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A DECENT PROPOSAL: HOW ANIMAL WELFARE ORGANIZATIONS HAVE UTILIZED SHAREHOLDER PROPOSALS TO ACHIEVE GREATER PROTECTION FOR ANIMALS

SUMMER M. HALLAJ*

I. INTRODUCTION

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.¹

The modern animal industry is more than simply a business. It is an ingrained institution,² sewn into the fabric of everyday life. Animals are used and exploited in the name of food, clothing, entertainment, and science.³ The analogy of animal exploitation to slavery is particularly apt:⁴ both are profitable institutions upon which the country has laid its foundation.⁵ Ethical issues aside,

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1. President Abraham Lincoln, *Second Annual Message to Congress* (Dec. 1, 1862), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29503>.

2. See Melanie L. Vanderau, *Science at Any Cost: The Ineffectiveness and Underenforcement of the Animal Welfare Act*, 14 PENN ST. ENVTL. L. REV. 721, 721 (2006) (noting that humans' use of animals for food, labor, and entertainment has existed for thousands of years); Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL'Y 391, 392 (2008) (stating "[t]he animal-industrial complex, a gigantic maze of factory farms, slaughterhouses, and packaging plants, is a heavily integrated industry in the United States that kills and processes over 9 billion animals per year.").

3. See e.g., *Animal Exploitation Fact Sheet*, ANIMALS AUSTRALIA, http://www.animalsaustralia.org/factsheets/animal_exploitation.php (last accessed Feb. 1, 2013) (listing the various forms of animal exploitation).

4. STEVEN M. WISE, *RATTLING THE CAGE* 66 (Basic Books, 2000).

5. See JOHN ROBBINS, *DIET FOR A NEW AMERICA* 236–37 (Stillpoint Publishing, 1987) (discussing that, since the early 1900's, American children have been taught nutrition based off of information and materials almost

both of these institutions have had devastating consequences. Unlike slavery, the impact of the animal industry is not upon the unity of our country, but upon our health,⁶ our environment,⁷ and our ability to create effective medicine.⁸

As this section will demonstrate, animal advocates face numerous obstacles on the path toward legal protection for non-human animals. Creative lawyering is absolutely necessary⁹ if animal advocates will successfully carve out legal protection for animals in a system hostile to its efforts.¹⁰ The legal and ideological obstacles presented by the courts and legislatures force advocates to become ever more creative. The use of shareholder

exclusively provided by the National Dairy Council, whose stated mission is to educate the public “about the importance of drinking milk and consuming dairy products”); *see also* C. RAY GREEK AND JEAN SWINGLE GREEK, SACRED COWS AND GOLDEN GEESE: THE HUMAN COST OF EXPERIMENTS ON ANIMALS (Continuum Int’l Pub. Group, 2000) (discussing how the foundation of American medicine was built upon animal experimentation because of regulations requiring such experiments before the medicine was deemed safe for human consumption); *see also* UPTON SINCLAIR, THE JUNGLE (Penguin Books, 2006) (1905) (describing the meatpacking industry at the beginning of the 20th century).

6. *See generally* FORKS OVER KNIVES, (Monica Beach Media 2011) (arguing that nearly all degenerative diseases could be prevented and even reversed with the elimination of animal products from the American diet and replaced with a whole foods, plant based diet); COLIN T. CAMPBELL, THE CHINA STUDY (Shanna Caughey ed., BenBella Books 2005) (discussing findings that people who eat the most animal products have the most chronic disease and people who eat the most plant-based diets have the lowest levels of chronic disease); ROBBINS, *supra* note 5, at XV (arguing that animal foods are directly linked to illnesses such as heart disease, cancer, diabetes, osteoporosis, etc); Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL’Y 391, 393–94 (2008) (finding that the workers within the animal agriculture industry suffer serious physical injuries at a rate several times higher than the normal employee population, as well as suffering extreme psychological trauma).

7. ROBBINS, *supra* note 5, at 314–80 (detailing the lasting damage to the environment created by animal agriculture).

8. *See* GREEK, *supra* note 5 (citing examples of how reliance on animal experimentation has hindered medical progress and has caused severe medical injuries).

9. Matthew Liebman, *Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness*, 18 ANIMAL L. 133, 137–38 (2011) (“Creativity and innovation are essential to effective animal law practice”). *See also* Clayton Gillette, Joyce Tischler, *Introduction*, 13 ANIMAL L. 13, 17 (2006) (explaining that in the absence of legal protection for animals, advocates must creatively use existing laws in new ways).

10. Liebman, *supra* note 9, at 138 (“Judges are not unbiased arbiters who adjudicate in a vacuum, but rather human beings reared on the ideologies and values of a legal system and a society that are profoundly speciesist”); Gillette, *supra* note 9, at 17 (“The law abhors change. It reveres the status quo.”).

resolutions¹¹ is one way that this creativity has manifested itself and it has proved to be a strong strategic option for increased legal protection for non-human animals.¹²

This Comment will explore the concept of shareholder activism within the context of animal protection. In 2010, there was a peak in the number of animal welfare shareholder proposals; however, in the last several years, animal advocacy shareholder proposals have decreased by more than fifty percent.¹³ The underutilization of animal welfare shareholder proposals amount to missed opportunities for improving animal welfare standards. The animal rights movement is comprised of many different moving parts, and employs various strategies with a common aim.¹⁴ Shareholder resolutions should be among these advocacy strategies because it provides a unique opportunity to engage with corporations and educate shareholders.

This Comment will then discuss how public interest shareholder proposals are generally successful, as well as their successful use in the context of animal advocacy campaigns. As one example of such success, this Comment will explore the Humane Society of the United States' shareholder advocacy against Tyson Foods. This Comment will argue that the Humane Society's model for animal welfare shareholder proposals should be emulated by other animal advocacy groups. In a movement where strategy is of the utmost importance,¹⁵ animal advocates should

11. Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 36 (1997). A shareholder resolution is a right of qualifying shareholders of a publicly owned company to submit proposals for changes in corporate policy. *Id.*

12. See e.g., *Proxy Preview 2014*, *infra* note 91, at 37 (illustrating one instance of a company's positive response to an animal welfare shareholder proposal).

13. *Proxy Preview 2012 Report*, *infra* note 65, at 17.

14. See e.g., *Joanna Krupa Bears Almost All for Animals*, PETA, <http://www.peta.org/tv/videos/celebrities-skins/1924982565001.aspx> (last visited on May 15, 2014) (exemplifying PETA's tactic of socially outrageous, sexually explicit advertising to create public dialog about animal rights issues). See also *Leafleting: Extending a Helping Hand to Farmed Animals*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/leafleting.aspx> (last visited on Jan. 31, 2013) (explaining Mercy For Animals' strategy of grass-roots activism to promote veganism); *Our Mission*, THE NATIONAL ANTI-VIVISECTION SOCIETY, <http://www.navs.org/page.aspx?pid=421> (last accessed Jan. 31, 2013) (stating mission to end scientific experimentation on animals); *About Us*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/section.php?id=3> (last accessed Jan. 31, 2013) (describing mission of creating legal rights through legal advocacy).

15. See generally Liebman, *supra* note 9, at 141 (arguing that “[a]nimal lawyers bring cases that challenge some of the most blood-spattered practices, some of which involve billions of animals. When we lose—that is, when our proposed interpretation of the applicable law fails to convince a judge—animals die”). See also Joyce Tischler, *A Brief History of Animal Law, Part II (1985 - 2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 77 (2012) (discussing the need

improve their legal strategies by studying the successes of other advocates and determine what factors play a role in an organization's success or failure.

II. EXPLOITING THE POPULARITY CONTEST: THE RISE OF CORPORATE SOCIAL RESPONSIBILITY

Public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed.¹⁶

This section will provide background information on the movement toward legal protection for animals, the development of corporate social responsibility, and the importance of public opinion as a motivating factor in voluntary corporate policy change. This section will conclude by analyzing how all of these factors have created an environment in which animal protection shareholder proposals are likely to be successful in advancing animal protection.

A. Obstacles on the Path Toward Animal Protection

Of the countless obstacles animal advocates face, the first and most daunting obstacle is establishing standing.¹⁷ Standing is a prerequisite for any lawsuit.¹⁸ Establishing standing is important, as bringing a lawsuit to enforce existing animal laws is seemingly the best way to begin advancing animal protection.¹⁹ Establishing

for careful selection of experimental strategies so that bad precedent is not created at this early period in animal law); Gillette, *supra* note 9, at 27 (noting that a judge's personal values and prejudices influence how he or she rules on a case and advocates must understand these values so that they do not create additional barriers against legal protection for animals).

16. REUBEN M. WANAMAKER, *THE VOICE OF LINCOLN*, 186 (Charles Scribner's Sons, 1918) (quoting Abraham Lincoln).

17. Delcianna J. Winders, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 *ANIMAL L.* 1, 6 (2006) (discussing how standing bars advocates from advocating for animals); Gillette, *supra* note 9, at 27 (arguing that one of the underlying barrier's to legal standing is the judge's prejudice that he brings to the bench); Kristen Stuber Snyder, *No Cracks in the Wall: The Standing Barrier and the Need for Restructuring Animal Protection Laws*, 57 *CLEV. ST. L. REV.* 137, 139 (2009) (stating "[b]ecause animals are technically private property, many believe the government should not infringe on the rights of the property owners to use their property as they see fit. This view has allowed the law to maintain animal owners' rights to exploit their animals for science, agriculture, entertainment, fashion").

18. Samantha Mortlock, *Standing on New Ground: Underenforcement of Animal Protection Laws Causes Competitive Injury to Complying Entities*, 32 *VT. L. REV.* 273, 278 (2007). Standing is a constitutional doctrine that requires the plaintiff to establish that there is an actual case or controversy currently in dispute between the parties. *Id.* A party who cannot establish standing will not be allowed to present a case before the court. *Id.* In order to establish standing, the plaintiff must establish several facts, including that they have a personal stake in the outcome of the litigation and that they have suffered an injury in fact. *Id.*

19. Gillette, *supra* note 9, at 16 (discussing various early animal law cases

standing has proved extremely difficult for animal advocates.²⁰ One of the reasons for this difficulty is that only federal or state bodies, such as the United States Department of Agriculture, or the State's Attorney, can enforce existing laws providing animals with protection.²¹ Attempts to gain standing have been an exercise in ingenuity for advocates,²² and some attempts have seen success.²³

based on existing law).

20. *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 28 (D.C. Cir. 2011) (holding that animal advocacy organizations had no standing to sue under the Endangered Species Act for cruelty inflicted to circus elephants); *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 106 (D.D.C. 2009) (discussing instances in which animal organizations seeking protection for animals may have standing to sue a federal agency); *Levine v. Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009) (holding that animal advocates did not have standing to argue for an interpretation of the Humane Methods of Slaughter Act which includes birds); *Symposium: Confronting Barriers to the Courtroom for Animal Advocates: Legal Standing for Animals and Advocates*, 13 ANIMAL L. 61, 66 (2006) (*hereinafter Symposium I*) ("It is a complete barrier to the courtroom. If you do not have standing, you do not get through the door. You may have a cause of action and a door may exist, but if you do not have standing, you cannot get through it"); Liebman, *supra* note 9, at 137 (noting injury to an animal is not enough to meet standing requirements- a human must have personally suffered harm).

21. See Liebman, *supra* note 9, at 136–137 (noting that the Animal Welfare Act and the Humane Methods of Slaughter Act grant sole enforcement power to the USDA and state anti-cruelty laws may be enforced only by government prosecutors); *Symposium I, supra* note 20, at 85 (noting that private citizens may not sue a regulatory body for failure to enforce an animal protection statute); Snyder, *supra* note 17, at 159 (discussing the various state and federal agencies tasked with oversight and enforcement of animal welfare laws).

22. Although many of these exercises in creativity have been unsuccessful, they have exhibited truly thoughtful and inventive lawyering. See *e.g.*, *People for the Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Bd.*, 125 Cal. App. 4th 871, 875 (2005) (suing the California Milk Producers Advisory Board for false advertising for "happy California cow" commercials); *Animal Legal Defense Fund v. Vilsack*, 2012 WL 1664149 (C.D. Cal.) (arguing that the sale of foie gras violates the federal Poultry Products Inspection Act's prohibition against the sale of diseased food). On the other hand, some lawsuits have been much more stunt-like. See *e.g.*, *Tilikum, et al., v. Seaworld, Plaintiffs Complaint for Declaratory and Injunctive Relief*, No. 11-cv 11CV2476JM WMC, 2011 WL 5077854 (S.D.Cal. Oct. 25, 2011) (pleading filed by PETA against SeaWorld, alleging that the capture and forced performance of Orca whales violates the 13th Amendment's prohibition against slavery).

23. See *e.g.*, *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (holding that animal advocate had standing to sue USDA for alleged violations of the Animal Welfare Act); *Humane Soc. of Rochester & Monroe Cnty. for Prevention of Cruelty To Animals, Inc. v. Lyng*, 633 F. Supp. 480, 481 (W.D.N.Y. 1986) (granting advocates preliminary injunction against using hot iron face branding on cows as a violation of state anti-cruelty laws); *Animal Legal Def. Fund v. Woodley*, 181 N.C. App. 594, 640 S.E.2d 777 (2007) (affirming grant of preliminary injunction against defendants hoarding 300 dogs).

Even if standing is established, there are merely a handful of laws providing animals with legal protection.²⁴ These laws are extremely rare and they offer only meager protection²⁵ to a very selective category²⁶ of animals. The limited applicability of these

24. Liebman, *supra* note 9, at 136.

25. The laws that have passed which grant animals legal protection grant only extremely limited protection and still allow for large scale animal torture. For example, the only law governing the transportation of animals is the Twenty-eight Hour Law of 1877, 49 U.S.C. § 80502 (2000). This law only governs the transportation of animals to slaughter and it only governs transportation by the railroad - which is a method rarely used today. *Id.* Furthermore, farm animals represent the largest number of animals used in the United States. *Contact Us: Protect Farm Animals*, THE HUMANE SOCIETY OF THE U.S. (May 26, 2014), http://www.humanesociety.org/forms/contact_us/farm_animals_contact.html (stating that “animals raised for meat, eggs, and milk represent more than 95% of the animals killed by humans in the United States”). However, the only federal law governing the treatment of farmed animals is the Humane Methods of Slaughter Act, 7 U.S.C. § 1901-1906. This law only regulates how the animal is treated at the time of slaughter, thereby exposing farmed animals to a myriad of painful procedures while they are being raised for slaughter. *See generally* EARTHLINGS (Nation Earth, 2005) (discussing the mistreatment of animals). *See e.g.*, Snyder, *supra* note 17, at 138 (stating that “[l]argely due to a growing public concern regarding the treatment of animals, laws directed at protecting animals have been passed at both the federal and state levels. However, many of these laws prove inadequate in practice due to their many restrictions, piecemeal enactment, and a lack of enforcement”). In the absence of federal law providing protection, it has become routine practice to kill sick piglets by bashing their heads on concrete floors; remove piglets’ testicles without anesthesia; sear off the end of chicks’ beaks with a hot blade; and allow calves, hens, and sows to live in such cramped conditions that they cannot even turn around their whole lives. *See e.g.*, EARTHLINGS.

26. *See* Lock v. Falkenstine, 380 P.2d 278, 279 (holding that although the anti-cruelty statute prohibits fighting “any animal,” the legislature did not intend the statute to cover roosters used in cock fights). *See also* Liebman, *supra* note 9, at 136 (noting that “[s]ubstantively, most animal protection laws are severely limited in scope. For example, the Federal Animal Welfare Act (AWA) regulates animal research, yet exempts birds, rats, and mice, who collectively make up ninety percent of the animals used in experiments”); Snyder, *supra* note 17, at 154 (stating that the Animal Welfare act explicitly excludes many different types of routinely exploited animals, such as farmed animals, and animals commonly used in research, from protection).

The Humane Methods of Slaughter Act (HMSA) regulates how animals are slaughtered, and requires that animals be rendered insensible to pain before they are slaughtered. 7 U.S.C. § 1901-1906. However, the Humane Methods of Slaughter Act does not apply to ninety percent of the animals slaughtered in the U.S. every year because birds are not protected under this act. *See* Liebman, *supra* note 9, at 136 (discussing that HMSA does not apply to chicken, geese, ducks or other birds, 9 billion of which are slaughtered every year in the U.S.); Snyder, *supra* note 17, at 141 (stating “[a]pproximately ten billion animals, excluding fish, are killed annually in the United States for food”).

Additional examples of this arbitrary exclusion of institutionally exploited animals is demonstrated by state anti-cruelty statutes. Snyder, *supra* note 17, at 154. Most states that have enacted anti-cruelty statutes have explicitly, or in practice, excluded all animals besides cats, dogs, and horses.

laws means that the vast majority of all exploited animals are left without legal protection.²⁷

If there are no effective existing laws protecting animals, it would then seem sensible to try to pass new legislation. Thousands of animal protection bills are introduced annually, but few pass.²⁸ Furthermore, attempts to pass legislation often take years and the final law's effectiveness is significantly diluted.²⁹

B. Utilizing Shareholder Resolutions to Achieve Social Justice

Due to the difficulties surrounding legislation and litigation, animal advocates have started utilizing regulation as an additional avenue.³⁰ The Securities and Exchange Commission (SEC) is one such regulatory agency that has provided opportunities for animal advocacy outside of the traditional channels.³¹

The SEC is the government agency tasked with protecting investors of publicly held corporations, maintaining investment

Id. (arguing that the broad exclusions in state anti-cruelty statutes renders these statutes ineffective and incomplete).

27. Conference: *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 5 (2002).

28. *Animallaw.com Explained*, THE NATIONAL ANTI-VIVISECTION SOCIETY, <http://www.navs.org/page.aspx?pid=443> (last accessed Feb. 1, 2013). See also *Current Legislation*, THE NATIONAL ANTI-VIVISECTION SOCIETY, <http://www.navs.org/page.aspx?pid=439> (last accessed Feb. 1, 2013) (tracking the status animal law legislation).

29. Gary Francione, Professor, Rutgers University School of Law, Keynote Address at the Duke University School of Law Symposium: Animal Rights: The Last Ten Years (Apr. 7, 2006), available at <http://www.abolitionistapproach.com/video/>. Professor Francione argues that animal welfare laws are designed to make animal exploitation more efficient and better standards of living for animals are merely an incidental benefit. *Id.* He also discusses the Chimp Act of 2000, arguing that although this animal protection measure was passed into law, its three exceptions are so broad that it renders the law entirely ineffective and meaningless. *Id.*

30. See e.g., Sarah Cranston, Note, *So Sue Me: How Consumer Fraud, Antitrust Litigation, and Other Kinds of Litigation Can Effect Change in the Treatment of Egg-Laying Hens Where Legislation Fails*, 9 RUTGERS J.L. & PUB. POL'Y 72, 93–94 (2012) (noting that animal advocates have used laws regulating government spending, the environment, public nuisance, anti-trust, and false advertising to litigate underlying issues of animal cruelty).

31. The Securities and Exchange Commission was created with the passage of the Securities Exchange Act of 1934. 15 U.S.C. § 78d. Congress has delegated to the SEC broad powers to regulate all aspects of the securities industry. 15 U.S.C. § 78. A few of these powers include: the power to regulate the securities exchanges, such as the NASDAQ and the New York Stock Exchange; the power to regulate brokerage firms and clearing agencies; control over activities taken on the market; requiring reporting information from publicly held corporations; and proxy solicitations. *Laws that Govern the Securities Industry*, THE SEC. AND EXCH. COMM'N, <http://www.sec.gov/about/laws.shtml#secexact1934> (last modified Aug. 30, 2012).

markets, ensuring that corporations adhere to disclosure requirements, and seeking out fraud.³² One aspect of the SEC is to regulate shareholder proposals under rule 14a-8³³ of the Securities Exchange Act of 1934.³⁴ This rule allows shareholders of a publicly held corporation to submit recommendations for changes in company policy.³⁵ These recommendations are called shareholder proposals.³⁶ These shareholder proposals may then be included in the company's annual proxy statement³⁷ and other shareholders have the opportunity to vote on the proposal.³⁸

There are several preliminary requirements that a shareholder must satisfy in order to submit a proposal.³⁹ First, the person must be a shareholder who owns either one percent of the company's securities or at least \$2,000 worth of shares under current market value.⁴⁰ The shareholder must own these shares

32. *Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, THE SEC. & EXCH. COMM'N, <http://www.sec.gov/about/whatwedo.shtml> (last visited May 15, 2014).

33. 17 C.F.R. § 240.14a-8 (2011). This rule has undergone significant revisions since its enactment. There were amendments to the rule in 1948, 1952, 1954, 1972, 1976, 1983, and 1987. Lazaroff, *supra* note 11, at 50. Rule 14a-8's authority has been elasticized over the years, being narrowed and expanded in scope as the public's view of the role of corporations and shareholders has evolved. *Id.* at 40-44. For example, in 1952 an amendment was passed that prevented shareholders from bringing a shareholder proposal that had a social or religious element to it. *Id.* at 42. In 1972, the rule was changed again to allow such proposals, resulting in a wave of social proposals. *Id.*

34. 17 C.F.R. § 240.14a-8.

35. *Id.*

36. *Id.*

37. The term "proxy materials" refers to the SEC mandated disclosure of materials from publicly held corporations. See Lazaroff, *supra* note 11, at 36 (describing the inclusion of shareholder proposals in a company's proxy materials); BLACK'S LAW DICTIONARY (9th ed. 2009) ("PROXY, *n.* (15c) 1. One who is authorized to act as a substitute for another; esp., in corporate law, a person who is authorized to vote another's stock shares. 2. The grant of authority by which a person is so authorized. 3. The document granting this authority"); The Procter & Gamble Company: Notice of Annual Meeting and Proxy Statement (Aug 26, 2011), available at http://www.google.com/url?sa=t&rct=j&q=http%3A%2F%2Fwww.pg.com%2Fen_us%2Fdownloads%2Finvestors%2Fannual_reports%2F2011%2Fpg_2011_proxy.pdf.&source=web&cd=1&cad=rja&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.pg.com%2Fen_US%2Fdownloads%2Finvestors%2Fannual_reports%2F2011%2FPG_2011_Proxy.pdf&ei=RMOMUOa5D7GgyAGx9IG4Dw&usg=AFQjCNGFahSksxYuh0LoCBwxc4urRtFfiw (providing an example of a proxy statement).

38. 17 C.F.R. § 240.14a-8(a).

39. *Id.* Shareholder proposals have a presumptive right of inclusion, unless the company can establish that the proposal would violate one of the many exceptions to the inclusion of shareholder proposals, or else the company can prove that a procedural rule was violated in the submission of the proposal. 17 C.F.R. § 240.14a-8(g).

40. 17 C.F.R. § 240.14a-8(b)(1).

for at least one year prior to the proposal's submission and continue to hold these shares until the date of the meeting.⁴¹ There are many other requirements regarding the proposal, including: length, deadlines, number of proposals that can be submitted, and the length of time before a shareholder may repeat a proposal.⁴²

Simply submitting a proposal, however, provides no guarantee that it will be adopted, or even included in the proxy materials.⁴³ If the proposal is adopted, it is non-binding on the corporation; the company may choose to ignore it completely.⁴⁴ Many proposals do not even reach the point of a shareholder vote. The company may challenge the proposal's inclusion by submitting a no-action request to the SEC.⁴⁵ The SEC considers the request and issues a recommendation.⁴⁶ This decision is also non-binding and the company may choose to disregard the SEC no-action recommendation.⁴⁷

There are two opportunities for redress if the shareholder wishes to challenge the exclusion of the proposal: the shareholder may seek a discretionary review before the full commission,⁴⁸ subsequently or in the alternative, the shareholder may challenge the exclusion in court by way of injunction.⁴⁹

41. *Id.*

42. 17 C.F.R. § 240.14a-8(i).

43. Lazaroff, *supra* note 11, at 44.

44. Paula Tkac, *One Proxy at a Time: Pursuing Social Change through Shareholder Proposals*, 91 *ECON. REV.* 1, 1 (2006), available at http://www.google.com/url?sa=t&rect=j&q=one%20proxy%20at%20a%20time&source=web&cd=1&cad=rja&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.frbatlanta.org%2Ffilelegacydocs%2Fferq306_tkac.pdf&ei=ntWKUIeMMqbfyAHzIC4Cw&usq=AFQjCNFIkSnXDAzXkX-PwtYfqm-7TQH8mg ("Shareholder proposals, even if they receive a majority vote of the shareholders, are precatory, or nonbinding, on corporate management. Therefore, shepherding a proposal through to a vote and even garnering widespread shareholder support are not guarantees of corporate action or even a response in the form of an open dialogue").

45. *Id.* A no-action request is a request from the corporation objecting to the inclusion of the proposal. *Id.* The no-action request seeks review from the SEC and an advisory opinion as to whether the corporation is justified in excluding the proposal. *Id.*

46. *Id.* at 44-45.

47. *Id.* The corporation may choose to send out its proxy materials as soon as it has sent its no-action request to the SEC; the corporation does not need to wait for a response from the SEC before choosing to exclude the proposal. *Id.* In practice this means that the corporation could send the SEC a no-action request, the corporation could exclude the proposal, and the SEC could subsequently issue a recommendation instructing the corporation to include the proposal in the proxy materials. Waiting for the SEC's recommendation may be a wise strategic move by the corporation, because the proponent of the proposal may be less inclined to seek a preliminary injunction ordering the corporation to include the proposal, if the SEC has agreed that the corporation is justified in excluding it. *Id.*

48. Lazaroff, *supra* note 11, at 45.

49. See e.g., *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 556

C. Corporate Social Responsibility

There are generally two types of shareholder proposals: corporate governance proposals, which seek to influence the corporate structure and operation of the company; and social advocacy shareholder proposals, which seek to influence corporate behavior in favor of a specific public interest.⁵⁰ Social advocacy shareholder proposals are a part of a larger movement toward corporate social responsibility (CSR). CSR is a much-debated philosophy that finds that because corporations have an enormous impact on society, they should be held both economically and morally responsible for their actions.⁵¹ Social interest shareholder proposals truly became part of the CSR movement after 1972, when the SEC amended the Securities Exchange Act of 1934 to allow for social justice and political shareholder proposals.⁵² Since that time,⁵³ social justice proposals have become a popular⁵⁴ and effective method for investors⁵⁵ seeking to influence a corporation's

(D.D.C. 1985) (seeking a preliminary injunction against the corporation excluding a shareholder proposal).

50. *Corporate Social Responsibility: Shareholder Advocacy*, AS YOU SOW, <http://www.asyousow.org/csr/shareholder.shtml> (last accessed Jan. 31, 2013).

51. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 768–69 (2005) (discussing the historical controversy surrounding the idea of corporate social responsibility). Many legal theorists have argued that the sole objective of a corporation is to increase the profits for its shareholders. *Id.* at 768. Many believe that this objective leaves no room for corporate social responsibility and that in fact corporations owe no duty to insure public welfare. *Id.*

52. Lazaroff, *supra* note 11, at 42. Prior to the 1972 amendments of the Securities Exchange Act of 1934, corporations were free to exclude any shareholder proposals whose goal was a political, religious, or social cause. *Id.* In 1952, the SEC added an exclusion for shareholder proposals which are submitted “primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.” Securities Exchange Act Release No. 34-4775 (Dec. 11, 1952), 17 Fed. Reg. 11,430 (1952). In 1972, the SEC amended this rule so that shareholder proposals with these types of alternative purposes were excluded if the proposal dealt with a social, economic, religious, etc., cause that is not “significantly related to the issuer’s business or within its control.” Lazaroff, *supra* note 11, at 42.

53. *Institutional Investors Find Common Ground with Social Investors*, 1694 PLI/CORP 257, 262 (hereinafter “Institutional Investors”) (“Since 1971 . . . there has been a steady growth of proactive advocacy by investors with companies in which they are shareowners. In 2004, according to the Investor Responsibility Research Center (IRRC), there were over 1,100 resolutions on social, environmental and corporate governance issues”).

54. See e.g., Lazaroff, *supra* note 11, at 40 (discussing the trend toward including more social interest proposals in shareholder resolutions); EQUILAR, WHAT DO SHAREHOLDERS CARE ABOUT? A STUDY OF SHAREHOLDER PROPOSAL VOTING OUTCOMES 2 (2012) (noting that social and environmental shareholder proposals have accounted for nearly thirty-five percent of all shareholder proposals in recent years).

55. Tkac, *supra* note 44, at 5–6. Social justice shareholder proposals are typically brought by individual shareholders, pension funds, religious

policies in favor of CSR.⁵⁶

CSR is a curious phenomenon in which corporations voluntarily agree to adhere to ethical standards that exceed what is legally required.⁵⁷ It is increasingly clear that, despite legal theorists' vehement arguments that the sole role of a corporation is to increase the profits of its shareholders, a growing number of corporations are willingly changing their policies to appease shareholders.⁵⁸ Corporations choose to bind themselves to CSR principles for two reasons: (1) corporations deeply value customer opinion; and (2) corporate social responsibility is compatible with financial responsibility.

D. Corporations Care About What We Think

Essential to the success of CSR is the value that corporations place in shareholder opinion.⁵⁹ In this way, shareholders are able

organizations, social organizations, socially responsible investors/mutual funds and occasionally by unions. *Id.*

56. See *Institutional Investors*, *supra* note 53, at 261 (noting that institutional investors are increasingly utilizing social interest shareholder proposals to influence corporate policy). See also Tkac, *supra* note 44, at 7 (noting findings that between 1992 and 2002, there was an annual average of 257 social/environmental shareholder proposals submitted).

57. Six states - California, Hawaii, New Jersey, Virginia, Maryland, and Vermont - have passed new laws that recognize 'benefit corporations.' Briana Cummings, *Benefit Corporations: How to Enforce A Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 579 (2012). A benefit corporation is similar to any other corporation except that it has voluntarily decided to promote the public interest. *Id.* Benefit corporations are different from corporations that willingly taking on CSR efforts in that benefit corporations are legally bound to promote the public interest. *Id.* Benefit corporations are bound by special enforcement provisions; for example, shareholders of benefit corporations have special causes of action against these corporations, third party monitoring systems monitor the activities of the corporation, and there are public disclosure requirements. *Id.* at 593. With these methods of legal enforcement of a corporation's commitment to public interest, benefit corporations are much more accountable than any other corporation which has taken up CSR efforts. *Id.* A benefit corporation's commitment to the public interest is two-fold: they commit to a specific public interest of their choosing, as well as a commitment to promote the general public interest. *Id.* at 592. The very existence of benefit corporations is testament to the fact that many corporations are willing to participate in public interest efforts - so willing that they voluntarily bind themselves under the law to serve a social cause.

58. See, David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 473-74 (2006) (discussing the increasing trend in which corporations voluntary undertake CSR initiatives, in the form of codes of conduct or voluntary corporate standards, which exceed what they are legally obligated to do, as part of overall corporate governance).

59. See *e.g.*, *Institutional Investors*, *supra* note 53, at 263 (arguing that one reason why corporations value shareholder proposals is because it provides an opportunity for communication between corporate management and the shareholders about company practices).

to influence a corporation in a fashion similar to consumers.⁶⁰ The common axiom that consumers vote with their dollars is literally applied in the context of shareholder resolutions because the more shares a shareholder owns, the more influence he can exert. When a consumer objects to a certain corporate practice, the consumer may choose to boycott products made by that company in an attempt to communicate to the corporation that a certain practice is unacceptable.⁶¹ Shareholders have the opportunity to express this type of opinion in a much more direct fashion through the use of shareholder resolutions.⁶² Shareholder resolutions provide a way for investors to directly express objections to a particular practice.⁶³

The pressure placed on corporations by public opinion is absolutely essential to the success of social justice shareholder

60. See e.g., Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1222 (2002) (arguing that corporate responsiveness to the "green movement" was motivated by corporations' interest in meeting consumer preference).

61. See e.g., Maya Mueller, *The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments*, 28 STETSON L. REV. 451, n.226 (1998) (describing a boycott against the Cracker Barrel restaurant chain in response to the company's policy of employment discrimination against homosexual individuals).

62. See *id.* at 483 (describing shareholder response to Cracker Barrel's employment discrimination).

63. One example of a corporation making a significant change in response to perceived public opinion was demonstrated when Urban Decay decided to refrain from selling in the Chinese market. In 2012, Urban Decay, a corporation that advertises as being a cruelty-free cosmetics company (meaning that it does not test its cosmetics products on animals) announced that it would begin selling its products in China. *Leaping Bunny Program Removes Urban Decay: China's Animal Testing Requirements are the Reason*, LEAPING BUNNY (June 6, 2012), <http://leapingbunny.org/press6.php>. The Chinese government mandates that all beauty products be tested on animals before the product is allowed to be sold in China. *Id.* Urban Decay's announcement was met with public outcry and only one month later the company announced that it rescinded its decision and would refrain from selling in the Chinese market. Olivia Bergin, *Urban Decay decides not to sell in China*, TELEGRAPH (July 9, 2012), <http://fashion.telegraph.co.uk/beauty/news-features/TMG9386314/Urban-Decay-decides-not-to-sell-in-China.html>.

Within days of Urban Decay's announcement, John Paul Mitchell Systems, another company that has prided itself on refraining from animal testing, announced that it too would withdraw from the Chinese market before it was required to begin testing on animals. Suzannah Hills, *L'Occitane and Yves Rocher: The big-name beauty brands among those ditching cruelty-free animal testing policies to sell their products to China*, DAILY MAIL (July 31, 2012), <http://www.dailymail.co.uk/news/article-2181468/Big-beauty-brands-dropping-cruelty-free-animal-testing-policies-sell-products-China.html>. Although customer opinion could not deter all beauty corporations from opening up sales in the lucrative Chinese market, Paul Mitchell and Urban Decay represent the important power customers hold over corporate decision-making. *Id.*

proposals.⁶⁴ Successful proposals have convinced corporations that the public cares about an issue and will take that issue into consideration when purchasing the company's goods.⁶⁵ Corporations are willing to adopt CSR proposals because such proposals act as a "canary in the coal mine" for corporations.⁶⁶ Such proposals are an indication of the issues on which customers will make their purchasing decisions in the near future.⁶⁷

E. Corporate Social Responsibility is Financial Responsibility

Studies have indicated that there is a direct correlation

64. See e.g., Tkac, *supra* note 44, at 2 (arguing that corporations are willing to change corporate policy in response to the financial pressure they receive from public opinion, in the form of cost savings and customer loyalty).

65. See, e.g., Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 498 (1997) (describing the recent trend of corporations voluntarily disclosing "environmental report cards"). The disclosure of the information contained on these report cards is not mandated by securities law, nor any other law. Nevertheless, corporations have increasingly submitted this information because of pressure from shareholders and the general public. *Id.* Some of these programs require the use of outside auditors to perform the evaluation. *Id.* Such an evaluation by a third party is a tremendous step toward corporate transparency. The only explanation for allowing these types of invasive third party audits is that the corporations sense that environmental disclosures are increasingly important to shareholders and consumers.

Corporations have also begun to disclose their political contributions. In 2012, the Supreme Court ruled that corporations have the right to free speech under the first amendment. *Citizen's United v. Fed. Election Com'n*, 130 S. Ct. 876, 900 (2010). In the 2012 proxy season, in the wake of this ruling, the number of public interest shareholder proposals concerning political contributions by corporations dramatically increased. Heidi Welsh & Michael Passoff, *Proxy Preview 2012*, AS YOU SOW FOUNDATION 5 (2012), available at <http://www.asyousow.org/csr/proxyvoting.shtml> ("Proxy Review 2012 Report"). In 2011, shareholder proposals concerning political contributions made up one quarter of all social interest shareholder proposals. *Id.* In 2012, the number of these proposals increased to one third of all social interest proposals. *Id.* Seemingly in response to this large increase, corporations have willingly disclosed information of lobbying and political spending, including PAC contributions. Timothy Smith, *Proxy Preview 2012 Webinar* (Feb. 28, 2012), available at <http://www.asyousow.org/csr/proxyvoting.shtml> ("Proxy Preview 2012 Webinar"). Some corporations have even begun posting the amount of money spent on lobbying on their websites, which means that this information is available to the general public and not only shareholders. *Id.* Approximately 80 corporations have provided meaningful disclosures pertaining to their political spending. *Id.* Disclosures on political spending and lobbying is extremely controversial information to disclose, and it speaks to the degree of pressure put on these corporations by the public and shareholders that these corporations are voluntarily providing these disclosures.

66. *Proxy Preview 2012 Report*, *supra* note 65, at 5.

67. Tkac, *supra* note 44, at n.3. For example, a recent study reported that over a third of consumers consider a corporation's social responsibility before buying its products. *Id.*

between CSR efforts and financial responsibility.⁶⁸ There are many ways that corporate responsibility translates to financial responsibility: (1) socially responsible corporations avoid the risk of defending lawsuits; (2) CSR methods are more cost efficient; (3) CSR is a way of encouraging a strong corporate culture and employee job satisfaction; and (4) CSR may even create new business opportunities.⁶⁹ It might also be the case that companies that have branded themselves as 'compassionate corporations' provide their customers with the satisfaction that when the consumer shops with that company, the consumer too is being compassionate.⁷⁰ Furthermore, corporations willingly submit to CSR efforts because customers buy more from socially responsible corporations.⁷¹

Although the correlation between CSR and profitability is sometimes disputed among legal theorists,⁷² the fact remains that the corporations believe that there is a correlation, and therefore continue to make efforts to appear socially responsible.⁷³

F. Victory Inside and Outside of the Boardroom

There are a variety of ways that a social interest shareholder resolution is successful. The most obvious success is when the proposal passes the vote. As discussed earlier, the passage of a proposal is no guarantee that the corporation will actually

68. *Institutional Investors*, *supra* note 53, at 261. For example, a 2004 study in the United Kingdom reported that fifty-one out of sixty studies showed that there is a favorable connection between a corporation's profitability and the corporation's environmental responsibility. *Id.* at 264.

69. *Id.* at 267.

70. Tkac, *supra* note 44, at 2 (discussing Whole Foods Markets and The Body Shop as examples of business' whose customers chose the company's products for both the CSR efforts of the company, and also the satisfaction of participating in social responsibility themselves).

71. *Id.* ("Underlying this business case for CSR is a fundamental assumption that at least some consumers prefer buying products that allow them to 'do good' and may even be willing to pay a little more for products or services that claim to help solve the world's problems").

72. See Tkac, *supra* note 44, at 2 (stating "activists argue that there is a direct link between a change in corporate operations and cost reductions. More typically, however, the channels through which an increase in profitability is claimed to occur are only indirectly related to a firm's financial performance: building goodwill and trust, increasing exposure . . . and improved employee satisfaction"). See also Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 768 (2005) (arguing that there is a lack of a true connection between CSR efforts and corporate profitability).

73. See *e.g.*, Tkac, *supra* note 44, at 2 (discussing that despite no direct relationship between CSR and revenue, corporations participate in CSR because they believe that CSR is related to positive public opinion and customer loyalty); Avi-Yonah, *supra* note 72, at 770 (noting that corporate managers insist on participating in CSR efforts because they believe that there is a long-term benefit).

implement the proposal—shareholder proposals are merely recommendations.⁷⁴ The vast majority of shareholder proposals, however, do not pass.⁷⁵ Yet, failure to pass within the boardroom, does not necessarily equate with the proposal's total failure to affect social change.⁷⁶ Success for shareholder resolutions comes in many forms.⁷⁷ This section will discuss these permutations of success.

One measure of a shareholder proposal's success is whether the proposal was withdrawn in compromise with the corporation.⁷⁸ Approximately one-third of all social interest shareholder

74. Lazaroff, *supra* note 11, at 44–45.

75. Tkac, *supra* note 44, at 11, 15. In a survey of 1,472 social interest shareholder proposals between 1992 and 2002, merely four proposals received at least fifty percent of the shareholder votes in support of the measure. For purposes of this study, a social proposal was a proposal concerned with the corporation's political standing, religious issues, animal welfare, environmental impact, human rights abuses, labor and employment issues, and other social concerns. *Id.*

76. Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 614 (2001). Sometimes shareholder proposals are adopted by the corporation shortly after the corporation's shareholders resoundingly reject a proposal. For example, in 1970, a group of Georgetown law students submitted a series of shareholder proposals to GM requesting that GM adopt safety measures, such as seatbelts. *Id.* None of the proposals were passed by the shareholders. *Id.* In fact, these proposals garnered nearly no support at the shareholder meeting. *Id.* However, only a month after the proposals were resoundingly rejected by the shareholders, GM adopted the proposals voluntarily. *Id.*

This same phenomenon was demonstrated in *Apache Corporation v. New York City Employee's Retirement System*, 621 F. Supp. 2d 444, 445 (S.D. Tex. 2008). Here, NYCERS submitted a proposal to adopt an LGBT non-discrimination policy; however, the proposal never made it to a shareholder vote because it was effectively excluded by the corporation. *Id.* at 447. The corporation originally challenged the proposal by submitting a no-action request to the SEC, the SEC agreed that the corporation was not required to include the proposal in the proxy materials. NYCERS then filed suit, seeking an injunction to prohibit the corporation from excluding their proposal. *Id.* at 448. The court affirmed the SEC's ruling and the corporation was not required to submit the proposal in its proxy materials. *Id.* at 453. Despite the company's vehement refusal to submit the non-discrimination proposal, soon after the litigation ended the corporation voluntarily adopted a non-discrimination policy. Branson, *supra* note 76, at 614.

77. Tkac, *supra* note 44, at 13.

78. See *Institutional Investors*, *supra* note 53, at 262 (stating "[o]ften management, upon facing a resolution, will begin to negotiate with the sponsor(s) and agreements are struck leading to the withdrawal of the resolution— a sort of negotiated settlement. There are many examples of successful management-shareholder dialogues that never reach the proxy ballot"); Joseph A. Roy, *Non-Traditional Activism: Using Shareholder Proposals to Urge LGBT Non-Discrimination Protection*, 74 BROOK. L. REV. 1513, 1515 (2009) (finding that corporations are generally willing to negotiate with the proponent of the shareholder proposal in an effort to avoid a proxy fight on the issue).

proposals were withdrawn between 1992 and 2002.⁷⁹ A withdrawn proposal generally means that the corporation has requested that the proponent withdraw the resolution in exchange for open negotiations with the corporation's management.⁸⁰ The success of negotiations after a proposal is withdrawn is difficult to quantify.⁸¹ Data suggests, however, that approximately eighty percent of all withdrawn social interest shareholder proposals result in positive action taken on behalf of the corporation.⁸²

Corporations frequently choose to negotiate with the proponents of a shareholder proposal, instead of allowing the resolution to be voted down at the annual shareholder meeting, because including a proposal in the corporation's proxy materials is enormously expensive. The SEC has estimated that it costs a corporation \$87,000 to include a proposal in its proxy materials.⁸³ The corporation could repeatedly incur this cost if the proposal does not pass and it is re-submitted year after year.⁸⁴ Although the

79. Tkac, *supra* note 44, at 15. There are significantly more social interest proposals withdrawn for negotiation purposes than are excluded from the proxy materials after the corporation submits a no-action request to the SEC. Overall, seventeen percent of social activism shareholder proposals between 1992 and 2002 were omitted after no-action requests were granted by the SEC. *Id.* at 14. The majority of all social interest proposals will get an opportunity to be voted on; fifty-two percent of social interest proposals are submitted for a vote during the annual shareholder meeting. *Id.* at 15.

80. *Id.* at 13 ("[A] withdrawn resolution usually signals some type of action on the part of the corporation—dialogue, agreement to resolution, or some other compromise. Withdrawal can be viewed as indicating some level of success. Indeed, as shown below, the data support this association as well").

81. *Id.* at 17 (noting that the estimated number of withdrawn proposals merely provides the lower bound of the true 'success' rate of these proposals—'success' being achieved when the corporation responded in a positive way and the proponent withdrew the proposal).

82. *Id.* at 18. This conclusion is based upon data collected for all public interest shareholder proposals in the ten-year period between 1992 and 2002. *Id.* This data is based upon follow-up information provided for 298 of the proposals submitted during this time that were withdrawn by the proponent before the proposal was submitted for a vote. *Id.* The data suggests that seventy-nine percent of these withdrawn proposals resulted in positive action taken on behalf of the corporation; in fact, many times the corporation agreed to implement the action requested in the proposal. *Id.* In nineteen percent of these withdrawn proposals, the proponent received an opportunity to negotiate with the corporation, without any commitment made by corporate management. *Id.* Some of these cases resulted in extended discussions between the activists and the corporation's management, which eventually resulted in some positive action taken on the part of the corporation. *Id.* The data revealed that in only three of the reported withdrawn proposals was there no further action or discussion between the corporation and the proponents of the proposal. *Id.* Out of the total number of withdrawn proposals for which data could be obtained, approximately eighty percent resulted in positive cooperation, either resulting in an opportunity for dialog and negotiations, or else the corporation fully adopted the proposal. *Id.*

83. *Id.* at n.7.

84. *Id.*

SEC has allowed corporations to distribute some materials via the internet to reduce costs,⁸⁵ this expense remains a considerable incentive for corporations to negotiate with the advocacy organization.

Even if the proposal does not pass and fails to promote negotiations, the resolution still has educational value.⁸⁶ In discussing the power of creative uses of information, Eric Glitzenstein argued, “using these mechanisms to bring bad practices to light can, itself, have an enormous impact. An old phrase about the First Amendment was that sunlight is the best disinfectant.”⁸⁷ Therefore, even if a social interest proposal is rejected, the proposal is likely to have educated an audience of people that may not have been aware of the issue, prior to the proposal.

G. Success of Animal Welfare Shareholder Proposals

Animal welfare organizations have achieved various forms of success through the use of shareholder proposals. Animal welfare resolutions have opened doors to successful negotiations with corporations⁸⁸ and have provided a means of educating

85. *Id.*

86. *Institutional Investors*, *supra* note 53, at 263. Shareholder proposals benefit the shareholders by educating them on social, economic or environmental issues. *Id.* Each shareholder has the opportunity to learn about new social causes by reading the proxy materials that are sent to them before the shareholder annual meeting. *See Lazaroff*, *supra* note 11, at 36. In this way, animal organizations can educate shareholders by describing abusive corporate practices that the shareholders may not have known existed. Furthermore, the general public may become aware of the issue through the organizations' promotion of their shareholder resolutions, media reports on the shareholder resolutions, as well as the public disclosure of the proposals. *See generally* People for the Ethical Treatment of Animals, *Shareholder Campaigns*, <http://www.peta.org/issues/animals-used-for-experimentation/shareholder-campaigns.aspx> (last visited Oct. 20, 2012) (promoting PETA's shareholder campaign against scientific research on animals); *Humane Society Hopes to Change Pork Farm Practices*, THE HUFFINGTON POST (Aug. 30, 2012), available at http://www.huffingtonpost.com/2012/08/31/humane-society-pork-farm-practices_n_1844621.html (reporting on shareholder proposal against the use of gestation crates); *Division of Corporation Finance, No-Action, Interpretive, and Exemptive Letters*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/divisions/corpfin/cf-noaction.shtml> (last accessed Feb. 1, 2013) (providing guidance on how to access SEC no-action letters, which contain copies of shareholder resolutions).

87. Carter Dillard, David Favre, Eric Glitzenstein, Mariann Sullivan, and Sonia Waisman, *Animal Advocacy and Causes of Action*, 13 ANIMAL L. 87, 114 (2006).

88. For example, PETA notes many instances in which PETA has filed shareholder proposals with the corporation, and the proposal has opened the door for constructive dialog and negotiations in exchange for PETA's withdrawal of the proposal. PETA, *supra* note 86. PETA cites many positive changes that have resulted from this dialog. A few of these successes include:

shareholders on cruel practices in which the corporation takes part.⁸⁹ “The current success of the animal protection movement and animal law in challenging factory farming has been due, in part, to the strategy of bringing the horrible conditions of intensive confinement, transport, and slaughter directly to consumers and forcing the massive agricultural industry into a defensive

“[u]sing a non-animal method in place of acute toxicity (LD-50) testing on animals and using fewer animals as a result of a tiered-testing strategy that PETA proposed,” “[i]nviting PETA scientists to speak to local toxicology chapters about the use of primates in experiments and the ethics of using animals in testing,” “[r]equiring all their contract laboratories to implement social and behavioral enrichment methods for all the animals used,” and “[w]orking on non-animal replacements for skin sensitization and skin irritation testing for medical devices.” *Id.*

One of the earliest and most important shareholder resolution controversies occurred in *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985). The proposal in dispute in *Lovenheim* was the first animal welfare shareholder proposal ever submitted. Gillette, *supra* note 9, at 20-21. Peter Lovenheim submitted a shareholder proposal to Iroquois Brands, asking Iroquois to determine whether their foie gras products were produced by force feeding geese, and if so, to stop selling foie gras products. *Id.* Lovenheim’s proposal was submitted in the proxy materials and received five percent shareholder support in the vote. D.A. Jeremy Telman, *Is the Quest for Corporate Responsibility A Wild Goose Chase? The Story of Lovenheim v. Iroquois Brands, Ltd.*, 45 AKRON L. REV. 291, 339 (2012). The next year, Lovenheim submitted the proposal again. *Id.* However, this time Iroquois filed a no-action letter with the SEC on the basis that foie gras sales made up less than five percent of Iroquois’ sales, making the proposal excludable under SEC rules. *Id.* The SEC agreed. *Id.* Lovenheim first appealed the decision, seeking full review by the commission, but the commission denied review. *Id.* Then Lovenheim filed suit seeking an injunction to prevent Iroquois from excluding his proposal. *Id.* In a groundbreaking decision, the Court found in favor of Lovenheim and ordered Iroquois to include the proposal. *Id.* The proposal received less than eight percent of the vote at the annual meeting. *Id.* However, shortly after this contentious litigation ended, and after Lovenheim’s proposal was overwhelmingly voted down by shareholders, Iroquois stopped selling foie gras- the very thing Lovenheim had requested. *Id.*

An additional illustration of voluntary corporate change was demonstrated when the National Anti-Vivisection Society (NAVS) submitted a shareholder proposal to Intel. Interview with Marcia Kramer, Legislative Director, The National Anti-Vivisection Society, (Nov. 12, 2013). Each year, Intel hosts an international high school science fair. *Id.* Some of the student experiments presented at the fair utilized testing on live or dead animals. *Id.* NAVS’s proposal asked Intel to refuse to award scholarship prizes to students who conducted experiments on animals. *Id.* Almost immediately upon receiving NAVS’s proposal, Intel contacted NAVS and asked for the proposal to be withdrawn in exchange for a chance to speak with the board of directors. In the end, Intel declined to adopt NAVS’s suggested policy change, and instead allowed NAVS to participate in the judging of the competition, and award their own scholarships to students who have created alternatives to animal research. *Id.*

89. Lazaroff, *supra* note 11, at 83 (arguing that shareholder proposals may be an effective tool for educating corporate participants of important social issues).

position.”⁹⁰

The 2012 proxy season exemplifies of the types of animal welfare proposals that are typically submitted.⁹¹ In the 2012 proxy season, there were three primary issues discussed in animal welfare proposals. Approximately fifty percent of shareholder proposals were dedicated to the issue of animals used in scientific experiments; the other half of shareholder proposals were split between focuses on the welfare of farmed animals, and animals that are used for clothing.⁹²

The proportion of animal welfare proposals in relation to other social interest proposals has remained relatively consistent in the last several years. In 2011, animal welfare proposals made up five percent of the overall social interest shareholder proposals filed.⁹³ In 2012 and 2013, there was a slight increase, and animal welfare proposals comprised six percent of all social interest proposals.⁹⁴ Although the percentage of animal welfare proposals in relation to other social welfare proposals has remained consistent, the actual number of animal welfare proposals filed has dramatically declined from 2010, a phenomenon that will be discussed in a later section.

Perhaps the most interesting statistic is how many of these proposals made it to a vote and how many votes they received. In the three proxy seasons between 2010 and 2013, half of all animal welfare proposals were submitted to shareholders for a vote.⁹⁵ On average, these proposals received support from approximately four percent of the shareholders.⁹⁶ Animal welfare proposals typically receive supporting votes in the low single digits.⁹⁷ However, such

90. Tischler, *supra* note 15, at 75.

91. To see the animal welfare proposals submitted in other years, see Heidi Welsh & Michael Passoff, *Proxy Preview 2013*, AS YOU SOW FOUNDATION 32 (2013), available at http://www.proxypreview.org/wp-content/uploads/2013/03/ProxyPreview2013_0308.pdf (“Proxy Preview 2013”); Heidi Welsh & Michael Passoff, *Proxy Preview 2014*, AS YOU SOW FOUNDATION 35, 38 (2014), available at <http://www.asyousow.org/publications/ProxyPreview2014.pdf> (“Proxy Preview 2014”).

92. *Proxy Preview 2012 Report*, *supra* note 65, at 17.

93. *Id.* at 12.

94. *Proxy Preview 2012 Report*, *supra* note 65, at 5; *Proxy Preview 2013*, *supra* note 91, at 11.

95. *Proxy Preview 2014 Report*, *supra* note 91, at 13.

96. *Id.*

97. See e.g., *id.* at 18 (noting that a 2010 HSUS shareholder proposal regarding chicken slaughter received only 1.8% of favorable shareholder votes); *id.* (a shareholder proposal submitted by PETA regarding abuses of animals in research laboratories received 9.6% support in 2012 and only 6.2% in 2011); *id.* at 17 (explaining that in order to submit a repeat proposal, the shareholder must have originally received a certain percentage of supporting votes cast in the immediately preceding year. Therefore, in order to submit a proposal for a second time, the proposal must have received at least 3% of the original vote; in order to submit the proposal for a third time, the proposal

low voting percentages are typical of most social interest proposals,⁹⁸ unless the organization can garner the support of institutional shareholders.⁹⁹ It is important to consider that although the percentage of favorable votes is small, these numbers can represent millions of shareholder votes in support of the resolution.¹⁰⁰

The proposals that did not make it to a vote were either excluded from the proxy materials, or were voluntarily withdrawn by the organization. Between 2011 and 2013, approximately thirty-three percent of all animal welfare shareholder proposals were withdrawn.¹⁰¹ Between 1992 and 2002, approximately twenty-one percent of all animal welfare shareholder proposals were withdrawn.¹⁰² The number of animal welfare proposals withdrawn is only slightly lower than the average for all social

must have received at least 6% of the vote in the second year; and in order to submit the proposal for a fourth time, the proposal must have received at least 10% of the vote during the third year. The article notes that animal welfare proposals often cannot meet these thresholds).

98. In 2011, only half of all social interest shareholder proposals that were put to vote received over twenty percent support. *Proxy Preview 2012 Report*, *supra* note 65, at 13. Although twenty percent support seems like a small amount, 2011 was a record-breaking year; most social interest proposals never garner even that much support. For example, in 2002, only eleven percent of all shareholder proposals submitted for a vote received twenty percent support. *Id.* To put the percentages into perspective, in 2011 ninety-one proposals received over twenty percent of the vote, whereas in 2002, only eighteen proposals received over twenty percent of the vote. *Id.* These numbers are significant for two reasons; first, they demonstrate the struggle that social interest proposals have in garnering support; second, and more importantly, they are a sign of an exponential increase in support for social interest resolutions.

99. Tkac, *supra* note 44, at 15 (discussing that the low voting average, 8.5%, in favor of social proposals is likely due to the lack of support from institutional investors).

100. In a series of campaigns against animal testing in 2005-2006, PETA submitted several shareholder proposals to corporations asking them to replace certain animal testing methods with reliable alternatives. People for the Ethical Treatment of Animals, *Give the Animals Five: Alternatives to Animals Testing*, <http://www.peta.org/issues/animals-used-for-experimentation/five-alternatives-to-animal-testing.aspx> (last accessed Oct. 29, 2012). Although these proposals only received shareholder support in the low single digits, the number of actual shares represented in favor of the proposals is substantial. A 2005 shareholder resolution against 3M received only 2.9% of the vote, but this percentage represents 14 million shares. People for the Ethical Treatment of Animals, *Shareholder Campaign: 3M*, <http://www.peta.org/issues/animals-used-for-experimentation/3M-shareholder-campaign.aspx> (last accessed Oct. 29, 2012). Similarly, a shareholder proposal against Abbott Laboratories garnered only 2.5% of the vote, but this represents 26 million shares. People for the Ethical Treatment of Animals, *Shareholder Campaign: Abbott Laboratories*, <http://www.peta.org/issues/animals-used-for-experimentation/abbott-laboratories-shareholder-campaign.aspx> (last accessed Oct. 29, 2012).

101. *Proxy Preview 2014 Report*, *supra* note 91, at 13.

102. Tkac, *supra* note 44, at 18.

interest shareholder proposals.¹⁰³ As an example, in 2011, there were just under twenty animal welfare proposals submitted; five of these proposals were withdrawn, eight proposals went to vote,¹⁰⁴ and the remaining proposals were omitted from the proxy materials.¹⁰⁵ As discussed, withdrawn proposals typically indicate that the corporation has made themselves available for negotiations on the issue.¹⁰⁶

H. *The Humane Society Saga Against Tyson*

In recent months, the issue of gestation crates¹⁰⁷ for pregnant sows has garnered national attention as a large number of popular restaurant chains, grocery stores, and food suppliers have vowed to phase out the use of gestation crates from their supply chain.¹⁰⁸ However, the fight against gestation crates has been in progress for over a decade.¹⁰⁹ Animal welfare organizations like the Humane Society of the United States (HSUS) have tried many different strategies and publicity campaigns in an effort to educate the public on the miseries inflicted by the use of gestation crates.¹¹⁰ HSUS utilized shareholder proposals as one component of their overall campaign.¹¹¹

The HSUS campaign against gestation crates has been in progress for several years.¹¹² In 2002, a campaign spearheaded by HSUS in Florida achieved tremendous success when Florida

103. *Proxy Preview 2012 Report*, *supra* note 65, at 17.

104. Heidi Walsh & Tim Smith, *Proxy Season 2011: A Tipping Point for Social and Environmental Issues?*, HARV. L. BLOG (Sept. 18, 2011, 9:09 AM), <http://blogs.law.harvard.edu/corpgov/2011/09/18/proxy-season-2011-a-tipping-point-for-social-and-environmental-issues/>.

105. *Id.*

106. Tkac, *supra* note 44, at 13.

107. Stephanie Strom, *Pig Farmers Face Pressure on the Size of the Sty*, THE NEW YORK TIMES (Oct. 5, 2012), available at <http://www.nytimes.com/2012/10/06/business/pig-farmers-face-pressure-on-the-size-of-the-sty.html?pagewanted=all>. Gestation crates are a farming mechanism designed to confine sows during pregnancy. *Id.* These cages are metal enclosures, approximately two feet wide and seven feet long, which confine the sow so tightly that she is unable to even turn around. *Id.* She is kept in the gestation crate the entire time she is pregnant, about four months, until she gives birth, and is impregnated again, and again she placed in a gestation crate. *Id.* This occurs over and over until she is physically unable to produce more piglets and she is sent to slaughter. *Id.*

108. *Timeline of Major Farm Animal Protection Advancements*, THE HUMANE SOC'Y OF THE U.S. (Oct. 11, 2012), http://www.humanesociety.org/issues/confinement_farm/timelines/timeline_farm_animal_protection.html.

109. *Id.*

110. *Id.*

111. *Proxy Preview 2012 Report*, *supra* note 65, at 18. For example, in 2012, HSUS submitted 11 animal welfare shareholder proposals and four of those proposals discussed the issue of gestation crates. *Id.*

112. *Timeline*, *supra* note 108.

residents approved a ballot initiative that banned the use of gestation crates.¹¹³ Florida was the first state to adopt such a measure.¹¹⁴ Since early 2012, dozens of corporations such as McDonalds, Burger King, Wendy's, and Smithfield have agreed to phase out the use of gestation crates from their suppliers.¹¹⁵ Since the beginning of 2012, twenty-seven corporations have agreed to begin phasing out the use of gestation crates.¹¹⁶

One company that HSUS has struggled to convert is Tyson Foods, the largest meat supplier in the United States.¹¹⁷ The HSUS campaign to convince Tyson to phase out the use of gestation crates has been storied, contentious, and inventive.¹¹⁸ At the time of this writing, Tyson has not yet agreed to eliminate gestation crates from its supply chain.¹¹⁹ However, the campaign against Tyson has forced the company into a defensive position, where it must answer the allegations of HSUS.¹²⁰ HSUS's campaign demonstrates the various tactics available to animal welfare organizations and how shareholder resolutions play a role in an organization's broader campaign.

In 2009, HSUS submitted its first shareholder resolution to Tyson on the issue of gestation crates.¹²¹ The proposal went to a vote at the annual meeting, but only received 1.25% of the shareholder vote.¹²² In 2010, HSUS again submitted a shareholder proposal, but Tyson's no-action request to the SEC was granted because HSUS did not receive enough votes the previous year to submit a repeat proposal.¹²³

In May 2012, HSUS released graphic undercover footage from

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Tyson Foods to Audit Suppliers' Farms*, N.Y. TIMES (Oct. 12, 2012), available at http://www.nytimes.com/2012/10/13/business/tyson-foods-to-audit-animal-treatment-at-its-suppliers-farms.html?smid=fb-share&_r=0.

118. *Timeline*, *supra* note 108.

119. Wayne Pacelle, *Even More Progress for Pigs in Gestation Crates* (Jan. 9, 2014), available at <http://hsus.typepad.com/wayne/2014/01/tyson-progress-pigs-gestation-crates.html>.

120. Tyson Foods, *Tyson Foods Announces New Audit Program to Help Ensure Responsible On-farm Treatment of Animals* (Oct. 12, 2012), <http://ir.tyson.com/phoenix.zhtml?c=65476&p=irol-newsArticle&ID=1744858&highlight>.

121. Letter from Heather L. Maples, Senior Special Counsel for the SEC Division of Corporate Finance, to Daniel L. Heard, regarding Tyson shareholder proposal, 1 (Nov. 10, 2009), available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2009/humanesociety111009-14a8.pdf>.

122. Letter from Gregory S. Belliston, Special Counsel for the SEC, to Daniel L. Heard, on behalf of Tyson Foods, 2 (Oct. 22, 2012), available at <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/thehumanesociety102210-14a8.pdf>.

123. *Id.*

an investigation of a farm that supplies Tyson.¹²⁴ One week after it released this footage, HSUS submitted a complaint to the SEC, alleging that Tyson made false statements to shareholders about the living conditions of pigs on their suppliers' farms.¹²⁵

In August 2012, HSUS filed a second shareholder resolution with Tyson after Tyson reported a sixty-one percent decrease in quarterly profits.¹²⁶ In this proposal, HSUS took a more aggressive position than in its previous shareholder proposals.¹²⁷ HSUS claimed that the loss in profits was directly related to customers' preference for gestation-free pork products, and most of Tyson's competitors have agreed to phase out gestation crates.¹²⁸ HSUS demanded, as a shareholder, to know how Tyson planned to make up for this loss of profits.¹²⁹

The same month, HSUS announced that it had purchased shares in four major financial companies that own Tyson stock.¹³⁰ HSUS purchased these shares as an additional way to put financial pressure on Tyson to eliminate gestation crates.¹³¹

In October 2012, Wayne Pacelle, the President and CEO of HSUS, announced that he was vying for a seat on Tyson's board.¹³² That same month, Tyson announced that it would begin to audit its independent farm suppliers to assess animal welfare standards.¹³³ Tyson specifically stated that the creation of its audit

124. *Undercover Investigation Documents Pig Abuse at Tyson Supplier*, THE HUMANE SOC'Y OF THE U.S. (May 8, 2012), http://www.humanesociety.org/news/press_releases/2012/05/wyoming_pig_investigation_050812.html#id=album-142&num=content-2668.

125. *The HSUS Files SEC Complaint Over Tyson Foods' Deceptive Animal Welfare Claims*, THE HUMANE SOC'Y OF THE U.S. (May 17, 2012), http://www.humanesociety.org/news/press_releases/2012/05/tyson_sec_complaint_051712.html.

126. *Following Poor Earnings Reports, Shareholders Request Disclosure from Tyson Foods on How it Will Address Animal Cruelty Concerns*, THE HUMANE SOC'Y OF THE U.S. (Aug. 16, 2012), http://www.humanesociety.org/news/press_releases/2012/08/tyson_foods_shareholder_resolution_081612.html.

127. See Letter from Heather L. Maples, *supra* note 121, at 19 (request by HSUS that company implement alternative slaughter methods); Letter from Gregory S. Belliston, *supra* note 122, at 11 (request by HSUS for a report regarding gestation crates).

128. *Following Poor Earnings Reports*, *supra* note 126.

129. *Id.*

130. Huffington Post, *supra* note 86.

131. P.J. Hutstutter, *Animal Activists Tap Wall Street to Change Farm Practices*, REUTERS (Aug. 30, 2012 5:11 PM), <http://www.reuters.com/article/2012/08/30/usa-wallstreet-farm-activism-idINL2E8JUF920120830>.

132. *HSUS President Wayne Pacelle Announces Candidacy for Board Seat at Tyson Foods, Renowned Investor Carl Icahan to Advise*, THE HUMANE SOC'Y OF THE U.S. (Oct. 2, 2012), http://www.humanesociety.org/news/press_releases/2012/10/Pacelle_Tyson_board_100212.html.

133. *Tyson Foods Announces New Audit Program to Help Ensure*

system is not in response to the actions of HSUS.¹³⁴

In August 2013, HSUS submitted yet another shareholder proposal to Tyson, this time asking Tyson to disclose any financial risks associated with eliminating the use of gestation crates.¹³⁵ In January 2014, HSUS withdrew its proposal because Tyson agreed to ask its suppliers to implement larger cages and more humane methods of slaughter.¹³⁶ Tyson's decision to negotiate with HSUS came directly after NBC News aired undercover footage of abuse on a Tyson contract farm that uses gestation crates.¹³⁷ Tyson has not required the implementation of any requested changes.¹³⁸

At the time of this writing, the campaign against Tyson continues and Tyson has not agreed to mandate the elimination of gestation crates from its supply chain. Although HSUS has not yet convinced Tyson, many other corporations have decided to phase out this practice. Furthermore, the HSUS proposals have been successful as opportunities to educate shareholders on the issue, by presenting information on the conditions in which these sows live. One indication of how influential this campaign has been is the fact that Tyson felt it had to respond to animal welfare concerns and created a new audit system.¹³⁹ Therefore, just because Tyson has not yet agreed to phase out gestation crates, as the proposals requested, does not mean the proposals have not seen some measure of success.

III. LOSING THE BATTLE, BUT WINNING THE WAR

The probability that we may fall in the struggle ought not to deter us from the support of a cause we believe to be just; it shall not deter me.¹⁴⁰

This section proposes that HSUS's shareholder proposal

Responsible On-farm Treatment of Animals, REUTERS (Oct. 12, 2012), available at <http://www.reuters.com/article/2012/10/12/idUS148285+12-Oct-2012+GNW20121012>.

134. *Tyson Foods to Audit*, *supra* note 117.

135. David Knowles, *Tyson Foods shareholders pressure company to eliminate use of 'cruel' pig gestation crates*, NEW YORK DAILY NEWS (Aug. 16, 2013), available at <http://www.nydailynews.com/news/national/tyson-foods-pressured-abandon-pig-gestation-crates-article-1.1429355>.

136. *Proxy Preview 2014*, *supra* note 91, at 37;

137. *Id.* See also Anna Schecter, *Tyson Foods changes pig care policies after NBC shows undercover video*, NBC NEWS (Jan. 10, 2014), http://investigations.nbcnews.com/_news/2014/01/10/22245308-tyson-foods-changes-pig-care-policies-after-nbc-shows-undercover-video.

138. James Andrews, *Smithfield, Tyson Encouraging Transition Away From Gestation Crates*, FOOD SAFETY NEWS (Jan. 10, 2014), <http://www.foodsafetynews.com/2014/01/smithfield-tyson-to-make-distance-from-gestation-crates/#.U0vU2vldWSp>.

139. *Tyson Foods Announces New Audit Program*, *supra* note 120.

140. PRESIDENT ABRAHAM LINCOLN, SPEECH ON THE NATIONAL BANK IN THE HALL OF THE HOUSE OF REPRESENTATIVES (Dec. 20, 1839), available at <http://www.classicreader.com/book/3237/23/>.

strategy against Tyson provides an excellent model for other animal welfare organizations seeking to utilize shareholder proposals. There has been a dramatic decline in the number of animal welfare shareholder proposals submitted in the last several years; this section suggests that animal welfare organizations follow the Humane Society's lead in utilizing shareholder proposals as an essential part of their advocacy strategy. This section will also explore what makes HSUS's strategy successful and suggests other strategies that might be useful for animal welfare organizations. Finally, this section will argue that shareholder proposals are a strategically sound method which animal organizations should utilize far more often.

A. The HSUS Strategy against Tyson Provides a Good Guideline for Other Animal Organizations Seeking to Submit Shareholder Proposals

The HSUS strategy of utilizing shareholder proposals to entice corporations to phase out the use of gestation crates provides a good example for many reasons: (1) HSUS chose a topic ripe for public discussion; (2) it demonstrated to the corporation that there is a financial benefit in eliminating gestation crates; (3) it targeted the largest supplier and gained maximum publicity; and (4) it made shareholder proposals part of a larger overall campaign against gestation crates.

First, it has been essential to the HSUS campaign that it chose an animal welfare topic that was ripe for discussion. At the time of the 2009 Tyson shareholder proposal, six states had already banned the use of gestation crates.¹⁴¹ Significantly, three of those states passed the ban by ballot initiatives,¹⁴² not through the traditional use of legislative bills. This indicates that a

141. The six states to ban the use of gestation crates prior to the August 2009 Tyson shareholder proposal were: Florida, Arizona, Oregon, Colorado, California and Maine. *Timeline, supra*, note 108. Two months after HSUS submitted their shareholder proposal, Michigan banned the use of gestation crates. *Id.* Less than one year later, HSUS negotiated with the Ohio Farm Bureau and Ohio Governor, agreeing that HSUS would indefinitely postpone a planned ballot initiative in exchange for the Ohio government adopting regulations banning the use of gestation crates in the state. *Landmark Ohio Animal Welfare Agreement Among HSUS, Ohioans for Humane Farms, Gov. Strickland, and Leading Livestock Organizations*, HUMANE SOC'Y OF U.S. (June 30, 2010), available at http://www.humanesociety.org/news/press_releases/2010/06/landmark_ohio_agreement_063010.html. Rhode Island became the latest state to ban the practice in June 2012. *Rhode Island Bans Gestation Crates for Pigs and Calves*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/06/21/rhode-island-bans-gestation-crates_n_1616635.html (last updated June 23, 2012).

142. The first two states to ban the use of gestation crates, Florida and Arizona, did so by the passage of ballot initiatives. *Timeline, supra* note 108. California also passed a ban by way of ballot initiative. *Id.*

majority of voters in these states oppose the practice.¹⁴³ The fact that a majority of residents in these states desired a ban on gestation crates was an indication that there was great public concern for this cause. This was, therefore, an ideal time for HSUS to capitalize on this public awareness – before the issue was no longer a topic of concern.

Relatedly, it was essential that HSUS chose a topic that works incrementally toward animal welfare; had HSUS chosen a proposal that sought a more dramatic change, such as a ban against all pork products, the proposal would not have had any success, as most Americans eat animal products.¹⁴⁴ Instead, HSUS campaigned against a practice that most people would agree is cruel, and which people can support without fundamentally changing their eating practices.

The HSUS campaign was also successful because they were able to make a financial argument in favor of abolishing gestation crates. In the 2009 proposal to Tyson, HSUS cited an Iowa State University study finding that it costs producers eleven percent less to breed pigs without confinement in gestation crates.¹⁴⁵ Furthermore, HSUS published its own report, citing various studies that found that group housing for sows is ultimately more profitable than housing in gestation crates.¹⁴⁶ These financial benefits make a corporation more likely to take shareholder campaigns seriously.

The third reason the HSUS campaign was successful was because it chose to target the largest meat distributor in the United States. A proposal against a large corporation receives more media attention, and increased media attention alerts smaller corporations of the campaign and the shareholder

143. A ballot initiative is a form of direct democracy, whereby citizens of a state vote on a particular state constitutional amendment or proposed statute. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 49 (1995). The fact that these three states adopted bans by way of ballot initiative is significant because ballot initiatives are a very direct form of support for the ban. Legislation is generally adopted through the decisions of elected representatives, whereas in a ballot initiative, there is a popular vote on the subject. *Id.* at 55.

144. *In U.S., 5% Consider Themselves Vegetarians*, GALLUP (July 26, 2012), http://www.gallup.com/poll/156215/Consider-Themselves-Vegetarians.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=USA%20-%20Wellbeing (discussing July 2012 poll findings that five percent of Americans consider themselves vegetarian and only two percent of Americans consider themselves vegan).

145. Letter from Gregory L. Belliston, *supra* note 122, at 11.

146. *An HSUS Report: The Economics of Adopting Alternatives to Gestation Crate Confinement of Sows*, HUMANE SOC'Y OF U.S., http://www.humanesociety.org/assets/pdfs/farm/economics_gestation_alternatives.pdf (last accessed Nov. 16, 2012).

proposal.¹⁴⁷ In the campaign against gestation crates, smaller restaurant chains evidently recognized that industry titans were phasing out gestation crates.¹⁴⁸ The smaller corporations, wanting to remain competitive and avoid the cost of including shareholder proposals in their own proxy materials, also began voluntarily phasing out this practice.¹⁴⁹

For example, in 2007, the first corporations began phasing out gestation crates.¹⁵⁰ These first corporations were Smithfield Foods, the largest pork producer in the world; Maple Leaf Foods, the largest pork producer in Canada; and Burger King.¹⁵¹ Between 2007 and 2009, however, this corporate momentum temporarily halted. During this period, the only bans taking place were the bans by the state legislatures, making such extreme confinement illegal.¹⁵² In 2009 and 2010, HSUS began submitting shareholder proposals to Tyson, although only the 2009 proposal ever went to a shareholder vote.¹⁵³ Then, in 2011 and 2012, there was resurgence in large corporations vowing to phase out gestation crates.¹⁵⁴ In a five month period between December 2011 and April 2011, Smithfield Foods, Hormel Foods (the producer of SPAM), McDonald's, Bon Appetite Management Company, Compass Group (the world's largest food service provider), and Wendy's all recommitted to phasing out gestation crates.¹⁵⁵ Shortly thereafter, smaller corporations also committed to phasing out gestation crates, for example: CKE Restaurants (parent corporation of Carl's Jr. and Hardee's); Fresh Enterprises (parent corporation of Baja Fresh and La Salsa Mexican Grill); Canyon's Burger; Kraft Foods; Sonic; Cracker Barrel; Sodexo and Costco.¹⁵⁶

It is likely that shareholder proposals against large corporations, such as HSUS's proposals against Tyson, motivated smaller corporations to agree to phase out gestation crates, to

147. Tkac, *supra* note 44, at 9 (arguing that to strengthen the indirect effects of social interest shareholder proposals upon other corporations, activists should submit proposals to corporations that receive increased media attention).

148. *Timeline, supra* note 108.

149. Tkac, *supra* note 44, at 8–9 (discussing that although social interest shareholder proposals are targeted at a fraction of all corporations, the effect of these proposals is felt by smaller corporations because as their competitors become more socially responsible, competing corporations are forced to become more socially responsible as well, in order to remain competitive and avoid being the target of a future proposal).

150. *Timeline, supra* note 108.

151. *Id.*

152. *Id.*

153. Belliston, *supra* note 122, at 2 (implying that because the 2009 shareholder proposal received so little support, the subsequent proposal was excludable).

154. *Id.*

155. *Id.*

156. *Id.*

avoid being the next target of a costly shareholder proposal. HSUS's decision to target the biggest supplier was wise, as it increased the likelihood that smaller corporations would follow, without HSUS ever having to target those corporations specifically.

HSUS's use of shareholder proposals became so influential that HSUS has begun changing corporate policy without actually having to submit a proposal. For example, in January 2012, HSUS purchased shares in CKE Restaurants, the parent corporation of Hardee's and Carl's Jr.¹⁵⁷ This initial purchase, which allowed HSUS to submit a shareholder proposal the following year, was enough of a threat that a few months later CKE Restaurants preemptively agreed to eliminate gestation crates.¹⁵⁸ HSUS did not need to submit a proposal to make the corporation change its policy, the possibility of the proposal was a great enough threat to encourage voluntary change.

Finally, HSUS's campaign serves as a good example of how animal organizations should incorporate shareholder proposals into the scheme of a larger campaign. Shareholder proposals should be utilized as one of many strategies to improve animal welfare standards.¹⁵⁹ Without the support of a larger campaign, the corporation has little reason to believe that its shareholders and consumers are even aware of the particular issue, let alone that they have a strong opinion one way or the other. Without consumer education, there is no consumer pressure on the corporation to make policy changes. If, however, shareholder activism is used in conjunction with methods such as advertising, undercover investigations, grassroots outreach, and boycotts, a proposal is more likely to be taken seriously because of the increased likelihood that the public is educated on the issue.¹⁶⁰

B. Animal Organizations Would Benefit from Increased Use of Shareholder Proposals to Influence Corporate Policy and Achieve

157. *HSUS Becomes Hardee's and Carl's Jr. Shareholder*, HUMANE SOC'Y OF THE U.S. (Jan. 5, 2012), http://www.humanesociety.org/news/press_releases/2012/01/hsus_becomes_hardees_01052011.html.

158. *Carl's Jr., Hardee's Set Timeline to End Gestation Crate Pig Confinement in Pork Supply Chain*, HUMANE SOC'Y OF THE U.S. (July 5, 2012), http://www.humanesociety.org/news/press_releases/2012/07/carls_jr_hardees_pigs_070612.html.

159. Tkac, *supra* note 44, at 9 ("shareholder activism is a tool to effect social change, a tool that is complementary to other methods such as political action, publicity campaigns, and boycotts. Important issues of the day that a large fraction of the population is concerned about are more likely to be pursued by all methods, including shareholder activism").

160. *Id.* at 3 (arguing that shareholder proposals are an important and complementary tool that advocates should use in conjunction with more traditional advocacy methods, such as educational outreach and publicity campaigns).

Animal Protection

The number of shareholder proposals on animal welfare topics has dramatically decreased since 2010.¹⁶¹ In the 2010 proxy season, thirty-seven animal welfare proposals were submitted.¹⁶² However, in the 2011 and 2012 proxy seasons, the number of animal welfare proposals decreased by approximately fifty percent.¹⁶³ In 2011, corporations received approximately nineteen proposals and in 2012, approximately twenty-one proposals were submitted on this issue.¹⁶⁴ The number of animal welfare proposals declined again in the 2013 and 2014 proxy seasons, when only approximately fifteen proposals were submitted each season.¹⁶⁵

There are a number of possible reasons for a decrease in the number of proposals. One reason may be animal organizations' primary reliance on other methods of advocacy, such as education and the promotion of vegetarianism and veganism.¹⁶⁶ Another explanation is the lack of diversity of organizations submitting the proposals; for example, all of the animal welfare proposals submitted in 2012 have come from only two organizations, HSUS and PETA.¹⁶⁷

Animal welfare organizations should utilize the shareholder proposal process much more frequently. Even if the proposal does not pass in the boardroom, there are many possible benefits from increased utilization of this strategy.¹⁶⁸

One argument in favor of increased utilization of animal welfare proposals is that such proposals are an effective method of creating dialog with a corporation. Corporations that might otherwise refuse to negotiate with advocacy organizations have a large incentive to cooperate because including the proposal in the corporation's proxy materials costs tens of thousands of dollars.¹⁶⁹ Furthermore, it is likely that the proposal will not pass, and the advocacy organization will continue to submit similar proposals¹⁷⁰

161. *Proxy Preview 2012 Report*, *supra* note 65, at 17.

162. *Id.*

163. *Id.*

164. *Id.* at 11.

165. *Proxy Preview 2014*, *supra* note 91, at 6, 16.

166. Tkac, *supra* note 44, at 10 ("The relatively small number of proposals on animal rights, for example, may reflect both a relative lack of widespread support along with a preference among these activists for other methods such as reducing consumer demand for animal products.")

167. *Proxy Preview 2012 Report*, *supra* note 65, at 7.

168. Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25 (2004) ("Whether there is a beneficial change in the law or not, current opportunities in the market for these cases should be sought out and exploited, if only to protect the ground animal advocates have gained in the battle for consumer opinion").

169. Tkac, *supra* note 44, at n.7.

170. It is often the case that advocacy organizations do not ask outright for the corporation to comply with the organization's true goal. Tkac, *supra* note

in subsequent years,¹⁷¹ multiplying the cost to the corporation.

Shareholder proposals are also beneficial because they allow animal welfare organizations to communicate with and educate members of a community that they might not reach through ordinary advocacy efforts. One of the primary goals of an animal welfare organization is to educate the public about the realities of animal cruelty in commercial animal industries.¹⁷² Shareholder

44, at 11 (noting that the strategy of activists is often to ask for less than what they truly aim for, in order to open the door for negotiations and future dialog with the corporations). The fact that advocacy organizations do not ask for what they truly want in their first proposal increases the likelihood that the organizations will submit subsequent shareholder proposals, to incrementally work toward their eventual goal.

171. One example of an animal welfare organization submitting the same proposal several years in a row is demonstrated in PETA's campaign against Hormel Foods. Letter from Jonathan A. Ingram, Deputy Chief Counsel of the Securities and Exchange Commission, to Amy C. Seidel, attorney for Hormel Foods, 2 (Nov. 10, 2011), available at <http://sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/humanesociety111011-14a8.pdf>. In 2010, PETA filed a shareholder proposal with Hormel, asking the corporation to phase out the use of gestation crates in their supply chain. *Id.* PETA's proposal was submitted in the proxy materials and was voted on by shareholders. However, PETA's proposal only garnered 1.83% of the vote. *Id.* at 7. The next year, HSUS tried to submit a proposal, also on the topic of gestation crates. However, Hormel successfully avoided including the proposal by submitting a no-action request to the SEC. *Id.* at 1. The SEC agreed that Hormel was not required to include the proposal because PETA submitted a substantially similar proposal the previous year, and did not gain the requisite three percent support needed for a similar proposal to be submitted the following year. *Id.* at 2.

Nevertheless, in February 2012, a mere three months after the SEC granted Hormel a favorable ruling, Hormel agreed to phase out the use of gestation crates in all company-owned facilities. *Hormel Foods-Maker of SPAM-Announces Plans to Eliminate Gestation Crates*, HUMANE SOC'Y OF THE U.S. (Feb. 2, 2012), http://www.humanesociety.org/news/press_releases/2012/02/hormel_foodsmaker_02022012.html. In fact, Hormel's process of phasing out gestation crates went beyond HSUS's requested action. HSUS's proposal requested that Hormel disclose how many sows live in gestation crates and how Hormel plans to phase out the use of gestation crates. *Id.* Although it is unclear whether Hormel ever disclosed the requested information, they foresaw that HSUS's eventual goal was to eliminate the use of gestation crates, and Hormel voluntarily submitted to this policy change — without HSUS ever explicitly requesting the change. *Id.* Hormel's decision to implement the policy appears to be an attempt to avoid future shareholder disputes on the issue of gestation crates.

172. See e.g., *About MFA*, MERCY FOR ANIMALS <http://mercyforanimals.org/about-mfa.aspx> (last accessed Nov. 16, 2012) (stating that part of MFA's mission is to educate consumers about cruel factory farming practices); *About PETA*, PETA, <http://www.peta.org/about/default.aspx> (last accessed Nov. 14, 2012) (stating in its mission statement that PETA aims to educate the public about animal cruelty); *About Us: Overview*, HUMANE SOC'Y OF THE U.S., <http://www.humanesociety.org/about/overview> (last accessed Nov. 14, 2012) (stating that HSUS's mission to educate the public on the inhumane treatment of animals).

proposals have the ability to educate those members of the corporation who have a direct say in the corporation's activities; therefore, the educational benefit of a proposal alone is invaluable.

The final reason that organizations should increase their use of animal welfare shareholder proposals is that this method of advocacy is relatively inexpensive. After it purchases the requisite number of shares, there is nearly no cost to the organization for submitting a proposal - the corporation bears the bulk of that cost. Once the organization owns and maintains the shares, it may submit many different types of proposals within the one corporation.¹⁷³ In order to qualify to submit a shareholder proposal, the SEC requires shareholders to own at least two percent of the company's stock, or \$2,000 worth of shares, according to the current market value of the corporation's stock. This expense is a pittance compared with animal organizations' expenditures in other areas. For example, HSUS reportedly spent \$15,142,458.00 on advertising and promotions alone in 2010.¹⁷⁴ In the same year, HSUS spent \$503,074.00 on lobbying.¹⁷⁵ Both lobbying and advertising are important methods of advocacy. Yet, the mere \$2,000.00 it would cost to own enough shares to submit shareholder proposals is miniscule in comparison.

V. CONCLUSION

Shareholder proposals are a strategically sound method of advocacy for animal welfare organizations. These proposals should be utilized with greater frequency because they are demonstrably successful in effecting positive change - even if the proposals receive single digit support from the corporation's shareholders. The true battlefield in the fight for animal protection, it seems, is not in the courtroom or the legislature; rather, it is a contest for consumer opinion. Corporations take shareholder proposals as concrete indications of consumer opinion, which many times, makes the corporation willing to implement the organization's request. Corporations take shareholder proposals seriously - animal organizations should too.

173. For example, PETA has utilized its ownership of share in McDonald's to submit numerous shareholder proposals on many different animal welfare issues. 2002 WL 32072764 (S.E.C. No - Action Letter), 1 (shareholder proposal requesting that McDonald's issue a report reviewing the corporation's animal welfare policies with the goal of implementing increased standards for all branches of the franchise); 2006 WL 538783 (S.E.C. No - Action Letter), 1 (shareholder proposal requesting that McDonald's issue a report indicating the progress the corporation has made toward implementing controlled-atmosphere killing on its suppliers' farms, as opposed to the current method of electrical stunning).

174. *Return of Organization Exempt From Income Tax: 2010 Form 990*, HUMANE SOC'Y OF THE U.S., 11, available at <http://www.humanesociety.org/assets/pdfs/financials/2010-form-990.pdf>.

175 (last accessed Nov. 16, 2012). *Id.*

