August 19, 2020

Honorable Jay Clayton, Chairman
U.S. Securities and Exchange Commission
I00 F Street, NE
Washington, DC 20549

William Hinman, Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
I00 F Street, NE
Washington, DC 20549

RE: <u>Assessment and Recommendation Regarding 2016-2020 Division of Corporation Finance Shifting Interpretations Under the Rule 14a-8 No Action Process</u>

Dear Chairman Clayton and Director Hinman,
Over the course of recent years, the interpretive decisions and guidance issued by the Securities and Exchange Commission (SEC) staff have broadened the range of proposals that are considered excludable under ordinary business and substantial implementation interpretations, eliminating or threatening to eliminate many long-standing types of proposals. The most pronounced impact has been on proposals seeking to encourage fossil fuel companies to reduce their climate impact and align with the global climate goals established under the Paris Agreement.

<u>Micromanagement Impacts</u>
Under Rule 14a-8(i)(7), a proposal may be considered "ordinary business" and excludable from a corporate proxy statement if it is determined by the Staff to micromanage. For decades, this micromanagement principle has been interpreted narrowly to only result in exclusion if the proposal in question addressed the minutia of running a business. The classic example of an excludable micromanaging proposal was one that sought to address water conservation by asking a hotel chain to install low flow shower heads. *Marriott International, Inc.* (Mar. 17, 2010, recon. denied Apr. 19, 2010)

Rule 14a-8(a) states that a proposal is the investor's "recommendation or requirement that the company and/or its Board of Directors take action…" The rule also states that the proposal "should state as clearly as possible the course of action that you believe the company should follow."

However, in recent years the Staff has expanded the concept of micromanagement to encompass any proposal, even a precatory proposal, that recommends a **"specific strategy, method, action, outcome or timeline**." Staff Legal Bulletin 14K, October 19, 2019. This new broad definition of micromanagement is inconsistent with the very definition of a proposal, which is defined in the rule itself as ***a request for action*** by the company that "should state as clearly as possible the course of action that you believe the company should follow." Now, proponents are also told that they should not be specific. It is unclear what actions are left to request if shareholders are unable to "state as clearly as possible the course of action that [they] believe the company should follow."

Thus, advisory proposals that would have been acceptable in prior years – such as asking a company to set greenhouse gas reduction targets – are now frequently treated as excludable unless the request is couched in generalized terms (that will then be found to be excludable as substantially implemented, as discussed below).

This new broader definition of micromanagement has blocked proposals that request that fossil fuel companies set goals consistent with the Paris Agreement. Examples of decisions providing exclusions under the Division's new principles include: *EOG Resources* (February 26, 2018), *Exxon Mobil* (April 2, 2019), *Devon Energy* (March 14, 2019), *Exxon Mobil* (March 29, 2019). In each of these instances, decisions to treat shareholder requests as micromanagement contradicted long-standing models of proposals that had been filed at many companies, either asking the company to set greenhouse gas goals or to establish board committees to address particular issues.

This new broad interpretation and guidance is inconsistent with the rule and undermines investors who are asking their companies to curtail the social and environmental impacts of business activities that create risk for companies and shareholders. Curtailing such impacts is an *outcome* for which investors have a right to file proposals under the securities laws, state law, and judicial interpretations.

A further radical departure from prior practice occurred in the 2020 no-action season when a proposal at Exxon Mobil asking the company to establish a board climate committee was allowed to be excluded as micromanagement. The written decision stated that proposals asking the company to establish a climate committee of the board would be considered to be micromanagement: "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." *Exxon Mobil* (March 6, 2020)

There is a venerable tradition of shareholder proposals asking companies to establish board committees on specific issues, be it human and civil rights, environment, sustainability or climate change, and such proposals have long been deemed acceptable by the Staff. The decision in Exxon Mobil casts doubt on the viability of such proposals in the future.

<u>Substantial Implementation Impacts</u>

The new micromanagement principle in combination with a new staff approach to substantial implementation forecloses greenhouse gas reduction proposals at fossil fuel companies. For decades, assessment of substantial implementation involved comparing company action with the specific guidelines and language of a proposal. This no longer seems a guide as to whether or not some proposals will be considered excludable.

Staff Legal Bulletin 14K stated that a proposal will be permissible, and not micromanaging, if it asks “if and how” the company might set greenhouse gas reduction targets. Yet, when proposals were filed for 2020 with fossil fuel companies asking them “if and how” they would align greenhouse gases with global climate goals, the companies’ ***general statements and reports on their climate change activities*** were found to substantially implement the proposal, despite the lack of a clear response to the “if and how” question. *Exxon Mobil* (March 20, 2020), *Chevron* (March 20, 2020), *Hess Corporation*, (April 9, 2020). Many investors view this as a demonstration that a company may now “paper over” a difficult challenge instead of being responsive to the core inquiry of a proposal. Once an oil and gas company reports generally on its actions related to greenhouse gas emissions, a proposal seeking clarity on whether the company’s scale and pace of greenhouse gas reduction is aligned with global climate goals will be found substantially implemented, even though such action or disclosures do not meet the specific requests of the proposal. This limitation on shareholders’ ability to seek action or even specific disclosures is particularly concerning where companies have disclosed complex and confusing information that can mislead all but the most informed shareholders.

Environmental and Economic Impact

The combined effect of the recent staff rulings is that shareholders are effectively barred from asking fossil fuel companies to reduce their contributions to global greenhouse gas emissions or to ask the board to reorganize by creating a committee to better address such issues. The important tool of shareholder proposals has been rendered ineffective.

Foreclosing the important tool of shareholder proposals to foster change is a considerable backward step that we do not believe is justifiable. These developments thus raise a major environmental issue which we believe implicates the Securities and Exchange Commission Commission's responsibilities under the National Environmental Policy Act.[1] Under the National Environmental Policy Act (NEPA):

> when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. * * * the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before

[1] The Commission, in 2016, described its activities under NEPA up to that point in the Regulation S-K Concept Release, Release No. 33-10064; 34-77599**,** April 13, 2016, which noted: "Under the National Environmental Policy Act of 1969 ("NEPA”) [42 U.S.C. 4321-4347] Congress required all federal agencies to include consideration of the environment and regulatory action. In response to this mandate, the Commission adopted environmental compliance and litigation disclosure requirements.” The Commission noted in a footnote that as a result of NEPA, the Commission issued an interpretive release in 1971 alerting companies to potential disclosure obligations that could arise from material environmental litigation and the material effects of compliance with environmental laws. The Commission later adopted more specific disclosure requirements relating to these matters and, in 1976, the Commission amended its forms to require disclosure of any material estimated capital expenditures for environmental control facilities. See Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Release No. 33-5170 (July 19, 1971) [36 FR 13989 (July 29, 1971)], Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release No. 33-5386 (April 20, 1973) [38 FR 12100 (May 9, 1973)], Disclosure of Environmental and Other Socially Significant Matters, Release No. 33-5569 (Feb. 11, 1975) [40 FR 7013 (Feb. 18, 1975)] (“Notice of Public Proceedings on Environmental Disclosure Release”).

> them an analysis (with prior public comment) of the likely effects of their decision upon the environment.[2]

We are interested in the SEC's process of implementation of this NEPA mandate in light of these shifts in policy. Specifically, we suggest that it is long past time for the SEC to undertake an environmental impact assessment of its major programmatic changes implemented through guidelines, no-action letters, and the impending rulemaking.

The catastrophic environmental and economic threats that climate change poses are well understood by the scientific and financial communities. See, for instance, the Task Force on Climate Related Disclosures.[3] The decisions to impede shareholder response hamstring investors' ability to encourage action on climate change to address the economic threat it poses to companies and portfolios.

Given the clear purpose of Rule 14a-8 to allow shareholders to suggest actions, as well as the precatory nature of the vast majority of proposals filed, we believe that shareholders' rights are being unjustifiably limited. We urge the SEC to reverse course on its stance for the handling of micromanagement and substantial implementation for the 2021 proxy season.

Sincerely,

Sanford Lewis, Director
Shareholder Rights Group

Mindy Lubber, Director
Ceres
Investor Network on Climate Risk

Josh Zinner, CEO
Interfaith Center on Corporate Responsibility

Danielle Fugere, President
As You Sow

Liz Gordon
Executive Director of Corporate Governance
New York State Common Retirement Fund

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[2] *Sierra Club v. Marsh,* 872 F.2d 497 (1st Cir. 1989) at page 500.
[3] https://www.fsb-tcfd.org