must be excluded, then Vanguard and other companies could effectively exclude virtually any proposal on any subject on any element of a business, since every business has complexities. Surely that is not the intent of the Rule 14a-8(i)(7) regarding shareholder proposals and ordinary business.

2. Vanguard incorrectly claims that it has already substantially implemented the proposal

The context for the Proposal is "genocide or crimes against humanity, the most egregious violations of human rights." Focusing solely on this context, the Proposal does not seek to address ordinary human rights concerns that may arise from typical business operations, such as workplace conditions, labor rights, civil rights, environment (water, air, pollution, carbon emissions, …) jobs, health, religion, disability, racism, and so on. Vanguard's policies and procedures that address these questions are not the concern of the Proposal. So, when testing whether Vanguard has substantially implemented the proposal, the focus must be solely on the extraordinary and most egregious human rights issues of "genocide or crimes against humanity." Any actions that Vanguard may take that relate to lesser human rights concerns are irrelevant to the implementation of the Proposal because its focus is solely on genocide and crimes against humanity.

The Proposal includes two concepts as essential components.

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28 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/alicerosenfeld030811-14a8.pdf

The **first essential component** is procedures that cause an action of **"avoiding holding or recommending"** investments. As the the full resolved clause of the Proposal 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 **second essential component** is that companies are to be evaluated not only for their **direct effects**, but also their **indirect effects**. That's why the full text of the Proposal indicates that the problem with PetroChina, for example, is it helps "fund genocide." Similarly, the resolved clause of the Proposal asks for the test of "companies that, in management's judgment, **substantially contribute** to genocide or crimes against humanity." So, for example, PetroChina does not have to be criminally responsible for directly massacring hundreds of thousands of Darfuris in Sudan. It is sufficient that it "substantially contributes" by propping up the genocidal regime with funding.

Substantially implementing the proposal requires addressing both essential elements: "avoiding holding or recommending" and "substantially contributing."

Therefore Vanguard has <u>not</u> "substantially implemented" the Proposal by:

- Having a human rights policy of some sort.
- Monitoring companies and advising the Funds.
- Reviewing a company's direct human rights abuses.
- Engaging companies about human rights concerns.
- Allowing for the possibility of divestment related to human rights, but not setting criteria for this action to happen, or not coming close to using the criterion in the Proposal.
- Allowing for the possibility of recommending divestment.

Vanguard rightly points out that it must show that "the company's actions must address the essential objectives of the proposal." Vanguard fails this test.

For example, Vanguard states, "Because the Funds have already implemented **procedures to escalate allegations** [emphasis added] of the most egregious violations that substantially contribute to genocide or crimes against humanity, the Funds have substantially implemented the Proposal." Vanguard is <u>not</u> addressing the essential objective of the Proposal to **"avoid holding or recommending"** certain investments. "Escalating allegations" is not substantially the same as "avoiding holding or recommending."

For example, Vanguard states, its "analysts review third-party materials and communicate with the Funds to determine whether a particular portfolio company is engaged in business practices that may violate human rights **or otherwise constitute a crime against humanity**." This type of review might be able to address direct crimes against humanity, but Vanguard is <u>not</u> addressing

the essential objective of the Proposal that concerns **"substantially contributing"** to genocide or crimes against humanity.

For example, Vanguard states the "Board has already exercised its judgment by directing management to develop and implement robust procedures directly addressing the ways in which the Funds will **monitor and address** [emphasis added] the human rights practices of its portfolio companies." Though those procedures to "monitor and address human rights" theoretically allow for the action of divestment, the procedures do not include criteria for actually acting. In contrast, the two essential components of Genocide-free Investing are procedures that cause an action of **"avoiding holding or recommending"** investments and the criterion test of "companies that, in management's judgment, **substantially contribute** to genocide or crimes against humanity." Vanguard has not substantially implemented the proposal because it has not addressed both essential elements: "avoiding holding or recommending" and "substantially contributing."

Vanguard's Letter provides other similar examples that describe its human rights policy, as summarized above, none of which shows that Vanguard has substantially implemented the proposal, because Vanguard has not shown that its actions "address the essential objectives of the Proposal."

Vanguard's Letter cites several No-Action cases, not directly on Genocide-free Investing, but on other human rights subjects, in which the Staff agreed that those proposals could be excluded because those companies had substantially implemented those proposals. However, in each of those cases, the company demonstrated it had already addressed "the essential objectives of the proposal." Since Vanguard has not shown that its actions "address the essential objectives of the proposal," these cases do not support Vanguard's claim that it has substantially implemented the Proposal.

In summary, Vanguard has failed to show that it "has substantially implemented the proposal" because "its particular policies, practices and procedures" do not "compare favorably with the guidelines of the proposal."

Prior No-Action Cases on Genocide-free Investing with claims to exclude on the grounds of "substantially implemented"

The Staff ruled against **Franklin Resources (Rosenfeld) (December 30, 2013)**[29] which claimed the proposal should be excluded because, among other claims, the fund had already substantially implemented the proposal. The Staff determination stated, "that Franklin's policies, practices, and procedures do not compare favorably with the guidelines of the proposal and that Franklin has not, therefore, substantially implemented the proposal."

In that case, Franklin Resources claimed that it took human rights issues into consideration as part of their overall investment management process and that it adopted the UN Principles for Responsible Investing. However, Franklin Resources offered no evidence that its policy had any effect on its investment decisions, no action to "avoid holding or recommending" investments "substantially contributing" to genocide or crimes against humanity. Further, Franklin

29 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/williamrosenfeld123013-14a8.pdf

Resources continued to recommend and make additional investments in companies tied to genocide.

The Staff ruled against **ING (Rosenfeld) (May 7, 2012)**[30] which claimed the proposal should be excluded because, among other claims, the fund had already substantially implemented the proposal.

In that case, ING provided documentation that the "Board has exercised its judgment by affirming that the Fund will not invest in companies subject to United States' sanctions, including sanctions based on serious human rights concerns." However, ING's policy did not address cases that were not already required by U.S. law. ING provided no evidence that it was applying its "judgment" to determine whether a company was "substantially contributing," that its policy had any effect on its investment decisions, that it had taken any action to "avoid holding or recommending" investments "substantially contributing" to genocide or crimes against humanity. Further, ING continued to recommend and make additional investments in companies tied to genocide.

A clear way to demonstrate that a company "substantially implemented" Genocide-free Investing is to take concrete action against a company that was "substantially contributing" to genocide. TIAA-CREF developed and implemented such a policy.[31] In that case, TIAA-CREF divested from PetroChina and Sinopec, but not all of the companies that were flagged by Investors Against Genocide. Management's judgment of which companies "substantially contribute" did not exactly match that of the proponents of the shareholder proposal, but TIAA-CREF's commitment and action were clear and concrete. That proposal was withdrawn.

Subsequently, a different shareholder proposal was submitted to TIAA-CREF, using much of the language of Genocide-free Investing, but focusing its resolution on Israel. In **CREF (Tamari) (May 10, 2013)**[32] the Staff agreed with TIAA-CREF that the company had "substantially implemented" the proposal. TIAA-CREF successfully argued that its policy addressed "the essential objective of the Proposal" including "as a last resort, consider divesting from companies we judge to be complicit in genocide and crimes against humanity, the most serious human rights violations, after sustained efforts at dialogue have failed and divestment can be undertaken in a manner consistent with our fiduciary duties." TIAA-CREF provided a proof point of its policy, stating "as a result of this process, CREF determined to divest from companies with material business dealings in Sudan. Clearly, this is a meaningful process that the organization treats with the utmost seriousness." TIAA-CREF clearly showed its policy addressed companies tied to genocide, management's criteria for action, and proof of applying the policy.

In this No-Action ruling, TIAA-CREF's support for Genocide-free investing made it harder, not easier, for special-interest groups to push the institution to consider more controversial human rights concerns. The Staff supported TIAA-CREF in resisting efforts from a shareholder seeking to force the firm into divestment which management felt was inappropriate.

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30 https://www.sec.gov/divisions/investment/noaction/2012/ingemergingcountries050712-14a8.pdf

31 https://web.archive.org/web/20130921184533/http://www1.tiaa-cref.org:80/public/about/press/about_us/releases/pressrelease313.html

32 https://www.sec.gov/divisions/investment/noaction/2013/steve-tamari-shareholder-letter-cref-050113-14a8.pdf

History of Vanguard's Policy

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.

Had Vanguard demonstrated that it took action any time over the last 14 years to avoid holding any company due to substantially contributing to genocide or crimes against humanity, in Sudan or Burma or Syria or any other country, then there might be some evidence of substantially implementing the procedures requested in the Proposal. However, Vanguard has not acted to "avoid holding" any company during this period. Vanguard stated this fact when it published its policy in 2009[33] and has confirmed this fact in one-on-one conversation in 2020.

Treatment of PetroChina

How Vanguard handled PetroChina provides a way of testing whether its policy substantially implements Genocide-free Investing. It is mentioned, simply as a test, because in the case of the genocide in Darfur, Sudan, the PetroChina/CNPC group was widely recognized as the company playing the largest role in helping to fund and support the government of Sudan. As a result of this widespread recognition, every one of the 30 states, every one of the 61 colleges, and every fund (including those from TIAA-CREF and T. Rowe Price) that decided to divest because of human rights abuses in Sudan targeted PetroChina, the publicly traded arm of CNPC.

2007

In 2007, the connection of the Chinese oil company, PetroChina, to the genocide in Darfur was brought to Vanguard's attention by Investors Against Genocide. At the same time, Warren Buffet's Berkshire Hathaway was in the news for selling off its PetroChina. Vanguard was and remained a large investor in PetroChina.

Shortly afterwards, the UN estimated the death toll in Darfur to be 300,000.[34]

2009

Vanguard did not seek No-Action relief to exclude Genocide-free Investing in 2009, but Vanguard opposed the Genocide-free Investing shareholder proposal when it was on the ballot for voting at 30 of its funds at its shareholder meeting in 2009. Vanguard's statement of opposition claimed that its procedures were "substantially identical" to the genocide-free investing proposals, that its procedures applied to all of its funds to consider "potential

33 https://web.archive.org/web/20090618151048/http://www.vanguard.com/jumppage/proxy/prop3.html
34 "Darfur deaths 'could be 300,000'," BBC News, April 23, 2008, - http://news.bbc.co.uk/2/hi/africa/7361979.stm

divestment" in cases of "**direct involvement** [emphasis added] in crimes against humanity or patterns of egregious abuses of human rights."[35] Writing on its website about the proxy vote, Vanguard stated, "For both actively managed and passively managed funds, the group seeks to identify companies whose involvement in crimes against humanity or human rights violations would warrant the trustees' consideration. When such companies are identified, they are reported to the funds' trustees for consideration. The **trustees then apply their judgment to determine whether further action is warranted.**[emphasis added]"[36]

However, Vanguard took no action on its holdings of PetroChina, stating, "The trustees have determined that no companies have warranted divestment."[37]Shortly thereafter, Vanguard increased its holdings of PetroChina.[38] Apparently, there are no criteria for Vanguard Fund management to determine action, even if Vanguard identifies companies warranting action, and/or the qualification of "direct involvement" made PetroChina's contribution to genocide insignificant to Vanguard.

Shortly afterwards, noted Sudan researcher Eric Reeves estimated the death toll in Darfur to have increased to 500,000.[39]

2017

Vanguard did not seek No-Action relief to exclude genocide-free investing in 2017, but Vanguard opposed the genocide-free investing shareholder proposal when it was the ballot for voting at 48 of its funds at its shareholder meeting in 2017. Vanguard's statement of opposition[40] stated that it is "compliant with all applicable U.S. laws" and that "the proposal would interfere with the advisors' fiduciary duty to manage your Funds." Significantly, Vanguard also stated that "Placing additional and specifically prescriptive constraints on a portfolio manager's investable universe, based on factors unrelated to a Fund's stated investment objective and/or investment strategies, could interfere with the Fund's obligation to its investors." Unlike 2009, Vanguard did not claim to have already implemented the proposal for all its funds, but instead implied that it could not implement such a proposal because it was unwise and possibly illegal.

2020

Now, in 2020, Vanguard's Letter claims it has already substantially implemented Genocide-free Investing. As you can see, Vanguard's "Responsible Investment Policy" statement is the same as in 2009. It states:[41]

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35 Vanguard definitive proxy materials filing, March 2009, - https://www.sec.gov/Archives/edgar/data/34066/000093247109000972/definitivefilingseccomments.txt

36 https://web.archive.org/web/20090618151048/http://www.vanguard.com/jumppage/proxy/prop3.html

37 Ibid.

38 "Group: Vanguard misled on investing," Boston Globe from Bloomberg News, April 14, 2009, - http://archive.boston.com/business/markets/articles/2009/04/14/group_vanguard_misled_on_investing/

39 "Quantifying Genocide: Darfur Mortality Update, August 6, 2010," Eric Reeves, August 6, 2010, accessed November 6, 2017 - http://sudanreeves.org/2017/01/05/quantifying-genocide-darfur-mortality-update-august-6-2010/

40 https://www.sec.gov/Archives/edgar/data/891190/000093247117004795/def14a.htm

41 https://about.vanguard.com/investment-stewardship/principles-policies/

> "We have established a formal procedure to **identify and monitor** [emphasis added] portfolio companies whose **direct involvement** [emphasis added] in crimes against humanity or patterns of egregious abuses of human rights would warrant engagement or potential divestment. While ultimately our judgment on these issues and actions with respect to specific companies may differ from that of special interest groups and other institutions, we believe our approach effectively integrates our commitment to corporate responsibility and our fiduciary obligations."

Vanguard's policy has apparently not come closer to Genocide-free Investing since the 2009 shareholder meeting. Vanguard's human rights concerns appear to be limited to "direct involvement." Even when Vanguard decides that "egregious abuses of human rights would warrant engagement or potential investment" the result is that Fund trustees consider what to do, apparently without criteria that require any action. In contrast, the Genocide-free Investing Proposal asks the Fund to implement procedures with two essential components of Genocide-free Investing: procedures that cause an action of **"avoiding holding or recommending"** investments and the criterion test of "companies that, in management's judgment, **substantially contribute** to genocide or crimes against humanity." The essential impact of these differences is clear by noting that Vanguard's policy has not caused it to act to "avoid holding" any company since it published its policy in 2009 through 2020.

Vanguard has failed to show that it "has substantially implemented the proposal" because "its particular policies, practices and procedures" do not "compare favorably with the guidelines of the proposal."

It is important to shareholders that the Staff reject Vanguard's request for No-Action Relief so that shareholders will be able to vote on the Proposal

The core business of a mutual fund is security selection and purchase. Therefore, what could be more central to shareholder's interests than providing input on the structure for how the Fund selects the securities it will hold? If the Staff holds that shareholders cannot influence these decisions without interfering with ordinary business, there is effectively nothing on which mutual fund shareholders can provide input.

Without a commitment on the part of the Fund, as expressed in the Proposal, shareholders cannot avoid inadvertently making investments that conflict with their fundamental values. Because they are not involved in day-to-day fund management, shareholders cannot avoid these investments without extensive research, periodic monitoring, and detailed assistance from fund advisors and 401k administrators. Even if they find funds that are "Genocide-free" as of the most recent quarterly reporting, without adoption of the Proposal, they cannot be confident that their Fund has not recently purchased one of the securities they seek to avoid.

Genocide-free Investing has personal ramifications for ordinary shareholders and their family savings. It is entirely appropriate that individual investors would want their mutual fund and investment managers to address the problem of potential investments in companies tied to genocide. Vanguard, by its lack of action, seems to demonstrate a belief that companies tied to the worst human rights abuses are appropriate investments for ordinary Americans, even if a

company is tied to genocide. The Proposal seeks to enable shareholders, by their votes, to indicate that Vanguard should take into account social concerns when the companies in which it invests are implicated in genocide, the most extreme human rights abuse.

The special shareholder meeting is the only means that Vanguard provides for shareholders to have their views heard and addressed on this subject. Unlike public corporations, shareholder meetings at Vanguard are not held annually, but rather may be many years apart. Further, shareholders of Vanguard Funds do not get to vote for any members of the Board of the Vanguard Group. Therefore, shareholders having a chance to express their opinions at the infrequent, special meetings of shareholders for the Funds is a particularly important opportunity. Therefore, it is particularly important that the Staff allow shareholders to have this opportunity to vote on the significant social policy issue presented by the Genocide-free Investing Proposal.

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. However, even if the Staff were to determine that it made sense when considering the business of a bank, for all these reasons it does not make sense for the Investment Management division to make a similar ruling for mutual funds. The mutual fund's intimate role in investing on behalf of its shareholders argues strongly for shareholders to have an opportunity to express themselves on a significant social policy issue as intended by rule 14a-8(i)(7). Since Vanguard is owned by the funds managed by the company and is therefore theoretically owned by its customers, it is particularly inappropriate for Vanguard to be supported in suppressing the voice of their shareholders on Genocide-free Investing.

Conclusion

Given that the Proposal focuses on a significant policy issue of concern to shareholders, that the Proposal does not seek to micromanage the company, that the Proposal is not already substantially implemented, and a Staff determination to this effect would be consistent with a broad range of the Staff's previous rulings, particularly on Genocide-free Investing proposals, we respectfully request that the Staff deny Vanguard's request for No-Action relief.

Sincerely,

Eric Cohen, Chairperson
Investors Against Genocide

Cc: Vanguard
Kani Ilangovan
Mary Lou Rosczyk

Dechert LLP

VIA E-MAIL

August 14, 2020

Office of Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549
IMshareholderproposals@sec.gov

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

Dear Sir or Madam:

This letter responds to the August 3, 2020 letter from Eric Cohen (the "Proponent Letter") concerning our July 27, 2020 letter ("Initial Request Letter") on behalf of our client, the Vanguard Funds listed on Appendix A of the Initial Request Letter ("Vanguard Funds"). The Initial Request Letter seeks confirmation that the staff of the Division of Investment Management will not recommend enforcement action to the U.S. Securities and Exchange Commission if the Vanguard Funds exclude a shareholder proposal (the "Proposal") submitted by Kani Ilangovan and Mary Lou Rosczyk (the "Proponents") for inclusion in the Vanguard Funds' 2020 proxy statement and form of proxy (the "Proxy Materials").

As discussed in the Initial Request Letter, we continue to believe that the Vanguard Funds have substantially implemented the Proposal consistent with the criteria required under Rule 14a-8(i)(10) in order to omit the proposal from its Proxy Materials. The Vanguard Funds' board of directors has considered the best way to address investments in companies that raise human rights concerns, and subsequently developed a formal procedure to identify and monitor portfolio companies whose direct involvement in crimes against humanity or patterns of egregious abuses of human rights would warrant engagement or potential divestment.

Pursuant to the Staff guidance on Rule 14a-8, a proposal need not be implemented completely or precisely as presented for the Staff to determine that the subject of the proposal has been acted upon favorably by management. Instead, the company's actions must address the essential objectives of the proposal.[1] Because the Vanguard Funds have already implemented procedures to address the most egregious violations that substantially contribute to genocide or crimes against humanity, including the possibility of divestment, the Funds have substantially

[1] SEC Release No. 20091 (August 16, 1983).

implemented the Proposal.

The Proponent Letter acknowledges that Vanguard has already established a formal procedure to identify and monitor portfolio companies whose direct involvement in crimes against humanity, or patterns of egregious abuses of human rights, would warrant engagement or potential divestment. But the Proponent Letter argues that this policy of monitoring such companies, and assessing whether engagement or divestment is appropriate, is not enough to satisfy the requirements of the Proposal. Instead, according to the Proponent Letter, the Proposal requires a specific action to be taken by Vanguard — avoid recommending or investing in the specific companies targeted by the Proponents. This response demonstrates that the Proposal, as construed by the Proponent Letter, actually is designed to micromanage the Vanguard Funds by requiring a specific method for implementing a complex policy—and thus is separately excludable pursuant to Rule 14a-8(i)(7).

In the Initial Request Letter, we explained that the Proposal may be properly omitted from the Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal "deals with a matter relating to the [Vanguard Funds'] ordinary business operations." Specifically, we argued that the Proposal would micromanage the Vanguard Funds by seeking to impose specific selection criteria in making (or recommending) investment decisions on behalf of the Vanguard Funds, including avoiding investments in (or divesting from) specific categories of companies disfavored by the Proponents. We noted that the staff of the Division of Corporation Finance just last year concluded that JPMorgan Chase & Co. could omit a nearly identical shareholder proposal from its proxy materials, concluding that "the Proposal micromanages the Company by seeking to impose specific methods for implementing complex policies," and thus was excludable under Rule 14a-8(i)(7).[2]

In response, the Proponent Letter argues that "the Proposal represents a significant social policy issue," and cites several no-action letters issued on or before 2014 that allowed the inclusion of similar proposals in proxy materials.[3] Importantly, however, the Proponent Letter does not account for the Commission staff's most recent public interpretations on the scope of Rule 14a-8(i)(7). Specifically, whether the Proposal addresses a significant policy issue is irrelevant under the micromanagement consideration underlying Rule 14a-8(i)(7).[4] Staff Legal Bulletin No. 14I, published on November 1, 2017 ("SLB 14I"), stated:

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2 *See* JPMorgan Chase & Co., SEC No-Action Letter (pub. avail. March 13, 2019) ("JPM 2019 Letter").

3 The Proponent Letter also makes reference to a March 29, 2018 letter to J.P. Morgan rejecting application of Rule 14a-8(i)(7), but that letter concerned a request for a "Report on Investments Tied to Genocide," not a request to avoid investing in or recommending specific categories of companies. *See* JPMorgan Chase & Co., SEC No-Action Letter (pub. avail. March 29, 2018). Accordingly, that letter is not relevant to the current Proposal.

4 *See* JPM 2019 Letter.

> "The Commission has stated that the policy underlying the 'ordinary business' exception rests on two central considerations. The first relates to the proposal's subject matter; the second, the degree to which the proposal 'micromanages' the company. ***Under the first consideration***, proposals that raise matters that are 'so fundamental 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' may be excluded, ***unless such a proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business and would be appropriate for a shareholder vote***." (emphasis added) (footnotes omitted).

Staff Legal Bulletin No. 14J, issued on October 23, 2018 ("SLB 14J"), then stated that, "[u]nlike the first consideration, which looks to a proposal's subject matter, the ***second consideration*** looks only to the degree to which a proposal seeks to micromanage." (emphasis added).

Accordingly, whether the Proposal addresses a significant policy issue has no bearing on whether the Vanguard Funds may exclude the Proposal under Rule 14a-8(i)(7) under the "micromanagement" consideration.

SLB 14I noted the Commission's view that the micromanagement consideration "may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or ***methods of implementing complex policies***."[5] The Proposal, as it is construed in the Proponent Letter, micromanages the Vanguard Funds by seeking to impose a specific method for implementing complex policies — namely, divesting from, or avoiding making or recommending investments in, the specific companies disfavored by the Proponents. In addition to imposing a specific method for implementing complex policies, the Proposal imposes a time frame for doing so, 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.

The Proponent Letter acknowledges that the staff of the Division of Corporation Finance — applying the updated guidance in SLB 14I and SLB 14J — most recently concluded that a nearly identical proposal resulted in micromanagement of the company and thus was excludable under Rule 14a-8(i)(7). The Proponent Letter then suggests that the considerations in that case may be different, since JPMorgan is a bank and not an investment company. However, the fact that the Vanguard Funds are in the business of investing only enhances the argument that the Proposal interferes with Vanguard's ordinary business operations. Indeed, the staff of the Division of Investment Management has repeatedly recognized that "the ordinary business operations of an

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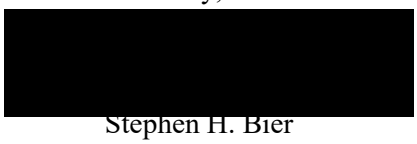
[5] *See SLB 14I* (emphasis added). *See also* Securities Exchange Act Release No. 40018 (May 21, 1998).

investment company include buying and selling portfolio securities."[6] Thus, by specifically interfering with the Funds' investment decision making process, the Proposal is fundamentally aimed at micromanaging an investment company's ordinary business operations.

For the foregoing reasons and those discussed in the Initial Request Letter, the Vanguard Funds respectfully submit that Vanguard's existing, board-approved human rights policies already have substantially implemented the Proposal, and thus the Proposal is excludable under Rule 14a-8(i)(10). To the extent the Proposal requires more specific methods for implementing complex policies, as envisaged by the Proponent Letter, the Proposal micromanages the Funds, and thus is excludable under Rule 14a-8(i)(7). We accordingly request that the staff confirm that it will not recommend any enforcement action to the Commission if the Vanguard Funds exclude the Proposal from their 2020 Proxy Materials. Please note that we have concurrently sent copies of this correspondence to the Proponents. Should you have any questions regarding any aspect of this letter or require any additional information, please contact the undersigned at 212-698-3889 or stephen.bier@dechert.com.

Sincerely,



Stephen H. Bier

cc: Kani Illangovan
Mary Lou Rosczyk

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[6] *See* College Retirement Equities Fund, SEC No-Action Letter (pub. avail. May 3. 2004) ("2004 CREF Letter"); *see also*, Morgan Stanley Africa Investment Fund, Inc.; SEC No-Action Letter (pub. avail. Apr 26, 1991) ("Morgan Stanley Letter") (noting that an investment company's ordinary business operations include "the purchase and sale of securities and the management of the fund's portfolio securities"); State Street Corp., SEC No-Action Letter (pub. avail. Feb. 24, 2009).

[redacted]

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

September 11, 2020

Via E-Mail

Stephen Bier
Dechert LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
stephen.bier@dechert.com

Vanguard Funds (Vanguard U.S. Value Fund, Vanguard Health Care Fund, Vanguard Energy Fund)
Shareholder Proposal of Kani Ilangovan and Mary Lou Rosczyk

Dear Mr. Bier:

In a letter dated July 27, 2020, on behalf of Vanguard U.S. Value Fund, Vanguard Health Care Fund, and Vanguard Energy Fund (the "Vanguard Funds"), you requested confirmation from the staff of the Division of Investment Management ("IM") that it would not recommend enforcement action to the Securities and Exchange Commission (the "Commission") if a shareholder proposal and supporting statement (the "Proposal") submitted by Kani Ilangovan and Mary Lou Rosczyk (the "Proponents") on October 17, 2018 and November 1, 2018 is excluded from the proxy materials for the Funds' 2020 Special Meeting (the "Proxy Materials").

> The Proposal provides:
>
> 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 crimes against humanity, the most egregious violations of human rights.

There appears to be some basis for your view that the Proposal may be omitted from the Funds' Proxy Materials pursuant to Rule 14a-8(i)(7) under the Securities Exchange Act of 1934, as relating to the Funds' ordinary business operations. In our view, the Proposal micromanages the Funds by seeking to impose specific methods for implementing complex policies.

Accordingly, the Division of Investment Management (the "Division") will not recommend enforcement action to the Commission if the Funds omit the Proposal from the Proxy Materials in reliance on Rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative basis for omission set forth in your letter.

Attached is a description of the informal procedures the Division follows in responding to shareholder proposals. You may contact imshareholderporposals@sec.gov if you have any questions.

Sincerely,

/s/ Lisa N. Larkin

Lisa N. Larkin
Senior Counsel

Attachment

cc:
Kani Ilangovan
Mary Lou Rosczyk
Eric Cohen