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# The Shareholder Proposal Rule

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## The Shareholder Proposal Rule

Under Securities and Exchange Commission (SEC) Rule 14a-8, public companies must include shareholder proposals in their proxy materials, provided proposal sponsors comply with the rule’s eligibility and procedural requirements and the proposals do not fall within certain substantive grounds for exclusion. Shareholder proposals generally involve shareholder recommendations regarding corporate governance or environmental and social (E&S) issues raised by a company’s operations. Rule 14a-8, often called the “shareholder proposal rule,” has long been a source of debate. The rule’s supporters tout it as a key tool in the shareholder rights movement and credit shareholder proposals with spurring valuable corporate governance reforms. Rule 14a-8’s critics argue that many proposals seek to advance social and political agendas unrelated to shareholder value, creating costly distractions for corporate management.

The shareholder proposal rule is a component of the federal proxy rules, which require public companies to disclose various information to shareholders when soliciting proxies for shareholder meetings. The SEC has traditionally taken the view that state law allows shareholders to present certain types of proposals for a vote at annual meetings. Shareholder Proposals, 72 Fed. Reg. 43466, 43467 (Aug. 3, 2007). The SEC adopted the shareholder proposal rule in 1942 based on its conclusion that company proxy materials would be materially misleading if they omitted shareholder proposals of which management had notice. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1143–44 (1993). Companies that intend to exclude proposals for non-compliance with Rule 14a-8’s eligibility, procedural, or substantive requirements must notify the SEC and explain the basis for the omission. 17 C.F.R. § 240.14a-8(j)(1) (2025). As a matter of practice, companies file these notifications along with requests for “no-action” letters from SEC staff—i.e., letters stating that SEC staff will not recommend an enforcement action if a company omits a proposal from its proxy materials. While no-action letters are not legally binding on any party, they play a key practical role in determining which proposals proceed to a shareholder vote.

As of this writing, the shareholder proposal rule may be approaching an inflection point. In an October 2025 speech, SEC Chairman Paul Atkins signaled a potential departure from the SEC’s longstanding approach to precatory proposals—i.e., proposals that recommend or request that companies take certain actions, as distinct from proposed bylaw amendments. Paul S. Atkins, Keynote Address at the John L. Weinberg Center for Corporate Governance’s 25<sup>th</sup> Anniversary Gala (Oct. 9, 2025), <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala>. In his speech, Chairman Atkins expressed “high confidence” that SEC staff would grant no-action requests seeking to exclude precatory proposals as improper under Delaware law if such requests are supported by an opinion of counsel. *Id.* Chairman Atkins went on to announce his support for a “fundamental reassessment” of Rule 14a-8, including the rule’s “fundamental premise that shareholders should be able to force companies to solicit for their proposals” at little or no personal expense. *Id.*

Congress is also considering legislation that would reform various aspects of the shareholder proposal regime, including Rule 14a-8 itself, institutional proxy voting, and the proxy advisor industry.

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Under Securities and Exchange Commission (SEC) Rule 14a-8, public companies must include shareholder proposals in their proxy materials, provided proposal sponsors comply with the rule's eligibility and procedural requirements and the proposals do not fall within certain substantive grounds for exclusion.<sup>1</sup> Shareholder proposals generally involve shareholder recommendations regarding corporate governance or environmental and social issues raised by a company's operations.<sup>2</sup> Rule 14a-8, often called the shareholder proposal rule, has long been a source of debate. The rule's supporters tout it as "the epicenter of the shareholder rights movement" and credit shareholder proposals with spurring valuable corporate governance reforms.<sup>3</sup> Rule 14a-8's critics argue that many proposals seek to advance social and political agendas unrelated to shareholder value, creating costly distractions for corporate management.<sup>4</sup>

In 2025, shareholder proposals attracted significant attention from policymakers. Aspects of the proposal ecosystem were the subject of three congressional hearings,<sup>5</sup> an executive order,<sup>6</sup> and state legislation.<sup>7</sup> In October 2025, SEC Chairman Paul Atkins announced changes in SEC staff's understanding of Rule 14a-8 that could lay the groundwork for substantial narrowing of the rule.<sup>8</sup> The SEC's regulatory flexibility agenda indicates that amendments to the rule may be forthcoming in the spring of 2026.<sup>9</sup>

This report is a primer on the shareholder proposal rule. It is divided into five parts. First, the report outlines the history of the rule. Second, the report discusses the SEC's no-action process, whereby SEC staff provides its views as to whether companies may exclude specific shareholder proposals from their proxy materials because of a sponsor's non-compliance with Rule 14a-8's eligibility, procedural, or substantive requirements. The third section of the report reviews the rule's eligibility and procedural requirements, while the fourth section examines its 13 substantive exclusions. The final section of the report discusses issues for Congress, including the primary justifications for and criticisms of Rule 14a-8 and proposals to reform the shareholder proposal regime.

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<sup>1</sup> 17 C.F.R. § 240.14a-8 (2025).

<sup>2</sup> See *infra* "Governance Proposals" and "Environmental and Social Proposals."

<sup>3</sup> J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENVER L. REV. ONLINE 151, 151 (2016).

<sup>4</sup> Lawrence Cunningham, *Restore Corporate Discipline by Reining in Shareholder Proposals*, BLOOMBERG LAW (Oct. 27, 2025), <https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/restore-corporate-discipline-by-reining-in-shareholder-proposals>.

<sup>5</sup> *Proxy Power and Proposal Abuse: Reforming Rule 14a-8 to Protect Shareholder Value*, Hearing Before the H. Comm. on Fin. Servs., 119<sup>th</sup> Cong. (2025); *The Proxy Advisor Duopoly's Anticompetitive Conduct*, Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Admin. State, Regul. Reform & Antitrust, 119<sup>th</sup> Cong. (2025); *Exposing the Proxy Advisory Cartel: How ISS and Glass Lewis Influence Markets*, Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Cap. Mkts., 119<sup>th</sup> Cong. (2025).

<sup>6</sup> Exec. Order 14,366, 90 Fed. Reg. 58503 (Dec. 11, 2025) [hereinafter E.O. 14366].

<sup>7</sup> S.B. 2337, 89<sup>th</sup> Leg., Reg. Sess. (Tex. 2025).

<sup>8</sup> Paul S. Atkins, Keynote Address at the John L. Weinberg Center for Corporate Governance's 25<sup>th</sup> Anniversary Gala (Oct. 9, 2025) [hereinafter Atkins Speech], <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala> <https://perma.cc/X6LX-Y9BL>.

<sup>9</sup> *Shareholder Proposal Modernization*, OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET (2025) [hereinafter *SEC Regulatory Flexibility Agenda*], <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=3235-AN47> <https://perma.cc/78DE-NMY6>.

# History of the Shareholder Proposal Rule

## Shareholder Voting and Proxy Regulation

The history of the shareholder proposal rule begins with the advent of federal proxy regulation in the 1930s. Proxy regulation, like many other aspects of securities law, was a response to the separation of ownership and control of large public corporations.<sup>10</sup> While shareholders are often described as “owning” corporations,<sup>11</sup> they do not manage them.<sup>12</sup> Rather, state corporate law vests managerial authority in boards of directors,<sup>13</sup> which delegate day-to-day decision-making responsibilities to corporate officers.<sup>14</sup> The resulting centralization of managerial authority generates well-recognized benefits.<sup>15</sup> However, the separation of corporate ownership and control also produces agency costs—losses that result from divergences between the interests of shareholders and those of directors and officers.<sup>16</sup> Because of such divergences, corporate leaders may self-deal,<sup>17</sup> engage in inefficient “empire building,”<sup>18</sup> retain unnecessary levels of cash,<sup>19</sup> seek high levels of performance-insensitive compensation,<sup>20</sup> resist takeover offers that would benefit shareholders,<sup>21</sup> exhibit greater risk aversion than diversified shareholders would prefer,<sup>22</sup> and expend less effort than a sole owner.<sup>23</sup>

Much of corporate and securities law can be understood as an attempt to balance the benefits of centralized managerial authority against the costs that result from delegating corporate control to agents.<sup>24</sup> Shareholder voting rights represent one governance mechanism designed to mitigate agency costs.<sup>25</sup> A combination of state law, federal law, and stock exchange rules allow

<sup>10</sup> See generally ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (the seminal work on the separation of ownership and control of large public companies).

<sup>11</sup> E.g., *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998). As a matter of corporate law theory, the proposition that shareholders “own” corporations is controversial. Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 899 (2010).

<sup>12</sup> *Orman v. Cullman*, 794 A.2d 5, 19 (Del. Ch. 2002) (“A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.”) (quotation marks and citation omitted).

<sup>13</sup> DEL. CODE ANN. tit. 8, § 141(a) (2025); MODEL BUS. CORP. ACT § 8.01(b) (2025).

<sup>14</sup> See *Grimes v. Donald*, No. CIV. A. 13358, 1995 WL 54441, at \*8 (Del. Ch. Jan. 11, 1995), *aff’d*, 673 A.2d 1207 (Del. 1996).

<sup>15</sup> Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

<sup>16</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>17</sup> Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903 (2011).

<sup>18</sup> Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1915 (2013).

<sup>19</sup> *Id.* at 1914.

<sup>20</sup> LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2006).

<sup>21</sup> Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

<sup>22</sup> John C. Coffee, Jr., *Shareholders versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 19 (1986).

<sup>23</sup> Jensen & Meckling, *supra* note 16, at 312–13.

<sup>24</sup> Rock, *supra* note 18, at 1911 (describing the separation of ownership and control as the “master problem” of U.S. corporate law).

<sup>25</sup> Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395 (1983). As discussed (continued...)

shareholders of public companies to vote on certain matters, such as director elections,<sup>26</sup> charter amendments,<sup>27</sup> mergers,<sup>28</sup> and executive compensation plans.<sup>29</sup> As relevant here, the SEC has also traditionally interpreted state law as granting shareholders the right to present certain types of proposals for a vote at annual shareholder meetings.<sup>30</sup>

The mechanics of shareholder voting have evolved over the history of corporate law. At common law, shareholders could vote only by attending an annual meeting in person, unless a corporation's organizing documents provided otherwise.<sup>31</sup> While some corporate charters allowed shareholders to delegate voting authority to a proxy who attended an annual meeting, 18<sup>th</sup> and 19<sup>th</sup>-century courts were close to unanimous in rejecting the argument that shareholders could vote by proxy in the absence of such a provision or statutory authorization.<sup>32</sup>

In the late 19<sup>th</sup> century, the emergence of large corporations with many geographically dispersed shareholders rendered in-person voting problematic, as few shareholders had the incentive and ability to travel to annual meetings.<sup>33</sup> State legislatures responded by enshrining a right to proxy voting in statute. Between 1870 and 1900, nearly all states amended their corporate laws to give shareholders the right to vote by proxy.<sup>34</sup>

Proxy voting has also proved useful to corporations, which solicit proxies to meet state law quorum requirements for annual and special meetings.<sup>35</sup> To ensure those requirements are met, public companies ordinarily distribute to shareholders a form of proxy (often called a proxy card or simply a proxy) by which shareholders can authorize a corporate official to vote their shares as instructed.<sup>36</sup> In contested votes, shareholders may receive proxies from both incumbent management and a dissident shareholder running an alternative slate of director candidates or opposing a management proposal.<sup>37</sup>

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below, shareholder voting—particularly in the context of shareholder proposals—may also serve other functions. *See infra* “Justifications for and Criticisms of the Shareholder Proposal Rule.”

<sup>26</sup> DEL. CODE ANN. tit. 8, § 211(b); MODEL BUS. CORP. ACT § 8.03(c).

<sup>27</sup> DEL. CODE ANN. tit. 8, § 242(b); MODEL BUS. CORP. ACT § 10.03(b).

<sup>28</sup> DEL. CODE ANN. tit. 8, § 251(c); MODEL BUS. CORP. ACT § 11.04(b).

<sup>29</sup> 15 U.S.C. § 78n-1; NYSE LISTED COMPANY MANUAL § 303A.08 (2025); NASDAQ STOCK MKT. LLC RULES § 5635(c) (2025).

<sup>30</sup> *See* Shareholder Proposals, 72 Fed. Reg. 43466, 43467 (Aug. 3, 2007) (codified at 17 C.F.R. pt. 240).

<sup>31</sup> Leonard H. Axe, *Corporate Proxies*, 41 MICH. L. REV. 38, 38–40 (1942).

<sup>32</sup> Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. CAL. L. REV. 881, 887–89 (2023).

<sup>33</sup> Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1134 (1993).

<sup>34</sup> Haan, *supra* note 32, at 902–04.

<sup>35</sup> Fisch, *supra* note 33, at 1135. The New York Stock Exchange and Nasdaq also require listed companies to solicit proxies for all shareholder meetings. NYSE LISTED COMPANY MANUAL § 402.04(A); NASDAQ STOCK MKT. LLC RULES § 5620(b).

<sup>36</sup> Fisch, *supra* note 33, at 1135.

<sup>37</sup> *Id.* at 1135 n.25.

By the early 20<sup>th</sup> century, the proxy solicitation process had supplanted the shareholder meeting as the key forum for shareholder voting.<sup>38</sup> The proxy system has thus been described as the “main instrument—the beating heart—of corporate power.”<sup>39</sup>

In the wake of the 1929 stock market crash, New Deal reformers sought to regulate a range of practices in securities markets, including the proxy solicitation process.<sup>40</sup> Before the adoption of the federal proxy rules, corporations frequently sent shareholders a proxy card giving management sweeping discretionary authorities, sometimes extending for several years.<sup>41</sup> Often, proxies authorized a corporate official to vote shares in director elections (which were usually uncontested) and take other actions considered “desirable.”<sup>42</sup> Shareholders were invited to sign and return proxies, but sometimes were not informed of all the items that would be presented for voting at a shareholder meeting.<sup>43</sup> These practices led to concerns that the proxy system had become “a self-perpetuation and ... self-approval device” for incumbent managers.<sup>44</sup>

Congress responded to these concerns by enacting Section 14(a) of the Securities Exchange Act of 1934 (the Exchange Act), which made it unlawful to “solicit” proxies in contravention of rules that the SEC may prescribe “as necessary or appropriate in the public interest or for the protection of investors.”<sup>45</sup> Using this authority, the SEC adopted the first proxy rules in 1935 and has revised them extensively over time.<sup>46</sup> Today, the proxy rules apply to companies with securities registered under Section 12 of the Exchange Act—i.e., companies that are listed on a national securities exchange or that exceed certain asset and shareholder thresholds.<sup>47</sup>

The proxy rules are principally focused on ensuring that solicited shareholders receive adequate disclosures.<sup>48</sup> To that end, the rules prohibit soliciting parties from transmitting a proxy card to shareholders unless the card is accompanied or preceded by a proxy statement containing specified information.<sup>49</sup> In addition to this core disclosure mandate, the proxy rules include

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<sup>38</sup> Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 227 (1940) (“It is generally recognized that in the larger corporations the stockholders’ meeting is now only a necessary formality; that stockholder expression can only be had by the statutory device of proxy. As a result, within limitations, realistically the solicitation of proxies is today the stockholders’ meeting.”).

<sup>39</sup> Haan, *supra* note 32, at 888.

<sup>40</sup> JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 1–240 (3d ed. 2003).

<sup>41</sup> Frank D. Emerson & Franklin C. Latham, *SEC Proxy Regulation: Steps Toward More Effective Stockholder Participation*, 59 YALE L.J. 635, 635 (1950).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 635–36.

<sup>44</sup> Bernstein & Fischer, *supra* note 38, at 227.

<sup>45</sup> 15 U.S.C. § 78n(a)(1). A Senate committee report on the Exchange Act stated: “Too often proxies are solicited without explanation to the stockholder of the real nature of the question for which authority to cast his vote is sought. It is contemplated that the rules and regulations promulgated by the Commission [under Section 14] will protect investors from promiscuous solicitation of their proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporate officers; and, on the other hand, by unscrupulous corporate officers seeking to retain control of the management by concealing and distorting facts.” S. Rep. No. 1455, 73d Cong. 2d Sess. 77 (1934).

<sup>46</sup> 4 LOUIS LOSS ET AL., *SECURITIES REGULATION* 425–34 (4<sup>th</sup> ed. 2009) (cataloguing the evolution of the proxy rules).

<sup>47</sup> 15 U.S.C. §§ 78l(b), 78l(g), 78n(a)(1).

<sup>48</sup> *Bus. Roundtable v. SEC*, 905 F.2d 406, 410–12 (D.C. Cir. 1990) (explaining that proxy regulation “bears almost exclusively on disclosure” while declining to say that disclosure is “necessarily the sole subject” of Section 14 of the Exchange Act).

<sup>49</sup> 17 C.F.R. § 240.14a-4(f).

requirements concerning the content of proxy cards (Rule 14a-4),<sup>50</sup> an anti-fraud provision prohibiting false or misleading statements and omissions in proxy solicitation materials (Rule 14a-9),<sup>51</sup> and a provision governing the circumstances in which companies must include shareholder proposals in their proxy materials, which is often called the shareholder proposal rule (Rule 14a-8).<sup>52</sup>

### State and Federal Regulation of Corporate Governance

Corporate governance is shaped by both state and federal law. With limited exceptions, corporations are chartered at the state level. Under a choice-of-law rule known as the “internal affairs doctrine,” matters that are “peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders” are resolved based on the law of the state in which the corporation is organized. *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982). Thus, issues such as the fiduciary duties of directors and the basic allocation of powers between boards and shareholders are governed by state law. GEVURTZ, *infra* note 354, at 181–248, 279–409. Delaware has long been the most popular chartering state for large public companies. As of 2024, roughly 65% of the S&P 500 had Delaware charters. Amy Simmerman et al., *Delaware’s Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOV. (May 8, 2024), <https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations> <https://perma.cc/324C-YFKH>. Accordingly, in discussing state corporate law, this report focuses primarily on Delaware law.

Federal securities law also exerts a significant influence on the governance of publicly traded companies. It is often said that, while state corporate law governs substantive issues of corporate governance, federal securities law is primarily concerned with ensuring that public companies make adequate disclosures to investors. James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 134–35 (2017). Judicial decisions interpreting the reach of the federal securities laws reflect this distinction. *E.g.*, *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977); *Bus. Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990). Disclosure, however, can shape corporate governance. A requirement to disclose related-party transactions, for example, may discourage problematic self-dealing. 17 C.F.R. § 229.404 (2025). The substance/disclosure distinction between corporate law and securities law is also not entirely accurate, as the governance of exchange-listed companies has become increasingly federalized over the course of the 21<sup>st</sup> century. MARC I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* 191–224 (2018). For example, federal law now mandates that certain board committees of listed companies consist entirely of directors who are independent from management. 15 U.S.C. §§ 78j-1(m), 78j-3(a).

The federal proxy rules blend substantive and disclosure-based regulation. While the proxy rules are primarily focused on disclosure, *Bus. Roundtable*, 905 F.2d at 410–12, they include some substantive rules—for example, a rule against “bundling” separate proposals and a requirement that companies use universal proxy cards in contested director elections. 17 C.F.R. §§ 240.14a-4(a)(3), 240.14a-19(e). The shareholder proposal rule (a component of the proxy rules) defies easy categorization under the substance/disclosure dichotomy. As discussed below, the shareholder proposal rule can be characterized as a disclosure-based requirement that facilitates shareholders’ ability to exercise their substantive state law rights. At the same time, the rule includes eligibility requirements that are not rooted in state law, along with a set of substantive exclusions that has come to resemble a type of federal common law. *Med. Comm. for Human Rts. v. SEC*, 432 F.2d 659, 677 (D.C. Cir. 1970), *vacated as moot* by 404 U.S. 403 (1972). Irrespective of whether the shareholder proposal rule is best categorized as substantive or disclosure-based, the rule now plays a central role in U.S. corporate governance.

## The Early History of the Shareholder Proposal Rule

Like other elements of the federal proxy rules, the shareholder proposal rule represents an attempt to “replicate the old-style annual meeting that was personally attended by shareholders.”<sup>53</sup> The SEC adopted the predecessor to Rule 14a-8 based on its view that state law afforded shareholders

<sup>50</sup> *Id.* § 240.14a-4.

<sup>51</sup> *Id.* § 240.14a-9.

<sup>52</sup> *Id.* § 240.14a-8.

<sup>53</sup> Fisch, *supra* note 33, at 1142.

the right to present certain types of proposals for a vote at annual meetings.<sup>54</sup> With widespread proxy voting, however, such proposals had little chance of passing unless corporations included the proposals in their proxy materials. Proposal sponsors thus asked corporations to do so.<sup>55</sup> Before the SEC enacted the shareholder proposal rule, management’s legal responsibilities in these circumstances were unclear. While the proxy regulations prohibited *misleading* omissions in proxy materials, they did not explicitly address whether it was misleading for corporations to fail to disclose shareholder proposals that were unrelated to the matters for which management sought proxy authority.<sup>56</sup>

In several cases in the late 1930s, the SEC took the position that it was materially misleading for a company to omit from its proxy materials issues that it knew would be raised at a shareholder meeting.<sup>57</sup> The agency ultimately codified that view in 1940.<sup>58</sup> Two years later, the SEC adopted Rule X-14-7, Rule 14a-8’s predecessor, which required corporations to include in their proxy materials any shareholder proposal of which they had reasonable notice as long as the proposal involved a “proper subject” for shareholder action.<sup>59</sup>

In 1945, the SEC’s Division of Corporation Finance advised in guidance that whether an issue was a “proper subject” for shareholder action depended on the law of the state in which a corporation was organized.<sup>60</sup> Ultimately, the SEC would conclude that shareholder proposals purporting to mandate that companies take certain actions are generally impermissible under state law.<sup>61</sup> As a result, with the exception of proposed bylaw amendments (which are discussed in greater detail below), proper shareholder proposals typically must consist of nonbinding recommendations or requests.<sup>62</sup> These types of resolutions are called “precatory” proposals and constitute the overwhelming majority of shareholder proposals submitted in a typical year.<sup>63</sup>

In 1947, the SEC required companies that intended to exclude a shareholder proposal from their proxy materials to file the reasons for the exclusion with the SEC.<sup>64</sup> Facing this requirement, companies began to inquire into whether SEC staff would recommend an enforcement action if the companies omitted certain proposals.<sup>65</sup> These “no-action” requests—now a core part of the shareholder proposal regime—are discussed in greater detail below.<sup>66</sup> Although SEC staff’s responses to no-action requests are not binding on any party, the no-action process has led the

<sup>54</sup> See Shareholder Proposals, 72 Fed. Reg. 43466, 43467 (Aug. 3, 2007).

<sup>55</sup> Fisch, *supra* note 33, at 1143.

<sup>56</sup> *Id.* at 1143–44.

<sup>57</sup> Bernstein & Fischer, *supra* note 38, at 233–34.

<sup>58</sup> Amendment of Regulation X-14, 5 Fed. Reg. 174, 175 (Jan. 12, 1940) (codified at 17 C.F.R. pt. 240).

<sup>59</sup> Solicitation of Proxies Under the Act, 7 Fed. Reg. 10655, 10656 (Dec. 22, 1942) (codified at 17 C.F.R. pt. 240).

<sup>60</sup> Proposals as Proper Subject for Action, Exchange Act Release No. 34-3638, 1945 WL 27415 at \*2 (Jan. 3, 1945) [hereinafter 1945 Guidance].

<sup>61</sup> Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-12999, 1976 WL 160347 at \*7 (Nov. 22, 1976) [hereinafter 1976 Amendments].

<sup>62</sup> 17 C.F.R. § 240.14a-8(i)(1) note.

<sup>63</sup> *SEC Chair Highlights Paths for Companies to Exclude Shareholder Proposals*, SULLIVAN & CROMWELL LLP (Oct. 14, 2025) [hereinafter *S&C Memo*], <https://www.sullcrom.com/insights/memo/2025/October/SEC-Chair-Highlights-Paths-Companies-Exclude-Shareholder-Proposals> <https://perma.cc/7EPR-9JE6>.

<sup>64</sup> General Rules and Regulations, 12 Fed. Reg. 8768, 8770 (Dec. 24, 1947) (codified at 17 C.F.R. § 240.14a-8). The 1947 amendments to the shareholder proposal rule also clarified that the rule does not apply to director elections. *Id.*

<sup>65</sup> Courtney C. Haseley & Elizabeth A. Ising, *The Shareholder Proposal Process*, in PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 12.02 (Amy L. Goodman et al. eds., 2022).

<sup>66</sup> See *infra* “The SEC No-Action Process.”

SEC to assume a key practical role in determining which proposals ultimately proceed to a shareholder vote.<sup>67</sup>

Also in 1947, the U.S. Court of Appeals for the Third Circuit (Third Circuit) issued a significant decision in Rule 14a-8 jurisprudence.<sup>68</sup> In *SEC v. Transamerica Corp.*, the Third Circuit affirmed the SEC’s authority to issue the shareholder proposal rule.<sup>69</sup> The court also held that a corporation was required to include certain proposals in its proxy materials notwithstanding a corporate bylaw that effectively gave management the authority to decide whether to submit the proposals for a shareholder vote.<sup>70</sup> This aspect of *Transamerica* may have implications for current debates over the extent to which corporations can adopt limits on shareholders’ proposal rights beyond the restrictions in Rule 14a-8—a topic that is discussed later in this report.<sup>71</sup>

Over the following decades, the SEC added several substantive exclusions to the shareholder proposal rule. In 1948, the SEC amended the rule to allow companies to exclude from their proxy materials proposals submitted primarily to redress personal grievances and proposals submitted at the previous annual meeting that received less than 3% of votes cast.<sup>72</sup> In 1952, the agency adopted an exclusion for proposals submitted “primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.”<sup>73</sup> 1954 amendments included an exclusion for proposals relating to a company’s “ordinary business operations,” which would later become one of the rule’s most significant exclusions.<sup>74</sup> In 1967, the SEC allowed companies to omit proposals that conflicted with a management proposal.<sup>75</sup>

## Social Policy Proposals in the 1960s and 1970s

The initial decades of the shareholder proposal rule’s history were dominated by proposals concerning corporate governance matters—for example, cumulative voting, executive compensation, and auditor approval.<sup>76</sup> In the late 1960s and 1970s, however, shareholders increasingly utilized the rule to submit proposals that implicated broader social issues,<sup>77</sup> such as environmental pollution, labor relations, and racial and gender equality.<sup>78</sup>

<sup>67</sup> DENNIS R. HONABACH & MARK A. SARGENT, PROXY RULES HANDBOOK § 5:36 (2025).

<sup>68</sup> *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947).

<sup>69</sup> *Id.* at 518.

<sup>70</sup> *Id.*

<sup>71</sup> See *infra* “Private Ordering.”

<sup>72</sup> Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-4185, 1948 WL 28695, at \*3 (Nov. 5, 1948).

<sup>73</sup> Amendment of Proxy Rules, Exchange Act Release No. 34-4775, Amendment of Proxy Rules, 1952 WL 5254 at \*8 (Dec. 11, 1952) [hereinafter 1952 Amendments].

<sup>74</sup> Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-4979, 1954 WL 5772, at \*4 (Jan. 6, 1954) [hereinafter 1954 Amendments]. The 1954 amendments also codified the principle that state law determines whether a proposal represents a “proper subject” for shareholder action and made the exclusion for resubmitted proposals more restrictive. *Id.*

<sup>75</sup> Adoption of Amendments to Proxy Rules and Information Rules, Exchange Act Release No. 34-8206, 1967 WL 88215, at \*9 (Dec. 14, 1967).

<sup>76</sup> Sean J. Griffith, *Corporate Speech and Corporate Purpose: A Theory of Corporate First Amendment Rights*, 5 J. FREE SPEECH L. 441, 455 & n.52 (2024).

<sup>77</sup> Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1083–84 (2015).

<sup>78</sup> Griffith, *supra* note 76, at 457.

During the previous decades, the SEC had attempted to limit such proposals. In 1945 guidance, the agency's Division of Corporation Finance took the position that corporations could exclude "proposals which deal with general political, social or economic matters" because such matters were not proper subjects for shareholder action.<sup>79</sup> SEC staff issued this guidance in response to a corporation's inquiry regarding the propriety of certain proposals that the corporation had no apparent power to implement. The proposals in question requested a federal income tax exemption for dividends, revisions to the enforcement of the antitrust laws, and the enactment of federal legislation concerning workers, farmers, and investors.<sup>80</sup> The 1945 guidance concluded that those proposals could be excluded as improper subjects for shareholder action because the shareholder proposal rule was not intended "to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature," as "[o]ther forums exist for the presentation of such views."<sup>81</sup>

Several years later, a case involving Greyhound Bus Company raised a related but different question.<sup>82</sup> A shareholder had submitted to Greyhound a proposal recommending that the company consider ending its policy of racially segregated seating in the southern United States.<sup>83</sup> Thus, unlike the proposals that prompted the 1945 guidance, the proposal to Greyhound concerned the company's conduct. In the words of one commentator, the Greyhound proposal involved "a mixed question of corporate policy and social policy," as opposed to a question of social policy only.<sup>84</sup> In the eyes of SEC staff, however, this distinction did not amount to a legal difference; the Division of Corporation Finance concluded that the proposal was not a proper subject for shareholder action under the 1945 guidance.<sup>85</sup> The following year, the SEC codified an exclusion for proposals submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."<sup>86</sup>

While these measures reflected the SEC's skeptical view of social policy proposals, the viability of such proposals was not tested in earnest until a wave of activist campaigns in the late 1960s and 1970s. In 1970, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) was drawn into this debate in *Medical Committee for Human Rights v. SEC*.<sup>87</sup> The case involved a proposal requesting that Dow Chemical Company stop manufacturing napalm, which was being used as a weapon in the Vietnam War.<sup>88</sup> The company argued that the proposal fell within Rule 14a-8's exclusions for proposals involving "ordinary business operations" (adopted in 1954) and proposals submitted primarily for the purpose of promoting political or social causes.<sup>89</sup> SEC staff granted the company no-action relief, which the SEC later affirmed.<sup>90</sup> Neither SEC staff nor the SEC, however, identified the basis on which the proposal was excludable or explained the

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<sup>79</sup> 1945 Guidance, *supra* note 60, at \*1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at \*2.

<sup>82</sup> *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

<sup>83</sup> *Id.* at 680.

<sup>84</sup> Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 442 (1971).

<sup>85</sup> *Peck*, 97 F. Supp. at 680. A federal district court rejected a lawsuit seeking to enjoin Greyhound from soliciting proxies without including the proposal in its proxy materials. *Id.* at 681.

<sup>86</sup> 1952 Amendments, *supra* note 73, at \*8.

<sup>87</sup> 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot by* 404 U.S. 403 (1972).

<sup>88</sup> *Id.* at 663.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

reasoning behind that conclusion.<sup>91</sup> Unsatisfied, the D.C. Circuit remanded the case to the SEC and directed the agency to detail its reasoning.<sup>92</sup>

While the D.C. Circuit did not decide the merits of the dispute—and the Supreme Court later vacated its decision on mootness grounds—dicta from the opinion evinced a more favorable view of social policy proposals than reflected in SEC practice at the time. In particular, the D.C. Circuit cast doubt on Dow Chemical’s effort to advance broad interpretations of both the ordinary business and social policy exclusions. That effort, the D.C. Circuit worried, threatened to create a regime in which “practically any” proposal could be excluded as either too specific (thereby triggering the ordinary business exclusion) or too general (thereby triggering the social policy exclusion).<sup>93</sup> The court went on to express skepticism that either exclusion applied to the proposal in question.<sup>94</sup> The D.C. Circuit’s discussion of the social policy exclusion was especially pointed, suggesting that the exclusion may contravene Section 14(a) of the Exchange Act and its “philosophy of corporate democracy” if read to encompass the proposal.<sup>95</sup>

The same year that the D.C. Circuit issued the *Medical Committee* decision, a group of activists announced a widely publicized effort to promote several proposals submitted to General Motors (GM).<sup>96</sup> That effort—which came to be known as “Campaign GM”—involved nine proposals raising various environmental and social issues concerning GM’s governance and business operations.<sup>97</sup> The SEC concluded that GM could exclude seven of the proposals, paving the way for two proposals to proceed to a shareholder vote:

- a proposed bylaw amendment that would have expanded GM’s board by three directors (Campaign GM announced that, if this amendment passed, it intended to nominate for the new seats a former consumer affairs advisor to President Lyndon Johnson, an African-American civil rights leader, and a professor of environmental biomedicine); and
- a proposal to create a “Shareholders Committee for Corporate Responsibility” consisting of representatives of various interests, which would submit a report to shareholders concerning GM’s past and present efforts regarding air pollution, vehicle safety, and the social welfare of the nation, among other topics.<sup>98</sup>

While the proposals received less than 3% support, Campaign GM’s leaders declared the project a success, contending that it represented “the beginnings of a great national debate on the issues of corporate responsibility.”<sup>99</sup> Within months of the vote, GM also named its first African-American director and created board committees to supervise the company’s environmental and social efforts.<sup>100</sup>

Following these developments, the SEC changed its approach to social policy proposals. In 1972, the agency amended the social policy exclusion.<sup>101</sup> Whereas the previous version of that exclusion

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 682.

<sup>93</sup> *Id.* at 679.

<sup>94</sup> *Id.* at 679–81.

<sup>95</sup> *Id.* at 681.

<sup>96</sup> Schwartz, *supra* note 84, at 425.

<sup>97</sup> *Id.* at 534–37.

<sup>98</sup> *Id.* at 424–25.

<sup>99</sup> *Id.* at 430.

<sup>100</sup> Wells, *supra* note 77, at 1084.

<sup>101</sup> Solicitations of Proxies, Exchange Act Release No. 34-9784, 1972 WL 125400, at \*4 (Sept. 22, 1972) [hereinafter 1972 Amendments].

was keyed to a proposal’s “purpose” (suggesting a subjective inquiry), the amended exclusion applied to proposals

that action be taken *with respect to any matter*, including a general economic, political, racial, religious, social, or similar cause, *that is not significantly related to the business of the issuer or is not within the control of the issuer*.<sup>102</sup>

The 1972 amendments thus reframed the exclusion around a proposal’s relevance to a company’s operations. Under the amended exclusion, a company could not omit proposals implicating social policy issues if the proposals were “significantly related” to its business and involved matters within the company’s control.<sup>103</sup>

In 1976, the SEC issued guidance regarding the ordinary business exclusion that likewise reflected a more favorable stance toward social policy proposals.<sup>104</sup> The guidance explained that proposals with “significant policy, economic or other implications” generally would not fall within the ordinary business exclusion.<sup>105</sup> As a result of this change, by 1976, the SEC’s posture toward social policy proposals was the “diametric opposite” of its approach at the start of the decade.<sup>106</sup> While the pre-1972 version of Rule 14a-8 permitted companies to exclude proposals motivated by general social policy concerns, the SEC’s 1976 guidance allowed proposals to avoid the ordinary business exclusion precisely because they involved such concerns.<sup>107</sup> Perhaps unsurprisingly, the 1970s witnessed a surge in proposals involving environmental and social issues.<sup>108</sup>

## The 1980s and 1990s: Modest Legal Evolution, Transformative Market Changes

In the 1980s and 1990s, the shareholder proposal regime experienced incremental legal changes. While amendments to Rule 14a-8 during that period ultimately proved relatively modest, the SEC on multiple occasions considered more sweeping revisions, some of which would have significantly reduced the agency’s participation in the proposal process.<sup>109</sup> The most controversial regulatory development of that era involved a 1992 no-action letter that likewise attempted to minimize SEC staff’s role as informal arbiter of proposal disputes.<sup>110</sup> That effort proved short-lived, however, as the SEC reversed the policy established by the 1992 letter in 1998.<sup>111</sup>

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> *Id.*

<sup>104</sup> 1976 Amendments, *supra* note 61, at \*11. In 1976, the SEC also adopted new exclusions for proposals that would, if implemented, cause a company to violate state, federal, or foreign law; proposals that violate the proxy rules; proposals that have been rendered moot; and proposals relating to specific amounts of dividends. *Id.* at \*18.

<sup>105</sup> *Id.* at \*11. As discussed below, the SEC would later conclude that the ordinary business exclusion allows companies to exclude proposals that seek to engage in “micromanagement” even if such proposals involve significant policy issues. *See infra* “Ordinary Business.”

<sup>106</sup> Griffith, *supra* note 76, at 459.

<sup>107</sup> *Id.*

<sup>108</sup> Susan W. Liebler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 431 (1984). Despite this surge, governance proposals continued to predominate. Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, in INSTITUTIONAL INVESTOR ACTIVISM: HEDGE FUNDS AND PRIVATE EQUITY, ECONOMICS AND REGULATION 39, 41 (William W. Bratton & Joseph A. McCahery eds., 2015).

<sup>109</sup> *See infra* “1982 Proposed Amendments and 1983 Final Amendments” & “From *Cracker Barrel* to the 1998 Amendments.”

<sup>110</sup> *See infra* “From *Cracker Barrel* to the 1998 Amendments.”

<sup>111</sup> *Id.*

Alongside these legal changes, the 1980s and 1990s witnessed financial market trends with profound implications for shareholder proposals and corporate governance more generally: the growth and increased engagement of institutional investors.<sup>112</sup>

## 1982 Proposed Amendments and 1983 Final Amendments

In the early 1980s, the SEC conducted a fundamental reexamination of the shareholder proposal rule. In 1982, the agency invited public comment on three alternatives to the existing proposal regime, in addition to the threshold issue of whether shareholders should continue to have access to company proxy statements for the purpose of disseminating proposals.<sup>113</sup>

Under the first alternative, the SEC proposed retaining the basic structure of the shareholder proposal rule with modest additional restrictions, including minimum ownership and holding-period requirements for proposal proponents.<sup>114</sup> The second and third alternatives involved broader changes. Under the second alternative, companies would have been permitted to adopt their own proposal procedures, subject to shareholder approval and certain minimum requirements prescribed by the SEC.<sup>115</sup> In this system, SEC staff generally would not have been involved in determining whether specific proposals were excludable. Rather, disagreements would have been resolved pursuant to individual company plans and, if necessary, the courts.<sup>116</sup> The third alternative would have significantly broadened shareholder access to company proxy statements by eliminating 11 of Rule 14a-8's 13 exclusions, retaining only the exclusions for proposals that are improper under state law and proposals involving director elections.<sup>117</sup> Under this framework, the number of proposals a company would have been required to include in its proxy materials would have been capped by a numerical formula based on the size of its shareholder base.<sup>118</sup> SEC staff would have no longer adjudicated no-action requests; instead, courts would have resolved any disputes involving the remaining grounds for exclusion.<sup>119</sup>

Comments on the proposals reflected “extensive support” for continued shareholder access to company proxy statements and SEC, as opposed to judicial, administration of the proposal process.<sup>120</sup> A “substantial majority” of commenters favored the first alternative or the retention of existing rule with no changes.<sup>121</sup> There was limited support for the second and third alternatives.<sup>122</sup> Many commenters were concerned that allowing companies to adopt their own proposal procedures would produce inconsistent and confusing standards.<sup>123</sup> Commenters also

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<sup>112</sup> Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275 (2000).

<sup>113</sup> Proposed Amendments to Rule 14a-8, Exchange Act Release No. 34-19135, 1982 WL 600869, at \*3 (Oct. 14, 1982) [hereinafter 1982 Proposed Amendments].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*4–5. Among other things, the second alternative would have prohibited companies from adopting eligibility criteria that would disqualify shareholders owning at least 1% of voting securities or voting securities with at least \$5,000 in market value. *Id.* at \*25. Companies would have been allowed to adopt “reasonable definitions and criteria” of their own in administering Rule 14a-8's exclusions. *Id.*

<sup>116</sup> *Id.* at \*5.

<sup>117</sup> *Id.* at \*6.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Amendments to Rule 14a-8, Exchange Act Release No. 34-20091, 1983 WL 33272, at \*2 (Aug. 16, 1983) [hereinafter 1983 Amendments].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

criticized the third alternative for suggesting a lottery system to determine which proposals would proceed to a vote in cases where the number of submitted proposals exceeded the prescribed maximum.<sup>124</sup>

The SEC ultimately decided to retain the basic framework of Rule 14a-8 with several of the changes from the first alternative, including minimum ownership and holding-period requirements for proposal proponents.<sup>125</sup>

### From *Cracker Barrel* to the 1998 Amendments

The SEC's interest in paring back its role in proposal disputes did not end with the 1982 proposed amendments. In 1992, SEC staff announced a new categorical approach to the ordinary business exclusion. Under the new approach, companies were permitted to exclude all proposals concerning their employment policies and practices for the general workforce, even if such proposals implicated significant social issues.<sup>126</sup> Before adopting this position, SEC staff had applied the agency's 1976 guidance to conclude that proposals related to affirmative action and equal employment opportunity involved significant policy issues, meaning they did not fall within the ordinary business exclusion.<sup>127</sup>

SEC staff adopted the new categorical approach in granting a no-action request from Cracker Barrel Old Country Store.<sup>128</sup> Cracker Barrel sought to exclude a proposal requesting that the company implement a non-discrimination policy concerning sexual orientation.<sup>129</sup> In granting the no-action request, SEC staff said that "the line between includable and excludable employment-related proposals based on social policy considerations" had become "increasingly difficult to draw."<sup>130</sup> As a result, the no-action letter explained, SEC staff would no longer attempt to draw such distinctions and companies would be permitted to exclude all employment-related proposals.<sup>131</sup> The SEC later affirmed the no-action letter.<sup>132</sup>

Litigation followed. In a 1993 lawsuit against Wal-Mart, a federal district court declined to defer to the SEC's *Cracker Barrel* position, reasoning that a categorical rule against employment-related proposals was inconsistent with the SEC's 1976 guidance regarding the ordinary business exclusion, which had been promulgated after notice and comment.<sup>133</sup> Applying the 1976 guidance, the court ordered Wal-Mart to include in its proxy materials a proposal seeking disclosures regarding the company's equal opportunity policies and efforts.<sup>134</sup> The SEC was not a party to the *Wal-Mart* litigation, however, meaning the court's decision did not require the agency to abandon its *Cracker Barrel* position.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Cracker Barrel Old Country Store, Inc. SEC No-Action Letter, 1992 WL 289095 (Oct. 13, 1992) [hereinafter 1992 *Cracker Barrel* No-Action Letter].

<sup>127</sup> HONABACH & SARGENT, *supra* note 67 § 5:12. In contrast, proposals involving employee benefits, hiring and firing, and compensation for workers other than senior executives were typically deemed excludable as ordinary business matters. 1992 *Cracker Barrel* No-Action Letter, *supra* note 126, at \*1.

<sup>128</sup> 1992 *Cracker Barrel* No-Action Letter, *supra* note 126, at \*1.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1993 WL 11016 (Jan. 15, 1993).

<sup>133</sup> Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 890 (S.D.N.Y. 1993).

<sup>134</sup> *Id.* at 891–92.

In a separate lawsuit to which the SEC was a party, a federal district court held that the *Cracker Barrel* no-action letter represented an amendment of the ordinary business exclusion that violated the notice-and-comment requirements of the Administrative Procedure Act (APA).<sup>135</sup> The court thus enjoined the SEC from applying *Cracker Barrel* absent notice and comment.<sup>136</sup> The U.S. Court of Appeals for the Second Circuit (Second Circuit) ultimately lifted that injunction, however, concluding that no-action letters are interpretive (as opposed to legislative) rules and thus not subject to the APA's notice-and-comment requirements.<sup>137</sup>

While the Second Circuit's decision cleared the way for SEC staff to resume application of *Cracker Barrel*, controversy persisted. Shareholder activists urged the SEC to rescind the decision.<sup>138</sup> Congress also prodded the agency to consider reversing *Cracker Barrel*. The National Securities Markets Improvement Act of 1996 included a provision instructing the SEC to conduct a study of (1) whether recent statutory, judicial, or regulatory changes had impaired shareholder access to proxy statements under Section 14 of the Exchange Act, and (2) shareholders' ability to have proposals relating to corporate practices and social issues included in proxy statements.<sup>139</sup>

The following year, the SEC proposed amendments to Rule 14a-8 that included a reversal of the *Cracker Barrel* position.<sup>140</sup> The SEC also proposed several other changes—some favoring proposal proponents, others favoring corporate management—that the agency framed as a “balanced” approach to the “sometimes conflicting concerns of different participants” in the proposal process.<sup>141</sup> In 1998, the SEC adopted a final rule reversing the *Cracker Barrel* policy and returning to a case-by-case approach to employment-related proposals.<sup>142</sup> The final amendments did not, however, include some of the more far-reaching revisions to the shareholder proposal rule that the agency had contemplated in its 1997 proposed rule.<sup>143</sup>

### **Institutional Investor Activism in the 1980s and 1990s**

For the first four decades of the shareholder proposal rule, the main proposal sponsors were individual shareholders.<sup>144</sup> Beginning in the mid-1980s, another category of proponent grew in prominence: institutional investors.<sup>145</sup> Initially, the leading institutional sponsors of shareholder proposals were public pension funds.<sup>146</sup> Growth in state and local government employment during the previous decades, coupled with legal changes allowing increased allocation of pension assets

<sup>135</sup> *New York City Emps. Ret. Sys. v. SEC*, 843 F. Supp. 858, 881 (S.D.N.Y. 1994), *reversed by*, 45 F.3d 7 (2d Cir. 1995).

<sup>136</sup> *Id.* at 882.

<sup>137</sup> *New York City Emps. Ret. Sys. v. SEC*, 45 F.3d 7, 12–14 (2d Cir. 1995).

<sup>138</sup> Phillip R. Stanton, *SEC Reverses Cracker Barrel No-Action Letter*, 77 WASH. U. L. Q. 979, 989 (1999).

<sup>139</sup> P.L. 104-290, § 510(b), 110 Stat. 3416, 3450 (1996).

<sup>140</sup> Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, 1997 WL 578696, at \*13 (Sept. 18, 1997) [hereinafter 1997 Proposed Amendments].

<sup>141</sup> *Id.* at \*5.

<sup>142</sup> Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 1998 WL 254809, at \*3 (May 21, 1998) [hereinafter 1998 Amendments].

<sup>143</sup> For example, the SEC declined to adopt a purely economic standard for administering the relevance exclusion, an “override” mechanism empowering groups of shareholders with at least 3% voting power to overturn certain exclusions, and stricter requirements for resubmitted proposals. *Id.* at \*12.

<sup>144</sup> Liebler, *supra* note 108, at 439; Gillan & Starks, *supra* note 108, at 41.

<sup>145</sup> Gillan & Starks, *supra* note 108, at 43.

<sup>146</sup> *Id.*

to equities, had laid the groundwork for public pension funds to exert themselves as powerful players in corporate governance.<sup>147</sup> Starting in 1986, a handful of especially engaged public pension funds began to sponsor large numbers of proposals,<sup>148</sup> many of which urged corporations to dismantle takeover defenses, adopt confidential proxy voting, enhance board independence from management, or make changes to executive compensation.<sup>149</sup>

In the 1990s, public pension funds continued to submit proposals, but increasingly pursued alternative forms of activism, including private outreach to portfolio companies and media campaigns targeting underperforming firms.<sup>150</sup> That shift coincided with the emergence of union pension funds as shareholder activists. By 1994, union funds had eclipsed public pension funds as the most frequent institutional sponsors of shareholder proposals.<sup>151</sup>

Union fund activism generated pushback. Some business groups argued that unions used the proposal process to gain private benefits for labor at the expense of other shareholders, citing union proposals targeting firms engaged in collective bargaining negotiations or facing union organizing campaigns.<sup>152</sup> The substance of most union proposals, however, mirrored the types of proposals offered by public pension funds, focusing on general governance issues such as takeover defenses and executive compensation.<sup>153</sup>

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<sup>147</sup> Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 799–800 & n.16 (1993).

<sup>148</sup> Pension fund activism in the 1980s was concentrated in a small group of particularly engaged funds: the California Public Employees' Retirement System (CalPERS), the California State Teachers' Retirement System (CalSTRS), the New York City Employees' Retirement System, the State of Wisconsin Investment Board (SWIB), and the Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA-CREF). Diane Del Guercio & Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism*, 52 J. FIN. ECON. 293, 297 (1999). The emergence of these funds as shareholder activists coincided with the creation of the Council of Institutional Investors (CII)—a lobbying group for shareholder rights—in 1985. Gillan & Starks, *supra* note 107, at 42. CII's founding co-chairs were the California State Treasurer, the New York City Comptroller, and the chair of the SWIB. *About CII*, COUNCIL OF INSTITUTIONAL INVESTORS <https://www.cii.org/about> <https://perma.cc/7U78-SKJ2> (last visited Dec. 11, 2025).

<sup>149</sup> Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. REGUL. 175, 175 (2001).

<sup>150</sup> Gillan & Starks, *supra* note 108, at 43.

<sup>151</sup> Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1045 (1998).

<sup>152</sup> Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals?*, 73 WASH. L. REV. 41, 42–43 (1998).

<sup>153</sup> Schwab & Thomas, *supra* note 151, at 1045, 1091–92.

### Takeover Defenses

The 1980s witnessed a wave of hostile takeover attempts—i.e., takeover attempts opposed by incumbent boards. Almost a quarter of large U.S. companies received a hostile bid over the course of the decade, while many others engaged in friendly deals in anticipation of a potential hostile offer. Gordon, *infra* note 160, at 1521. In many cases, companies adopted defensive measures to ward off actual or potential raids. Common defenses included charter provisions requiring supermajority votes to approve a merger and the issuance of multiple classes of stock with different voting rights. Richard S. Ruback, *An Overview of Takeover Defenses*, in *MERGERS AND ACQUISITIONS* 49, 57, 60 (Alan J. Auerbach, ed. 1988). The most potent takeover defense, however, consists of a combination of a poison pill and a staggered board. Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 *STAN. L. REV.* 887, 890 (2002).

Poison pills (also called shareholder rights plans) are designed to deter hostile bids by causing substantial dilution of a bidder's holdings in the target if the bidder crosses a specified ownership threshold without the target board's approval. PAUL S. BIRD ET AL., *TAKEOVERS: A STRATEGIC GUIDE TO MERGERS AND ACQUISITIONS* § 11.03[A] (4<sup>th</sup> ed. 2019). Poison pills effectuate this dilution by allowing the target's shareholders (other than the bidder) to purchase shares at a discount once the bidder crosses the relevant threshold. *Id.* § 11.03[A][2]. Companies convey these rights as a dividend, allowing boards to implement poison pills without shareholder approval. *Id.* § 11.03[A][1].

Standing alone, a poison pill does not preclude a hostile bidder from gaining control of a target. If a bidder can replace a majority of incumbent directors via a proxy contest, its slate of directors can then redeem the typical poison pill and allow the acquisition to proceed. Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 *U. PA. L. REV.* 633, 644 (2012). This “ballot box safety valve” becomes less accessible, however, if a company has a staggered board. *Id.* at 644–46. At companies with staggered boards, directors are grouped into multiple classes, with only one class standing for election each year. *Id.* at 645. Accordingly, absent certain shareholder rights (e.g., to remove directors without cause at a special meeting or by written consent), the combination of a poison pill and staggered board functionally requires hostile bidders to prevail in two consecutive proxy contests to complete an acquisition. Bebchuk et al., *supra*, at 899. These hurdles are formidable: an empirical study from 2002 did not identify any instance in which a hostile bidder overcame a staggered board by winning consecutive proxy contests. *Id.* at 928–29.

Delaware courts have given companies broad latitude to adopt and maintain poison pills, *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985), including in cases where a pill was paired with a staggered board, *Air Prods. & Chems. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011). As discussed below, however, shareholder activists have used proposals to urge various restrictions on poison pills and pressure companies to de-stagger their boards.

The flowering of institutional investor activism during the 1980s and 1990s gave the shareholder proposal rule newfound importance. To that point, few proposals garnered significant support. In a 1981 speech, an SEC Commissioner observed that proposals opposed by management typically received less than 10% of votes cast.<sup>154</sup> The Commissioner also said that SEC staff recalled only two instances in the history of the shareholder proposal rule in which such proposals obtained majority votes.<sup>155</sup> Institutional activism changed these dynamics. Between 1986 and 1990, more than 20 governance proposals received majority votes in their favor.<sup>156</sup> Those figures climbed throughout the 1990s,<sup>157</sup> with 33 proposals receiving majority support in 1998.<sup>158</sup> Proposals

<sup>154</sup> Bevis Longstreth, Comm'r, SEC, *The SEC and Shareholder Proposals: Simplification in Regulation*, Remarks to the National Association of Manufacturers (Dec. 11, 1981), <https://www.sec.gov/news/speech/1981/121181longstreth.pdf> <https://perma.cc/PD3W-UHVH>.

<sup>155</sup> *Id.*

<sup>156</sup> Romano, *supra* note 149, at 186; Jonathan M. Karpoff et al., *Corporate Governance and Shareholder Initiatives: Empirical Evidence*, 42 *J. FIN. ECON.* 365, 368 (1996).

<sup>157</sup> Kosmas Papadopoulos, *The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance (2000-2018)*, *HARV. L. SCH. F. ON CORP. GOV.* (Feb. 6, 2019), <https://corpgov.law.harvard.edu/2019/02/06/the-long-view-the-role-of-shareholder-proposals-in-shaping-u-s-corporate-governance-2000-2018> <https://perma.cc/F6TM-6ZFU>.

<sup>158</sup> Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 *BUS. LAW.* 23, 27 (2004).

targeting takeover defenses were among the most popular, with proposals seeking to restrict the use of poison pills receiving an average of 54% support in 1994.<sup>159</sup>

Several developments were responsible for this shift. One factor—perhaps the most foundational—was growth in institutional shareholdings. In 1970, institutions owned roughly a third of the U.S. stock market.<sup>160</sup> By 1985, their share had grown to 55%.<sup>161</sup> Whereas individual shareholders voted at relatively low rates, institutional investors increasingly used their voting power to advance their governance preferences.

Regulatory changes facilitated these efforts. In 1992, the SEC liberalized the proxy rules governing inter-shareholder communications.<sup>162</sup> The changes allowed shareholders not seeking proxy authority to discuss potential proposals among themselves and seek support for proposals without triggering the full panoply of regulations governing other types of proxy solicitations.<sup>163</sup> The 1992 amendments are widely credited with making the regulatory climate more hospitable to shareholder activism.<sup>164</sup>

## Shareholder Proposals in the 21<sup>st</sup> Century

### Governance Proposals

The trends discussed above accelerated in the 21<sup>st</sup> century. In 2003, 37% of governance proposals that went to a vote received majority support.<sup>165</sup> Proposals to de-stagger boards, remove supermajority vote requirements, and restrict poison pills routinely obtained more than 60% of votes cast.<sup>166</sup> While most of these proposals were precatory, corporations grew increasingly responsive to majority votes. One study of proposals that received majority support between 1997 and 2004 found that the rate at which companies implemented such proposals nearly doubled after 2002 to more than 40%.<sup>167</sup> Regulatory developments, the standardization of institutional voting policies, and the governance climate of the early 2000s likely contributed to rising rates of majority votes and companies' increased responsiveness to such votes.

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<sup>159</sup> *Id.* at 28.

<sup>160</sup> Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1568 (2007).

<sup>161</sup> *Id.*

<sup>162</sup> Regulation of Communications Among Shareholders, Exchange Act Release No. 34-31326, 1992 WL 301258, at \*7-11 (Oct. 16, 1992).

<sup>163</sup> *Id.*

<sup>164</sup> *E.g.*, Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1276-77 (2008).

<sup>165</sup> Papadopoulos, *supra* note 157.

<sup>166</sup> *Id.*

<sup>167</sup> Yonca Ertimur et al., *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53 (2010).

The regulatory changes involved mutual funds.<sup>168</sup> Traditionally, mutual fund sponsors had been less inclined to activism than public and union pension funds.<sup>169</sup> Some commentators have attributed this reticence to actual or prospective business relationships between mutual fund sponsors and public companies.<sup>170</sup> A fund sponsor that administers a company’s retirement plan or sells a company other services, for example, may be reluctant to submit or support proposals opposed by the company’s management.<sup>171</sup>

In 2003, the SEC adopted rules to address these potential conflicts of interest. One rule required mutual funds to disclose their proxy voting policies and vote records.<sup>172</sup> Disclosure of mutual fund voting records prompted increased scrutiny of proposal votes and relationships between fund sponsors and corporate management.<sup>173</sup> Another rule required investment advisers—including advisers to mutual funds—to implement policies and procedures reasonably designed to ensure that they vote proxies in the best interests of their clients.<sup>174</sup> Under the rule, the relevant policies and procedures must address how advisers resolve material conflicts of interest with their clients—for example, conflicts arising from business relationships between an adviser and a company soliciting proxies.<sup>175</sup> The adopting release accompanying the rule made clear that fund sponsors cannot adopt a blanket policy of voting proxies in favor of the management of companies with which they do business.<sup>176</sup>

The SEC’s 2003 rule targeting investment advisers is often highlighted as contributing to two related trends that would shape the shareholder proposal ecosystem: the standardization of institutional voting policies and the increased influence of proxy advisory firms.<sup>177</sup> Proxy advisors—firms that provide institutional investors with research, recommendations, and administrative services related to proxy voting—first emerged in the 1980s.<sup>178</sup> The SEC’s 2003 conflict-of-interest rule appeared to steer mutual fund sponsors in their direction, identifying

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<sup>168</sup> A mutual fund is a collective investment vehicle that pools money from public investors to purchase a portfolio of stocks, bonds, and/or other financial assets. WILLIAM A. BIRDTHISTLE, *EMPIRE OF THE FUND: THE WAY WE SAVE NOW* 19 (2016). Mutual funds are created by investment advisers, which enter contracts to provide the funds with management services in exchange for a fee based on a fund’s assets under management. *Id.* at 32–38. Mutual fund investors receive the economic benefits of a fund’s performance net of fees. Under their advisory contracts, however, mutual fund advisers typically have the right to vote shares held by the funds. Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 992 (2020).

In recent decades, a close cousin to mutual funds—the exchange-traded fund (ETF)—has grown in popularity. CRS Report R45318, *Exchange-Traded Funds (ETFs): Issues for Congress*, by Eva Su. As with mutual funds, an ETF’s investment adviser typically has a contractual right to vote the shares in the fund’s portfolio. Danielli Gurrieri, *Pass-Through Voting*, BROADRIDGE (2025), <https://www.broadridge.com/article/wealth-management/pass-through-voting> <https://perma.cc/3CZG-Q94G> (last visited Jan. 6, 2026). For ease of discussion, this report will use the term “mutual fund” to refer to both mutual funds and ETFs.

<sup>169</sup> Brownstein & Kirman, *supra* note 158, at 30.

<sup>170</sup> Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151, 1176–81 (2019).

<sup>171</sup> *Id.* at 1179.

<sup>172</sup> Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564 (Feb. 7, 2003) (codified at 17 C.F.R. pts. 239, 249, 270, 274).

<sup>173</sup> *E.g.*, Gretchen Morgenson, *A Door Opens. The View is Ugly*, N.Y. TIMES (Sept. 12, 2004), <https://www.nytimes.com/2004/09/12/business/yourmoney/a-door-opens-the-view-is-ugly.html>.

<sup>174</sup> Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585, 6588 (Feb. 7, 2003) (codified at 17 C.F.R. pt. 275).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 6588 n.24.

<sup>177</sup> Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U. L. REV. 1459, 1468–69 (2019); Brownstein & Kirman, *supra* note 158, at 35–38.

<sup>178</sup> Douglas Sarro, *Proxy Advisors as Issue Spotters*, 15 BROOK. J. CORP. FIN. & COM. L. 371, 378 (2021).

proxy advisors as a possible means by which fund sponsors could discharge their compliance obligations. In the rule’s adopting release, the SEC explained that a fund adviser can demonstrate compliance with the requirement to mitigate conflicts of interest by voting proxies “in accordance with a pre-determined policy, based upon the recommendations of an independent third party.”<sup>179</sup> The following year, SEC staff issued no-action letters addressing the circumstances in which proxy advisors could be deemed “independent.”<sup>180</sup> The 2003 rule and 2004 no-action letters are broadly viewed as increasing demand for proxy advisors.<sup>181</sup>

Against this backdrop, institutional investors increasingly voted on shareholder proposals in accordance with standardized policies.<sup>182</sup> Mutual fund advisers confronted with hundreds of proposals often deemed it uneconomical to evaluate individual proposals in light of company-specific details, preferring to vote based on rules of thumb from their own in-house guidelines or the recommendations of a proxy advisor.<sup>183</sup> As a result, proposals tailored to institutional voting policies were likely to obtain majority support.<sup>184</sup> While mutual funds still rarely submit proposals,<sup>185</sup> their voting weight led them to become “the center of power in corporate governance.”<sup>186</sup>

The standardization of institutional voting also pushed companies to be more responsive to proposals that received majority votes. In the late 1990s and early 2000s, public and union pension funds organized campaigns to vote against or withhold votes from directors at companies that failed to implement proposals that received majority support.<sup>187</sup> In 2000, one of the leading proxy advisors—Institutional Shareholder Services (ISS)—moved in a similar direction, adopting a policy of generally recommending that shareholders withhold votes from directors at companies that had not implemented majority-supported proposals within certain timeframes.<sup>188</sup> Today, the other major proxy advisor—Glass, Lewis & Co. (Glass Lewis)—takes the position that “an initial level of board responsiveness” in the form of engagement and disclosures is warranted when proposals receive more than 30% support.<sup>189</sup>

The corporate climate of the early 2000s likewise encouraged boards to be more responsive to shareholder preferences. That era was marred by a series of accounting scandals at major firms—including Enron, WorldCom, and Tyco International—that prompted widespread anxiety about the state of U.S. corporate governance.<sup>190</sup> This wave of scandals drove the enactment of the

<sup>179</sup> Proxy Voting by Investment Advisers, 68 Fed. Reg. at 6588.

<sup>180</sup> Letter from Douglas Scheidt, Assoc. Dir. & Chief Counsel, Div. of Inv. Mgmt., SEC, to Mari Anne Pisarri, Pickard & Djinis LLP (Sept. 15, 2004); Letter from Douglas Scheidt, Assoc. Dir. & Chief Counsel, Div. of Inv. Mgmt., SEC, to Kent S. Hughes, Managing Dir., Egan-Jones Proxy Servs. (May 27, 2004). The SEC’s Division of Investment Management withdrew the 2004 no-action letters in 2018. Statement Regarding Staff Proxy Advisory Letters, DIV. OF INV. MGMT., SEC (Sept. 2018), <https://www.sec.gov/divisions/investment/imannouncements/im-info-2018-02.pdf> <https://perma.cc/3STT-2N3W>.

<sup>181</sup> *E.g.*, Tuch, *supra* note 177, at 1468–69.

<sup>182</sup> Brownstein & Kirman, *supra* note 158, at 35–38.

<sup>183</sup> *Id.* at 37–38.

<sup>184</sup> *Id.*

<sup>185</sup> Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2101–05 (2019).

<sup>186</sup> Griffith, *supra* note 168, at 984.

<sup>187</sup> Brownstein & Kirman, *supra* note 158, at 45–49.

<sup>188</sup> *Id.* at 50 & n.153.

<sup>189</sup> GLASS LEWIS, 2025 BENCHMARK POLICY GUIDELINES at 16 (2025) [hereinafter GLASS LEWIS 2025 BENCHMARK GUIDELINES].

<sup>190</sup> BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 281–88 (2018).

Sarbanes-Oxley Act in 2002 and a series of rule changes by the major stock exchanges.<sup>191</sup> In the eyes of many observers, it also created an environment in which boards sought to avoid the perception that they were indifferent to shareholder concerns.<sup>192</sup>

Several governance trends sprouted from this milieu, including a decline in the number of staggered boards and extensive adoption of majority voting for uncontested director elections, advisory shareholder votes on executive compensation, and proxy access.

While shareholders had submitted proposals to de-stagger boards since the 1980s, support for de-staggering proposals and companies' responsiveness to those proposals increased sharply post-2000.<sup>193</sup> As a result, staggered boards have become far less common. In 2002, 61% of S&P 500 companies had a staggered board; by 2022, that figure had fallen to 12%.<sup>194</sup>

The shift toward majority voting in uncontested director elections was similarly pronounced. Most states have a default rule under which directors are elected based on a plurality voting standard, but allow corporations to adopt an alternative standard in their charter or bylaws.<sup>195</sup> Under a plurality voting standard, the director nominee who receives the most votes for a given seat is elected.<sup>196</sup> Accordingly, in an uncontested election governed by a plurality standard, a nominee can be elected with only a single vote in his or her favor.<sup>197</sup> In 2005, voting standards emerged as a popular target for shareholder activists, who argued that the plurality rule—coupled with the expense and rarity of proxy contests—rendered most director elections a purely ceremonial exercise.<sup>198</sup>

Over the following years, shareholders submitted hundreds of proposals requesting that corporations adopt alternative voting standards for uncontested director elections, including standards requiring that nominees receive majority support to be elected.<sup>199</sup> The campaign to promote majority voting has been characterized as “one of the most popular and successful

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<sup>191</sup> *Id.* at 289–95.

<sup>192</sup> Ertimur et al., *supra* note 167; Brownstein & Kirman, *supra* note 158, at 66–67.

<sup>193</sup> John H. Matheson & Vilena Nicolet, *Shareholder Democracy and Special Interest Governance*, 103 MINN. L. REV. 1649, 1661 (2019).

<sup>194</sup> Lynn S. Paine & Will Hurwitz, *Brief Note on Staggered Boards*, Harv. Bus. Sch. Background Note 323-040 (May 2024).

<sup>195</sup> Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1125 (2016).

<sup>196</sup> *Id.* at 1120–21.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1125; Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 682–86, 701–04 (2007) (documenting the rarity of proxy contests and advocating a default majority voting standard to complement other suggested governance reforms).

<sup>199</sup> Matheson & Nicolet, *supra* note 193, at 1663. There are three general alternatives to the traditional plurality standard: (1) “plurality plus,” (2) majority voting with board-rejectable resignation, and (3) “consequential majority voting.” *Id.* A plurality plus regime retains the plurality standard, but requires directors to tender conditional resignations that are triggered by a failure to receive a majority of votes cast at the next election. Choi et al., *supra* note 195, at 1125–26. These regimes typically give boards discretion to reject a director's resignation. William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 480–81 (2007). Under a “true majority” standard, director candidates are not elected unless they receive majority support. Mary Siegel, *The Holes in Majority Voting*, 2011 COLUM. BUS. L. REV. 364, 368 (2011). Because most states have a “holdover” rule allowing incumbent directors to remain in office until the occurrence of specified events—such as their resignation or the election of a replacement director—true majority regimes usually include a requirement that incumbent directors tender their resignations upon failing to secure reelection. Sjostrom & Kim, *supra* note 199, at 482–83. Almost all true majority regimes give boards discretion to reject director resignations in these circumstances. COUNCIL OF INST. INVESTORS FAQ: MAJORITY VOTING FOR DIRECTORS (2017) [hereinafter CII MAJORITY VOTING FAQ]. A handful of companies, however, have adopted “consequential majority voting,” which requires directors who fail to secure majority support to leave the board within a specified timeframe. *Id.*

corporate governance reform efforts.”<sup>200</sup> While few companies employed a majority voting standard in 2005,<sup>201</sup> nearly 90% of the S&P 500 had adopted majority voting by 2017.<sup>202</sup>

The push for advisory shareholder votes on executive compensation—often called “say on pay”—was even more successful. Proposals requesting say on pay proliferated in the 2000s.<sup>203</sup> Congress took notice. In 2009, the American Recovery and Reinvestment Act required companies that received financial assistance from the Treasury Department’s Troubled Asset Relief Program (TARP) to conduct annual say-on-pay votes while their obligations incurred under TARP remained outstanding.<sup>204</sup> The following year, the Dodd-Frank Act expanded say on pay.<sup>205</sup> The statute required companies subject to the SEC’s proxy rules to conduct advisory shareholder votes on executive compensation at least every three years, in addition to a separate advisory vote every six years on the frequency of say-on-pay votes.<sup>206</sup> Most public companies conduct annual say-on-pay votes,<sup>207</sup> consistent with the voting guidelines of the leading proxy advisors and several of the largest institutional investors.<sup>208</sup>

In the 2010s, proxy access joined the list of governance reforms that shareholders advocated through proposals.<sup>209</sup> Proxy access is a mechanism by which certain large long-term shareholders are allowed to place their own director nominees on a company’s proxy card, avoiding some of the costs of mounting a traditional proxy contest.<sup>210</sup> This report defers a more detailed discussion of proxy access to the subsection on Rule 14a-8’s election exclusion.<sup>211</sup> For present purposes, it suffices to note that shareholder proposals appear to have prompted many companies to adopt proxy access. As of 2024, 85% of S&P 500 companies had adopted some form of proxy access,<sup>212</sup> compared to less than 1% in 2014.<sup>213</sup>

The trends discussed above have been strongest among large-capitalization companies, which receive the majority of shareholder proposals.<sup>214</sup> Mid- and small-cap firms have adopted annual

<sup>200</sup> Choi et al., *supra* note 195, at 1121. Although shareholder activists succeeded in securing widespread adoption of majority voting, some commentators have doubted the significance of this change. *E.g.*, Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2012–14 (2014); Siegel, *supra* note 199; Sjoström & Kim, *supra* note 199, at 487.

<sup>201</sup> Choi et al., *supra* note 195, at 1121.

<sup>202</sup> CII Majority Voting FAQ, *supra* note 199.

<sup>203</sup> Matheson & Nicolet, *supra* note 193, at 1665.

<sup>204</sup> 12 U.S.C. § 5221(e).

<sup>205</sup> 15 U.S.C. § 78n-1(a)(1)–(2).

<sup>206</sup> *Id.*

<sup>207</sup> Pamela Marcogliese et al., *When Do We Say What on Pay?*, FRESHFIELDS (Mar. 20, 2023), <https://blog.freshfields.us/post/102iauh/when-do-we-say-what-on-pay> <https://perma.cc/CGW2-VBSF>.

<sup>208</sup> ISS, UNITED STATES PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS 50 (2025); GLASS LEWIS 2025 BENCHMARK GUIDELINES, *supra* note 188, at 62; BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR BENCHMARK POLICIES – U.S. SECURITIES 15 (2025).

<sup>209</sup> Holly J. Gregory et al., *Proxy Access: A Five-Year Review*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 4, 2020), <https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review> <https://perma.cc/FJ23-3VUE>.

<sup>210</sup> *Proxy Access*, COUNCIL OF INST. INVESTORS (accessed Dec. 16, 2025), [https://www.cii.org/proxy\\_access](https://www.cii.org/proxy_access) <https://perma.cc/8BAH-XEAR> (last visited Dec. 16, 2025).

<sup>211</sup> *See infra* “Director Elections.”

<sup>212</sup> Subodh Mishra, *U.S. Shareholder Proposals: A Decade in Motion*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 18, 2024), <https://corpgov.law.harvard.edu/2024/11/18/u-s-shareholder-proposals-a-decade-in-motion> <https://perma.cc/D3JM-NDRM>.

<sup>213</sup> Gregory et al., *supra* note 209.

<sup>214</sup> Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. 782, 840 (2022).

director elections, majority voting, and proxy access at much lower rates than their large-cap counterparts.<sup>215</sup> Many companies outside the S&P 500 thus continue to receive proposals regarding these issues.<sup>216</sup> In recent years, other common governance proposals include those involving shareholders' right to call special meetings, requests for an independent board chair, and requests to eliminate supermajority vote requirements.<sup>217</sup>

## Environmental and Social Proposals

Proposals involving environmental and social issues (E&S proposals) were slower to gain significant traction with shareholders than governance proposals. Between 2000 and 2008, median levels of support for E&S proposals hovered in the mid-single digits.<sup>218</sup> After the 2008 financial crisis, however, E&S proposals began to exert a greater influence on corporate behavior. Support levels for E&S proposals increased throughout the 2010s, as did the percentage of E&S proposals that were withdrawn by their proponents before a meeting.<sup>219</sup> Withdrawn proposals often signal that a corporation has reached a settlement with the proponent, with the corporation agreeing to take certain actions in exchange for the withdrawal of the proposal.<sup>220</sup>

The 2021 proxy season witnessed a large spike in support for environmental proposals, many of which focused on climate change.<sup>221</sup> That year, 46% of environmental proposals that went to a vote received majority support.<sup>222</sup> 2021 also marked a record for the share of E&S proposals that were withdrawn, with proponents pulling 49% of such proposals before a shareholder vote.<sup>223</sup> During the following proxy seasons, however, support levels for E&S proposals—and the percentage of E&S proposals that were withdrawn—declined from their 2021 peaks.<sup>224</sup>

Since 2017, the landscape for E&S proposals has been buffeted by shifts in SEC guidance that have accompanied changes in presidential administration. The guidance has come in the form of staff legal bulletins outlining the Division of Corporation Finance's analytical approach to no-action requests. This report provides a more detailed overview of the relevant bulletins in later discussions of Rule 14a-8's substantive exclusions.<sup>225</sup> The overarching narrative, however, is that SEC staff's approach to the "ordinary business" and "relevance" exclusions under the

<sup>215</sup> *Id.* at 827, 829, 833.

<sup>216</sup> *Don't Forget the "G" in ESG (Because Your Shareholders Won't)*, CONF. BD. (Feb. 14, 2022), <https://www.conference-board.org/topics/shareholder-voting/corporate-governance-proposals-brief-5> <https://perma.cc/BWY3-HXSC>.

<sup>217</sup> SULLIVAN & CROMWELL LLP, 2025 PROXY SEASON REVIEW: PART 1, at 15 (2025), [https://www.sullcrom.com/SullivanCromwell/\\_Assets/PDFs/Memos/2025-Proxy-Season-Review-Part-1.pdf](https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/2025-Proxy-Season-Review-Part-1.pdf)

<sup>218</sup> Kosmas Papadopoulos, *The Long View: US Proxy Voting Trends on E&S Issues from 2000 to 2018*, HARV. L. SCH. F. ON CORP. GOV. (Jan. 31, 2019), <https://corpgov.law.harvard.edu/2019/01/31/the-long-view-us-proxy-voting-trends-on-es-issues-from-2000-to-2018/> <https://perma.cc/A98V-6DVH>.

<sup>219</sup> Mishra, *supra* note 212.

<sup>220</sup> Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 264–65 (2016).

<sup>221</sup> Mishra, *supra* note 212.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Kenneth Khoo & Roberto Tallarita, *Expanding Shareholder Voice: The Impact of SEC Guidance on Environmental and Social Proposals*, J. L. & ECON (forthcoming).

<sup>225</sup> See *infra* "Relevance" and "Ordinary Business."

Biden Administration allowed for a broader range of E&S proposals than its approach under the first and second Trump Administrations.<sup>226</sup>

In recent years, common subjects for E&S proposals have included climate change, “diversity, equity, and inclusion” (DEI), corporate lobbying and political expenditures, and human rights issues.<sup>227</sup> These types of E&S proposals have assumed greater salience alongside the rise of what is often called “ESG” investing and activism. While “ESG”—an abbreviation for “environmental, social, and governance”—does not have a universally agreed-upon meaning,<sup>228</sup> it often “operates as something of an umbrella term” for two distinct approaches to investing and activism.<sup>229</sup> One variant of ESG involves investors forgoing “some degree of profit-seeking” and instead “demanding more prosocial behavior from portfolio companies, either by divesting from bad actors, or by using their voting power to influence corporate policy.”<sup>230</sup> This strand of ESG is a form of “concessionary” investing because it involves sacrificing financial returns to promote non-pecuniary objectives.<sup>231</sup> Another category of ESG investing and activism involves the consideration or promotion of environmental, social, and governance factors as a means of improving risk-adjusted financial returns.<sup>232</sup> Investors employing this strategy might believe that companies with strong environmental records or diverse boards exhibit better long-term financial performance than other firms.<sup>233</sup>

ESG investing and E&S shareholder proposals have generated controversy.<sup>234</sup> Critics argue that many E&S proposals are driven by concessionary objectives that harm corporate financial

<sup>226</sup> Some commentators have argued that the SEC’s greater receptiveness toward prescriptive E&S proposals during the Biden Administration—reflected in 2021 guidance—was responsible for the decline in support for E&S proposals in 2022 and 2023. Their theory is that the 2021 guidance encouraged shareholders to submit more prescriptive proposals—for example, proposals requesting that a company adopt specific targets for carbon emissions, as opposed to those requesting that a company publish a report regarding its emission-reduction efforts. Prescriptive proposals have tended to enjoy less shareholder support than non-prescriptive proposals. Khoo & Tallarita, *supra* note 224; Cydney Posner, *More prescriptive proposals, less support for 2022 proxy season*, COOLEY LLP (Aug. 4, 2022), <https://cooleypubco.com/2022/08/04/prescriptive-proposals-2022/> <https://perma.cc/Q8RV-WWYN>.

<sup>227</sup> Mishra, *supra* note 212.

<sup>228</sup> Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584, 1594 (2024) (reviewing STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* (2023)) (indicating that the phrase “ESG investing” has become “somewhat infamous for its malleability”); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 436–37 (2024) (noting that the term “ESG” lacks a clear definition and has been used for a range of different purposes); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 397 (2020) (explaining that the term “ESG investing” is “inherently ambiguous” and distinguishing between different variants of that concept).

<sup>229</sup> Lipton, *supra* note 228, at 1594.

<sup>230</sup> *Id.*; see also Anil Kovvali & Yair Listokin, *Valuing ESG*, 49 BYU L. REV. 705, 719 (2024) (distinguishing between “an instrumental approach to ESG” that seeks long-term profits and “a more pluralistic approach to ESG” that is “prepared to sacrifice profits simply to advance an environmental or social cause”); Schanzenbach & Sitkoff, *supra* note 228, at 388, 397 (noting that one version of ESG investing is “motivated by providing a benefit to a third party or otherwise for moral or ethical reasons”).

<sup>231</sup> FREDERICK H. ALEXANDER, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE* 45 (2018) (distinguishing between concessionary and non-concessionary investing).

<sup>232</sup> Lipton, *supra* note 228, at 1594.

<sup>233</sup> DOUGLAS M. GRIM & DANIEL B. BERKOWITZ, *VANGUARD, ESG, SRI, AND IMPACT INVESTING: A PRIMER FOR DECISION-MAKING*, at 17 (2020), <https://www.ch.vanguard/content/dam/intl/europe/documents/en/esg-a-primer-for-decision-making-eu-en-pro.pdf> <https://perma.cc/2XP5-RFHL> (describing an “ESG integration” strategy that involves the incorporation of “material climate-change risks” into assessments of asset valuations with an objective of improving risk-adjusted returns).

<sup>234</sup> Almost all of this controversy focuses on the “E” and “S” in “ESG.” Notwithstanding the rise of “ESG” as a (continued...)

performance.<sup>235</sup> Much of the debate surrounding E&S proposals involves the role of intermediaries such as mutual fund sponsors and proxy advisors.<sup>236</sup> These issues—which have attracted the attention of the White House, the SEC, and multiple congressional subcommittees—are discussed in greater detail later in this report.<sup>237</sup>

In addition to receiving scrutiny from policymakers, ESG activism has catalyzed a wave of what are often called “anti-ESG” shareholder proposals.<sup>238</sup> Examples of anti-ESG proposals include requests that corporations consider ending DEI initiatives or prepare reports on the risks of carbon-mitigation commitments.<sup>239</sup> While recent proxy seasons have seen a surge in anti-ESG proposals, such proposals have generally received low levels of shareholder support.<sup>240</sup>

## The Future of Shareholder Proposals

As of this writing, the shareholder proposal rule may be approaching an inflection point. In an October 2025 speech, SEC Chairman Paul Atkins signaled a potential departure from the SEC’s longstanding approach to precatory proposals, questioning whether such proposals are proper as a matter of Delaware law.<sup>241</sup> Chairman Atkins also expressed “high confidence” that SEC staff would grant no-action requests seeking to exclude precatory proposals as improper under Delaware law if such requests are supported by an opinion of counsel.<sup>242</sup> This possible change could have major ramifications; according to some estimates, precatory proposals constitute roughly 98% of proposals submitted in a typical proxy season.<sup>243</sup>

The following month, the SEC’s Division of Corporation Finance announced that it would not respond “substantively” to no-action requests for the 2025-2026 proxy season, except for requests seeking to exclude proposals as improper subjects for shareholder action.<sup>244</sup> In its announcement, the Division of Corporation Finance cited “current resource and timing considerations following the lengthy government shutdown,” along with the availability of an “extensive body of guidance” on shareholder proposals.<sup>245</sup> While SEC staff will not respond “substantively” to

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concept, it remains standard to distinguish between governance proposals and E&S proposals—a convention that this report follows. *E.g.*, Haan, *supra* note 220, at 300.

<sup>235</sup> STAFF OF ESG WORKING GRP., H. COMM. ON FIN. SERVS., 118<sup>TH</sup> CONG., THE FAILURE OF ESG: AN EXAMINATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS IN THE AMERICAN BOARDROOM AND NEEDED REFORMS at 9–10 (2024).

<sup>236</sup> Caleb Griffin, *Margins: Estimating the Influence of the Big Three on Shareholder Proposals*, 73 SMU L. REV. 409, 411 (2020) (finding that the “Big Three” index fund managers—BlackRock, Vanguard, and State Street—individually have the potential to determine a significant proportion of proxy votes and together possess the power to decide the outcome of most shareholder proposal votes).

<sup>237</sup> See *infra* “Corporate Social Responsibility.”

<sup>238</sup> Liz Walsh et al., *Anti-ESG Shareholder Proposals in 2025*, HARV. L. SCH. F. ON CORP. GOV. (June 18, 2025), <https://corpgov.law.harvard.edu/2025/06/18/anti-esg-shareholder-in-2025/> <https://perma.cc/GG27-X85N>.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Atkins Speech, *supra* note 8.

<sup>242</sup> *Id.*

<sup>243</sup> Sanford Lewis & Khadija Foda, *The SEC, Delaware and the High Stakes for Investors on Advisory Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 20, 2025), <https://corpgov.law.harvard.edu/2025/11/20/the-sec-delaware-and-the-high-stakes-for-investors-on-advisory-shareholder-proposals/> <https://perma.cc/LW7K-HTJU>.

<sup>244</sup> Div. of Corp. Fin., SEC, Statement Regarding the Division of Corporation Finance’s Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season (Nov. 17, 2025), <https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finances-role-exchange-act-rule-14a-8-process-current-proxy-season> <https://perma.cc/XH28-Y2JS>.

<sup>245</sup> *Id.*

no-action requests (other than those implicating the “improper subject” exclusion), it will provide companies with letters indicating that the Division of Corporation of Finance does not object to decisions to exclude proposals, provided companies represent that they have a “reasonable basis” for excluding the proposals under Rule 14a-8.<sup>246</sup>

Chairman Atkins’ October 2025 speech also suggested other possible changes to the shareholder proposal regime. Endorsing a view previously expressed by SEC Commissioner Mark Uyeda,<sup>247</sup> Chairman Atkins argued that existing law permits companies to adopt their own “procedural” standards for shareholder proposals in their governing documents.<sup>248</sup> He also announced that, in his view, “a fundamental reassessment of Rule 14a-8 is in order,” and that the SEC “should re-evaluate the rule’s fundamental premise that shareholders should be able to force companies to solicit for their proposals” at little or no personal expense.<sup>249</sup>

The SEC’s regulatory flexibility agenda forecasts proposed amendments to Rule 14a-8 in the spring of 2026.<sup>250</sup>

## The SEC No-Action Process

As discussed, the SEC no-action process has long been an integral feature of the shareholder proposal regime. While the SEC has on multiple occasions considered changes to Rule 14a-8 that would reduce the agency’s role in the shareholder proposal process, corporations and shareholder groups alike have successfully resisted such efforts.<sup>251</sup> The SEC thus remains a central player in disputes over the excludability of shareholder proposals, reviewing hundreds of no-action requests each year.<sup>252</sup>

The SEC no-action process is not the product of a legal mandate. Although Rule 14a-8 requires corporations that plan to omit a shareholder proposal from their proxy materials to notify the SEC and explain the basis for the omission no later than 80 days before filing a definitive proxy statement,<sup>253</sup> the rule does not require corporations to seek or obtain a favorable no-action response before omitting a proposal. Nevertheless, in pursuit of regulatory clarity, companies generally file their reasons for excluding a proposal in the form of a request for no-action relief.<sup>254</sup> The SEC is not required to answer such requests.<sup>255</sup> Rather, the SEC has explained that it responds to no-action requests “as a convenience to both companies and shareholders” to assist

<sup>246</sup> *Id.*

<sup>247</sup> Mark T. Uyeda, Comm’r, SEC, Remarks at the Society for Corporate Governance 2023 National Conference (June 21, 2023) [hereinafter Uyeda Speech], <https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-society-corporate-governance-conference-062123> <https://perma.cc/L76G-VCLW>.

<sup>248</sup> Atkins Speech, *supra* note 8. The extent to which companies can adopt their own procedural and substantive standards for shareholder proposals is discussed in “Private Ordering” *infra*.

<sup>249</sup> *Id.*

<sup>250</sup> *SEC Regulatory Flexibility Agenda*, *supra* note 9.

<sup>251</sup> 1998 Amendments, *supra* note 142, at \*2 (discussing resistance to changes that would have diminished SEC staff’s role as “informal arbiters” of the excludability of shareholder proposals).

<sup>252</sup> Elizabeth A. Ising, Ronald O. Mueller & Geoffrey Walter, *2025 Shareholder Proposal Season: A First Glimpse at Key No-Action Request Results*, HARV. L. SCH. F. ON CORP. GOV. (June 14, 2025), <https://corpgov.law.harvard.edu/2025/06/14/2025-shareholder-proposal-season-a-first-glimpse-at-key-no-action-request-results/> <https://perma.cc/P4CR-S5NV>.

<sup>253</sup> 17 C.F.R. § 240.14a-8(j)(1).

<sup>254</sup> Haseley & Ising, *supra* note 65 § 12.03[A].

<sup>255</sup> SEC Staff Legal Bulletin No. 14 (July 13, 2001) [hereinafter SLB 14], <https://www.sec.gov/interps/legal/cfslb14.htm> <https://perma.cc/YPG6-NTL9>.

them in complying with the proxy rules.<sup>256</sup> The proponent of a shareholder proposal may provide the SEC with a response to the company’s arguments for excludability, but is not required to do so.<sup>257</sup> Corporations bear the burden of demonstrating that they are entitled to exclude a proposal from their proxy materials.<sup>258</sup>

SEC staff typically offers one of three responses to requests for no-action relief:

- that there “appears to be some basis” for a company’s view that it may exclude a proposal from its proxy materials and that SEC staff therefore will not recommend an enforcement action if the company omits the proposal;
- that SEC staff is “unable to concur” in the company’s view that it may exclude the proposal and that SEC staff disagrees with the asserted basis for exclusion; or
- that SEC staff expresses “no view” regarding the company’s intention to omit the proposal from its proxy materials.<sup>259</sup>

As discussed in several sections below, if SEC staff identifies deficiencies in a proposal that can be cured, it may permit the proponent to remedy the deficiencies and resubmit the proposal.<sup>260</sup> Often, no-action responses are limited to a statement of SEC staff’s enforcement posture and do not include detailed explanations of the staff’s reasoning.<sup>261</sup>

Corporations and shareholders can seek reconsideration of a no-action response by SEC staff, but such requests are rarely successful.<sup>262</sup> Cases in which SEC staff have granted such requests include those in which a party submitted new or additional facts not provided in the original no-action request; obtained a legal opinion to support arguments based on state, federal, or foreign law where it had previously not provided one; or raised additional arguments for exclusion not presented in the original no-action request.<sup>263</sup>

Parties can also seek review of no-action responses by the SEC.<sup>264</sup> The agency’s regulations provide that SEC staff may, upon request or on its own motion, present questions to the SEC that involve “matters of substantial importance” where “the issues are novel or highly complex.”<sup>265</sup> The decision to present questions to the SEC is entirely within the discretion of SEC staff,<sup>266</sup> and requests for SEC review of no-action responses are seldom granted.<sup>267</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> 17 C.F.R. § 240.14a-8(k).

<sup>258</sup> *Id.* § 240.14a-8(g).

<sup>259</sup> SLB 14, *supra* note 255. SEC staff may express no view on a company’s intention to omit a proposal in cases where the arguments raised in a no-action request are the subject of litigation. *Id.*

<sup>260</sup> ARANOW & EINHORN ON PROXY CONTESTS FOR CORPORATE CONTROL § 16.02 (3d ed. 2001) [hereinafter ARANOW & EINHORN].

<sup>261</sup> *Proxy Power and Proposal Abuse, Hearing Before the H. Comm. on Fin. Servs.*, 119<sup>th</sup> Cong. 8 (Sept. 10, 2025) (statement of Ronald Mueller, Partner, Gibson Dunn & Crutcher LLP) [hereinafter Mueller Testimony].

<sup>262</sup> KEIR D. GUMBS & LILLIAN BROWN, BLOOMBERG BNA, SHAREHOLDER PROPOSALS, at A-25–26 (2018).

<sup>263</sup> *Id.* at A-26.

<sup>264</sup> Courtney Bartkus, *Appealing No-Action Responses under Rule 14a-8: Informal Procedures of the SEC and the Availability of Meaningful Review*, 93 DENV. L. REV. F. 199, 203 (2016).

<sup>265</sup> 17 C.F.R. § 202.1(d).

<sup>266</sup> *Id.*

<sup>267</sup> Bartkus, *supra* note 264, at 203.

SEC no-action responses are not binding on any party.<sup>268</sup> They reflect only the informal views of SEC staff, which has advised that such responses “do not and cannot adjudicate the merits of a company’s position” with respect to a shareholder proposal.<sup>269</sup> “Only a court,” SEC staff has explained, “can decide whether a shareholder proposal can be excluded from a company’s proxy materials.”<sup>270</sup> Accordingly, no-action responses do not preclude a company or the proponent of a proposal from pursuing its rights via litigation.<sup>271</sup>

Shareholders that litigate a company’s exclusion of a proposal usually seek a temporary restraining order or preliminary injunction in federal district court to prevent a company from distributing its proxy materials without the proposal.<sup>272</sup> A company may also seek a declaratory judgment that it is permitted to omit a proposal.<sup>273</sup> The SEC can bring enforcement actions against companies that improperly exclude proposals from their proxy materials, but such actions are very rare.<sup>274</sup>

Despite the availability of litigation as an option for resolving disputes over shareholder proposals, most companies and proponents accept no-action responses as the final word on whether a proposal may be omitted.<sup>275</sup> As a result, SEC staff has a major influence on which proposals are ultimately presented for a shareholder vote.

In most years, a significant percentage of submitted proposals are withdrawn, which often signals a settlement between a company and the proponent of the withdrawn proposal.<sup>276</sup> These settlements remain an opaque area within the shareholder proposal regime; proposal settlements are not subject to SEC oversight and there is no central repository of settlement agreements.<sup>277</sup> Proposal settlements are akin to contracts between a corporation and the proponent of a proposal, with the corporation agreeing to take certain actions in exchange for the withdrawal of the proposal.<sup>278</sup> While the terms and even the existence of many shareholder proposal settlements are private, some settlement agreements include disclosure commitments involving issues such as political expenditures, the environmental effects of a company’s operations, and human rights standards.<sup>279</sup>

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<sup>268</sup> *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 423 (D.C. Cir. 1992).

<sup>269</sup> Div. of Corp. Fin., *Informal Procedures Regarding Shareholder Proposals*, SEC (Nov. 21, 2022), <https://www.sec.gov/rules-regulations/shareholder-proposals/division-corporation-finance-informal-procedures-regarding-shareholder-proposals> <https://perma.cc/S2G3-BNVK>.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* Some courts have said that SEC no-action letters, while not binding, constitute persuasive authority. *Schatzki v. Weiser Capital Mgmt., LLC*, 2016 WL 6662264 at \*5 (S.D.N.Y. Nov. 9, 2016); *Apache Corp. v. New York City Emp. Ret. Sys.*, 621 F. Supp. 2d 444, 449 (S.D. Tex. 2008).

<sup>272</sup> *Haseley & Ising, supra* note 65 § 12.03[I]. In 1992, the U.S. Court of Appeals for the D.C. Circuit held that shareholders have a private right of action under Rule 14a-8, confirming the existence of a right that had previously been “widely assumed.” *Roosevelt*, 958 F.2d at 419.

<sup>273</sup> *Haseley & Ising, supra* note 65 § 12.03[I].

<sup>274</sup> *Id.*

<sup>275</sup> *Mueller Testimony, supra* note 261, at 6.

<sup>276</sup> *Mishra, supra* note 212.

<sup>277</sup> *Haan, supra* note 220, at 277.

<sup>278</sup> *Id.* at 264.

<sup>279</sup> *Id.* at 267–68.

## Eligibility and Procedural Requirements

Rule 14a-8 includes a variety of eligibility and procedural requirements. To be eligible to submit a proposal under the rule, a shareholder must meet certain ownership thresholds, which the SEC made more restrictive in 2020.<sup>280</sup> Under the tiered approach adopted in 2020, eligible shareholders must have continuously held

- at least \$2,000 in market value of the relevant company’s securities entitled to vote on the proposal for at least three years;
- at least \$15,000 in market value of the company’s securities entitled to vote on the proposal for at least two years; or
- at least \$25,000 in market value of the company’s securities entitled to vote on the proposal for at least one year.<sup>281</sup>

The proponent of a proposal must provide the company with evidence documenting its eligibility.<sup>282</sup> Proponents must also provide the company with written statements that they (1) intend to hold the requisite amount of securities through the date of the meeting for which they submit a proposal, and (2) are able to meet with the company in person or via teleconference.<sup>283</sup> In offering to meet with the company, proponents must identify specific days and times within the regular business hours of the company’s principal executive office that they are available.<sup>284</sup>

Rule 14a-8 limits proponents to one proposal per company for a particular meeting.<sup>285</sup> Proposals and accompanying statements must not exceed 500 words and must be received by the company at least 120 days before the one-year anniversary of the company’s distribution of its proxy statement for the previous year’s annual meeting.<sup>286</sup>

Shareholder proponents or their representatives must appear in person at the shareholder meeting to present their proposals.<sup>287</sup> If the proponent of a proposal fails to abide by this requirement without good cause, the company may exclude the proponent’s proposals from its proxy materials for any meetings held in the following two calendar years.<sup>288</sup>

If a company seeks to omit a proposal on eligibility or procedural grounds, it must notify the proponent within 14 days of receiving the proposal, unless the deficiency cannot be remedied

<sup>280</sup> 17 C.F.R. § 240.14a-8(b); Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. 70240 (Nov. 4, 2020) (codified at 17 C.F.R. pt. 240).

<sup>281</sup> 17 C.F.R. § 240.14a-8(b)(1)(i). In June 2025, a federal district court rejected a lawsuit alleging that the SEC’s 2020 amendments to Rule 14a-8 violated the Administrative Procedure Act. *Interfaith Ctr. on Corp. Resp. v. SEC*, 768 F. Supp. 3d 97 (D.D.C. 2025).

<sup>282</sup> 17 C.F.R. § 240.14a-8(b)(2).

<sup>283</sup> *Id.* § 240.14a-8(b)(1)(ii)–(iii).

<sup>284</sup> *Id.* § 240.14a-8(b)(1)(iii).

<sup>285</sup> *Id.* § 240.14a-8(c).

<sup>286</sup> *Id.* § 240.14a-8(d), (e)(2). If the company did not hold an annual meeting the previous year or if the date of the annual meeting has been changed by more than 30 days from the date of the previous year’s meeting, the deadline is “a reasonable time before the company begins to print and send its proxy materials.” *Id.* § 240.14a-8(e)(2).

<sup>287</sup> *Id.* § 240.14a-8(h)(1).

<sup>288</sup> *Id.* § 240.14a-8(h)(2).

(e.g., because the proponent submitted the proposal after the deadline).<sup>289</sup> Proponents must correct deficiencies within 14 days of receiving notice from the company.<sup>290</sup>

## Substantive Exclusions

### Improper Subject for Shareholder Action

Rule 14a-8(i)(1) permits a company to exclude a proposal that is not a “proper subject for action by shareholders” under the laws of the jurisdiction of the company’s organization.<sup>291</sup> This “improper subject” exclusion is the oldest substantive exclusion in the shareholder proposal rule.<sup>292</sup> While the exclusion turns on the application of state law, there is little state law precedent directly addressing which issues qualify as “proper” subjects for shareholder action.<sup>293</sup> As a result, in administering the “improper subject” exclusion, SEC staff has developed something akin to its own common law on that topic.<sup>294</sup> Two categories of proposals have emerged from this process: precatory proposals and bylaw amendments.

### Precatory Proposals

State corporate law vests managerial authority in boards of directors, not shareholders.<sup>295</sup> That principle underpins the following note to Rule 14a-8(i)(1):

Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our [i.e., the SEC’s] experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.<sup>296</sup>

Proposals framed as recommendations or requests, often called precatory proposals, constitute the overwhelming majority of shareholder proposals submitted in a typical year.<sup>297</sup>

The SEC’s approach to precatory proposals appears to be changing. In an October 2025 speech, SEC Chairman Paul Atkins signaled a potential departure from the above text, questioning whether precatory proposals in fact constitute “proper subjects” for shareholder action under Delaware law.<sup>298</sup> In posing that question, Chairman Atkins cited a forthcoming law review article by a Delaware attorney concluding that Delaware law does not give shareholders an “inherent

<sup>289</sup> *Id.* § 240.14a-8(f).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* § 240.14a-8(i)(1). Requests for no-action relief that are based on state or international law must be accompanied by an opinion of counsel. *Id.* § 240.14a-8(j)(iii).

<sup>292</sup> Solicitation of Proxies Under the Act, 7 Fed. Reg. 10655, 10656 (Dec. 22, 1942).

<sup>293</sup> *Med. Comm. for Human Rts. v. SEC*, 432 F.2d 659, 677 (D.C. Cir. 1970).

<sup>294</sup> *Id.*

<sup>295</sup> DEL. CODE ANN. tit. 8, § 141(a); MODEL BUS. CORP. ACT § 8.01(b).

<sup>296</sup> 17 C.F.R. § 240.14a-8(i)(1) note.

<sup>297</sup> John G. Matsusaka et al., *Can Shareholder Proposals Hurt Shareholders? Evidence from Securities and Exchange Commission No-Action-Letter Decisions*, 64 J. L. & ECON. 107, 115 (2021).

<sup>298</sup> Atkins Speech, *supra* note 8.

right” to submit precatory proposals.<sup>299</sup> If this conclusion is correct, Chairman Atkins continued, and a corporation has not created such a right in its governing documents, “then one could make an argument that a precatory shareholder proposal submitted to a Delaware company is excludable under [Rule 14a-8(i)(1)].”<sup>300</sup> Chairman Atkins then indicated that, if a company makes this argument in a no-action request accompanied by an opinion of counsel, the company “should prevail.”<sup>301</sup> He also expressed “high confidence” that SEC staff will honor this position.<sup>302</sup>

The approach outlined by Chairman Atkins may have significant implications for the shareholder proposal regime. According to some estimates, precatory proposals constitute roughly 98% of proposals submitted in a typical proxy season.<sup>303</sup> Thus, if precatory proposals are improper under state law, nearly all shareholder proposals submitted in recent years would have been excludable.<sup>304</sup> The extent to which companies would take advantage of this expanded exclusion, however, remains uncertain. The prospect of receiving negative attention from shareholder activists and proxy advisors may deter some corporations from adopting a categorical stance against all precatory proposals.<sup>305</sup> Additionally, shareholders may respond to the change discussed by Chairman Atkins by proposing bylaw amendments authorizing precatory proposals.<sup>306</sup>

Delaware courts (and courts applying the laws of other states) would likely prove to be the final arbiters of the propriety of precatory proposals.<sup>307</sup> Chairman Atkins appeared to contemplate this possibility in his October 2025 speech, noting that Delaware’s constitution allows the SEC to certify questions to the Delaware Supreme Court.<sup>308</sup>

It is unclear how the Delaware Supreme Court would rule on the propriety of precatory proposals. Section 211(b) of the Delaware General Corporation Law (DGCL) requires corporations to hold annual meetings at which directors are elected and provides that “[a]ny other proper business may be transacted at the annual meeting.”<sup>309</sup> The DGCL does not define “proper business,” however, and there is little case law addressing that issue.<sup>310</sup> The DGCL and Delaware judicial decisions thus do not appear to authorize or prohibit precatory proposals explicitly.<sup>311</sup> The forthcoming law

<sup>299</sup> Kyle Pinder, *The Non-Binding Bind: Reframing Precatory Stockholder Proposals under Delaware Law*, 15 MICH. BUS. & ENTREPRENEURIAL L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5418534](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5418534) <https://perma.cc/LAX3-KWWN>.

<sup>300</sup> Atkins Speech, *supra* note 8.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Lewis & Foda, *supra* note 243.

<sup>304</sup> *S&C Memo*, *supra* note 63.

<sup>305</sup> Ryan J. Adams et al., *SEC Chairman Atkins Casts Doubt on the Validity of Precatory Shareholder Proposals*, MORRISON & FOERSTER LLP (Oct. 10, 2025), <https://www.mofo.com/resources/insights/251010-sec-doubt-validity-precatory-shareholder-proposals> <https://perma.cc/NN7Q-PWZ8>.

<sup>306</sup> Jill Fisch et al., *Stockholder Proposals—Law and Policy Considerations*, HARV. L. SCH. F. ON CORP. GOV. (Dec. 9, 2025), <https://corpgov.law.harvard.edu/2025/12/09/stockholder-proposals-law-and-policy-considerations/> <https://perma.cc/S2WT-RDPL>.

<sup>307</sup> John Filar Atwood, *Atkins Remarks May Not be Death Knell for Precatory Proposals, Panelists Say*, VITALLAW (Nov. 10, 2025), <https://www.vitalaw.com/news/proxies-atkins-remarks-may-not-be-death-knell-for-precatory-proposals-panelists-say/sld01a5e5302bf1ad48c5a2fdec208fbaf2f5> <https://perma.cc/89NT-3HKD>.

<sup>308</sup> Atkins Speech, *supra* note 8.

<sup>309</sup> DEL. CODE ANN. tit. 8, § 211(b).

<sup>310</sup> Mohsen Manesh, *The Corporate Contract & The Private Ordering of Shareholder Proposals*, 50 J. CORP. L. 1, 29 (2024).

<sup>311</sup> Brett McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 254 (2005) (explaining that precatory proposals “have only a shadowy presence in state law,” with nothing authorizing or forbidding them).

review article that Chairman Atkins referenced in his speech argues that this doctrinal silence should be interpreted as militating against an “inherent right” to submit precatory proposals given Delaware’s board-centric governance model and prioritization of private ordering.<sup>312</sup>

Others have contested this analysis, contending that the right to present and vote on precatory proposals is grounded in Section 121 of the DGCL and the overall governance scheme created by the statute.<sup>313</sup> Section 121 of the DGCL provides that corporations and their officers, directors, and shareholders shall possess powers that are “incidental” to certain expressly granted powers “so far as such [incidental] powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in [a corporation’s] certificate of incorporation.”<sup>314</sup> Some commentators have argued that Section 121, read together with other DGCL provisions—including those involving director elections, director removal, and shareholder voting rights—suggests that shareholders have an “incidental” power to submit and vote on advisory resolutions.<sup>315</sup> Defenders of precatory proposals have also cited case law from Delaware and other states that, in their view, supports such a power.<sup>316</sup>

## Bylaw Amendments

A corporation’s organizing documents consist of its charter (sometimes called the certificate or articles of incorporation) and bylaws.<sup>317</sup> The charter defines “the broad and general aspects of the corporate entity’s existence and nature.”<sup>318</sup> Charters must include certain basic information—for example, the corporation’s name and number of authorized shares.<sup>319</sup> The DGCL provides that charters may also include any provisions defining the powers of the corporation, directors, and shareholders as long as such provisions are not contrary to Delaware law.<sup>320</sup> Most states, including Delaware, provide that charter amendments must be initiated by the board of directors and then approved by shareholders.<sup>321</sup> Because most states do not allow shareholders to initiate charter amendments, shareholder proposals advocating charter amendments typically must be phrased as requests that the board “take the steps necessary” to amend the charter in specified ways.<sup>322</sup>

A corporation’s bylaws “are generally regarded as the proper place for the self-imposed rules and regulations deemed expedient for its convenient functioning to be laid down.”<sup>323</sup> Matters commonly addressed in bylaws include annual meetings, board size, director resignations, board vacancies, and indemnification rights.<sup>324</sup> Most states, including Delaware, allow shareholders to

<sup>312</sup> Pinder, *supra* note 299.

<sup>313</sup> Fisch et al., *supra* note 306.

<sup>314</sup> DEL. CODE ANN. tit. 8, § 121.

<sup>315</sup> Fisch et al., *supra* note 306.

<sup>316</sup> *Id.*

<sup>317</sup> DEL. CODE ANN. tit. 8, §§ 102, 109; MODEL BUS. CORP. ACT §§ 2.02, 2.06 (2025).

<sup>318</sup> *Gow v. Consol. Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933).

<sup>319</sup> DEL. CODE ANN. tit. 8, § 102(a)(1), (a)(4); MODEL BUS. CORP. ACT § 2.02(a)(1)-(2).

<sup>320</sup> DEL. CODE ANN. tit. 8, § 102(b)(1).

<sup>321</sup> *Id.* § 242(b); MODEL BUS. CORP. ACT § 10.03.

<sup>322</sup> SEC Staff Legal Bulletin No. 14D (Nov. 7, 2008) [hereinafter SLB 14D], <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14d-cf> <https://perma.cc/9MHY-VCMJ>.

<sup>323</sup> *Gow*, 165 A. at 140.

<sup>324</sup> Megan Wischmeier Shaner, *Interpreting Organizational “Contracts” and the Private Ordering of Public Company* (continued...)

amend the bylaws on their own initiative without board approval.<sup>325</sup> The DGCL also allows corporations to adopt charter provisions granting their boards concurrent authority to amend bylaws,<sup>326</sup> and almost all public corporations do so.<sup>327</sup> Under Delaware law, the adoption of a charter provision permitting the board to amend the bylaws does not divest shareholders of that power.<sup>328</sup> Because shareholders have this statutory right in most states, bylaw amendment proposals are the exception to the general principle that shareholder proposals must be phrased in precatory form to be proper under state law.<sup>329</sup>

Shareholders' bylaw-amendment power is not without limit, however. Bylaw proposals frequently implicate unsettled issues of state law because of the tension between two types of statutory provisions. On the one hand, as discussed, state corporate statutes vest managerial authority in boards of directors.<sup>330</sup> Section 141(a) of the DGCL, for example, provides that

[t]he business and affairs of every corporation ... shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.<sup>331</sup>

As the note to Rule 14a-8(i)(1) reflects, Section 141(a) and similar provisions in other states have traditionally been understood as preventing shareholders from dictating specific business decisions.<sup>332</sup>

On the other hand, state corporate statutes generally impose few explicit limits on shareholders' power to adopt bylaw amendments. Section 109(b) of the DGCL, for example, prohibits fee-shifting bylaws involving litigation over internal corporate claims, but otherwise provides that bylaws may include

any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.<sup>333</sup>

The scope of shareholders' bylaw-amendment power is not obvious from the plain text of these provisions. Section 109(b) says that bylaws cannot be "inconsistent with law," meaning Section 141(a)—which provides for board management—may limit the ways in which shareholder-adopted bylaws can restrict board authority.<sup>334</sup> A shareholder-adopted bylaw requiring a corporation to buy or sell a certain type of product, for example, would likely be inconsistent with the proposition that boards—not shareholders—have managerial authority.<sup>335</sup>

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*Governance*, 60 WM. & MARY L. REV. 985, 994 (2019). Bylaws must be consistent with state law and a company's charter. DEL. CODE ANN. tit. 8, § 109(b).

<sup>325</sup> DEL. CODE ANN. tit. 8, § 109(a); MODEL BUS. CORP. ACT § 10.20(a).

<sup>326</sup> DEL. CODE ANN. tit. 8, § 109(a). In some other states, boards have this power by default. MODEL BUS. CORP. ACT § 10.20(b).

<sup>327</sup> Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 589 n.25 (2016).

<sup>328</sup> DEL. CODE ANN. tit. 8, § 109(a).

<sup>329</sup> See HONABACH & SARGENT, *supra* note 67 § 5:51.

<sup>330</sup> DEL. CODE ANN. tit. 8, § 141(a); MODEL BUS. CORP. ACT § 8.01(b).

<sup>331</sup> DEL. CODE ANN. tit. 8, § 141(a).

<sup>332</sup> 17 C.F.R. § 240.14a-8(i)(1) note.

<sup>333</sup> DEL. CODE ANN. tit. 8, § 109(b).

<sup>334</sup> Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 TUL. L. REV. 409, 428–30 (1998).

<sup>335</sup> See *id.* at 436 (assuming that a bylaw requiring a corporation to buy a certain brand of pencil would be invalid).

At the same time, Section 141(a) explicitly contemplates limits on board authority, providing for board management “except as may be otherwise provided in this chapter,” with “this chapter” presumably including Section 109(b).<sup>336</sup> Highlighting these wrinkles, one scholar has argued that Sections 109(b) and 141(a) create a “recursive loop,” raising questions regarding the balance of power between boards and shareholders that statutory formalism cannot answer.<sup>337</sup>

There is limited state law precedent addressing the scope of shareholders’ power to restrict board authority in bylaws.<sup>338</sup> The leading Delaware decision addressing this issue is *CA, Inc. v. AFSCME Employees Pension Plan*.<sup>339</sup> In that case, the SEC certified to the Delaware Supreme Court questions regarding the propriety of a proposed bylaw that would have required a corporation to reimburse the reasonable expenses incurred by dissident shareholders who obtained at least one board seat in a proxy contest.<sup>340</sup> Specifically, the SEC asked the Delaware Supreme Court (1) whether the proposed bylaw was a proper subject for shareholder action under Delaware law, and (2) whether the proposed bylaw would cause the company to violate Delaware law, which would trigger a separate exclusion under Rule 14a-8(i)(2).<sup>341</sup>

At the outset of its analysis in *CA*, the Delaware Supreme Court explained that, in light of Section 141(a) of the DGCL, shareholders’ bylaw-amendment power is not coextensive with the board’s concurrent power and is “limited by the board’s management prerogatives.”<sup>342</sup> In identifying the relevant limits, the Court drew a distinction between shareholder-adopted bylaws that prescribe substantive business decisions (which are invalid) and shareholder-adopted bylaws that “define the process and procedures by which those decisions are made” (which may be valid).<sup>343</sup>

The Court then applied that distinction to conclude that the proposed bylaw at issue in *CA* was a proper subject for shareholder action because it had “both the intent and effect of regulating the process for electing directors,” even though it was “infelicitously couched as a substantive-sounding mandate to expend corporate funds.”<sup>344</sup> The Court emphasized that a bylaw’s status as procedural or substantive “must necessarily be determined in light of its context and purpose.”<sup>345</sup> The expense-reimbursement bylaw was procedural, the Court concluded, because it involved director elections (a subject in which shareholders have “a legitimate and protected interest”) and its purpose was to “promote the integrity of that electoral process by facilitating the nomination of director candidates by stockholders.”<sup>346</sup>

(The Delaware Supreme Court went on to hold that the proposed bylaw would have caused the company to violate Delaware law because it would have required the board to pay an insurgent’s expenses even in cases where directors’ fiduciary duties precluded reimbursement—for example, where a proxy contest was motivated by “personal or petty concerns” or waged to promote

<sup>336</sup> DEL. CODE ANN. tit. 8, § 141(a).

<sup>337</sup> Jeffrey N. Gordon, “Just Say Never?” *Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 546–47 (1997).

<sup>338</sup> Haseley & Ising, *supra* note 65 § 12.04[C].

<sup>339</sup> 953 A.2d 227 (Del. 2008).

<sup>340</sup> *Id.* at 230.

<sup>341</sup> *Id.* at 231.

<sup>342</sup> *Id.* at 232.

<sup>343</sup> *Id.* at 235–37.

<sup>344</sup> *Id.* at 236.

<sup>345</sup> *Id.* at 236–37.

<sup>346</sup> *Id.* at 237.

interests adverse to those of the corporation.<sup>347</sup> After the *CA* decision, Delaware amended the DGCL to authorize bylaws providing for the reimbursement of expenses incurred by shareholders in soliciting proxies for director elections.<sup>348</sup>)

One issue that remains unresolved in Delaware and some other states is the extent to which shareholder-adopted bylaws can restrict board authority to adopt or maintain a poison pill.<sup>349</sup> Some companies have attempted to exclude such proposals on the grounds that they are improper under state law (Rule 14a-8(i)(1)) and that they would cause the companies to violate state law if implemented (Rule 14a-8(i)(2)).<sup>350</sup>

The Oklahoma Supreme Court confronted these issues in its 1999 decision in *International Brotherhood of Teamsters General Fund v. Fleming Companies, Inc.*, which involved a shareholder-enacted bylaw requiring a company to redeem a poison pill and obtain shareholder approval before adopting any new poison pill.<sup>351</sup> The company challenged the legality of the bylaw, arguing that it conflicted with a provision in Oklahoma’s corporation statute permitting corporations to issue options.<sup>352</sup> The Oklahoma Supreme Court rejected this argument, upholding the bylaw after determining that nothing in Oklahoma’s corporation statute indicated that the board’s power to issue options was “exempt” from shareholder-adopted bylaws.<sup>353</sup>

*Fleming* appears to endorse a more expansive view of shareholder power than the Delaware Supreme Court’s decision in *CA*.<sup>354</sup> The Oklahoma Supreme Court did not address Oklahoma’s analog to Section 141(a) of the DGCL—an omission that may limit the decision’s influence as persuasive authority in other states.<sup>355</sup> A bylaw requiring the redemption of an existing poison pill appears to prescribe a substantive business decision, and Delaware courts may deem such a bylaw invalid for that reason.<sup>356</sup> In contrast, a bylaw requiring shareholder approval of future poison pills may qualify as procedural and thus valid.<sup>357</sup> That conclusion, however, is necessarily speculative. Some types of shareholder-approval requirements—for example, those involving product offerings—may impermissibly infringe on board prerogatives under the *CA* analysis.<sup>358</sup> Whether a bylaw subjecting poison pills to a binding shareholder vote would fall

<sup>347</sup> *Id.* at 240.

<sup>348</sup> DEL. CODE ANN. tit. 8, § 113.

<sup>349</sup> GUMBS & BROWN, *supra* note 262, at A-36.

<sup>350</sup> *Id.*

<sup>351</sup> 975 P.2d 907, 909 & n.3 (Okla. 1999). Earlier in the litigation, a federal district court had ordered the company to include the proposed bylaw amendment in its proxy materials. *Int’l Bhd. of Teamsters Gen. Fund v. Fleming Cos., Inc.*, 1997 WL 996768 (W.D. Okla. Feb. 19, 1997). On appeal, the U.S. Court of Appeals for the Tenth Circuit certified the question of the proposed amendment’s permissibility to the Oklahoma Supreme Court. *Int’l Bhd. of Teamsters Gen. Fund v. Fleming Cos., Inc.*, 975 P.2d 907, 910 (Okla. 1999). Before the Oklahoma Supreme Court issued its decision, the proposed amendment passed with approximately 60% of votes in its favor. *Id.*

<sup>352</sup> *Fleming Cos., Inc.*, 975 P.2d at 911.

<sup>353</sup> *Id.* at 912.

<sup>354</sup> FRANKLIN GEVURTZ, CORPORATION LAW 200–01 (3d ed. 2021).

<sup>355</sup> McDonnell, *supra* note 311, at 228.

<sup>356</sup> John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605, 615 (1997).

<sup>357</sup> *Id.*

<sup>358</sup> See Hamermesh, *supra* note 334, at 444 (arguing, before the *CA* decision, that bylaws requiring shareholder votes on certain issues would likely be invalid notwithstanding their “procedural” character).

within that category remains uncertain. *CA* leaves this question and a variety of others regarding shareholders' bylaw-amendment power unanswered.<sup>359</sup>

SEC staff's approach to bylaw proposals that implicate unsettled issues of state law has evolved over time. In the late 1990s, several no-action letters involving such proposals indicated that SEC staff was "unable to concur" in the company's view that a proposal was excludable, but did not express explicit disagreement with that view—a departure from staff's standard denial language.<sup>360</sup> Some commentators criticized this development, contending that it gave companies greater leeway to exclude bylaw proposals.<sup>361</sup> In the early 2000s, SEC staff abandoned this "agnostic" approach and adopted its current posture toward no-action requests implicating unsettled issues of state law.<sup>362</sup> Today, SEC staff generally denies such requests and concludes that, without controlling state law, the company seeking no-action relief has not carried its burden of demonstrating excludability under Rule 14a-8(g).<sup>363</sup>

## Violations of Law

Rule 14a-8(i)(2) permits a company to exclude a proposal that would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject.<sup>364</sup> While this exclusion overlaps with Rule 14a-8(i)(1)'s "improper subject" exclusion, it provides a distinct basis upon which companies may omit a proposal from their proxy materials.<sup>365</sup> The "improper subject" exclusion applies to proposals involving subjects that are facially improper for shareholder action.<sup>366</sup> Rule 14a-8(i)(2), in contrast, permits the exclusion of proposals that would cause a company to violate state law if implemented, even if the subject matter of the proposal is proper on its face.<sup>367</sup>

As mentioned, companies sometimes seek to exclude bylaw proposals under both Rule 14a-8(i)(1) and Rule 14a-8(i)(2). Under Rule 14a-8(i)(2), SEC staff has allowed companies to exclude bylaw proposals that would conflict with provisions in their charters.<sup>368</sup> Corporations have also successfully invoked Rule 14a-8(i)(2) to exclude proposals that would, if implemented, cause them to breach existing contracts, including employment agreements with executives.<sup>369</sup>

<sup>359</sup> See Ben Walther, *Bylaw Governance*, 20 *FORDHAM J. CORP. & FIN. L.* 399, 400 (2015) (indicating that the scope of shareholders' bylaw power remains "ill-defined" under Delaware law).

<sup>360</sup> GUMBS & BROWN, *supra* note 262, at A-37. During this period, other no-action responses involving bylaw proposals that implicated unsettled state law issues expressed no view as to whether the proposals were excludable. *Id.*

<sup>361</sup> *Id.*; ROBERT J. HAFT ET AL., *ANALYSIS OF KEY SEC NO-ACTION LETTERS AND COMPLIANCE AND DISCLOSURE INTERPRETATIONS* § 10:19 (2025) (characterizing this approach as placing the risk of legal uncertainty on proponents of shareholder proposals).

<sup>362</sup> Haseley & Ising, *supra* note 65 § 12.04[D].

<sup>363</sup> *Id.* In 2002, for example, SEC staff concluded that a company could not exclude a poison pill bylaw proposal as improper under California law, reasoning that the company had not carried its burden of establishing excludability. Sw. Gas Corp., SEC No-Action Letter, 2002 WL 597378 (Mar. 19, 2002).

<sup>364</sup> 17 C.F.R. § 240.14a-8(i)(2).

<sup>365</sup> GUMBS & BROWN, *supra* note 262, at A-33.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *E.g.*, Advanced Photonix, Inc., SEC No-Action Letter, 2014 WL 1411041 (May 15, 2014).

<sup>369</sup> *E.g.*, BankAmerica Corp., SEC No-Action Letter, 1999 WL 107732 (Feb. 24, 1999).

## Violations of the Proxy Rules

Rule 14a-8(i)(3) allows a company to exclude a proposal if the proposal or its supporting statement is contrary to any of the SEC's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy solicitation materials.<sup>370</sup> In Staff Legal Bulletin (SLB) 14B, SEC staff identified the following circumstances in which Rule 14a-8(i)(3) may offer a basis for excluding a proposal:

- a proposal's supporting statement impugns character, integrity, or personal reputation, or directly or indirectly makes charges concerning improper, illegal, or immoral conduct or association, without factual foundation;
- the company demonstrates objectively that a factual statement is materially false or misleading;
- a proposal is so inherently vague or indefinite that neither shareholders nor the company would be able to determine with any reasonable certainty what actions or measures the proposal requires; or
- substantial portions of a proposal's supporting statement are irrelevant to a consideration of the proposal's subject matter, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which she is being asked to vote.<sup>371</sup>

In contrast, SLB 14B explained that companies may not rely upon Rule 14a-8(i)(3) to exclude a proposal on the basis that

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.<sup>372</sup>

## Personal Grievances and Special Interests

Rule 14a-8(i)(4) allows a company to exclude a proposal if the proposal relates to the redress of a personal claim or grievance against the company or any other person or is designed to result in a benefit to the proponent, or to further a personal interest, which is not shared by the other shareholders at large.<sup>373</sup> Rule 14a-8(i)(4) has been successfully invoked to exclude proposals that on their face involve personal grievances, many of which have been submitted by disgruntled former employees.<sup>374</sup> SEC staff has also permitted companies to rely on Rule 14a-8(i)(4) to

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<sup>370</sup> 17 C.F.R. § 240.14a-8(i)(3).

<sup>371</sup> SEC Staff Legal Bulletin No. 14B (Sept. 15, 2004), <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14b-cf> <https://perma.cc/N5JH-BDU8>.

<sup>372</sup> *Id.*

<sup>373</sup> 17 C.F.R. § 240.14a-8(i)(4).

<sup>374</sup> *E.g.*, Morgan Stanley, SEC No-Action Letter, 2004 WL 111573 (Jan. 14, 2004).

exclude proposals based on evidence linking a proposal to a personal grievance, even where that grievance is not apparent from the four corners of the proposal. For example, SEC staff has allowed a company to exclude a proposal requesting the creation of an ethics committee chaired by an outside director where the proponent was a former employee who had sued the company and been involved in various disputes with it.<sup>375</sup>

## Relevance

Rule 14a-8(i)(5) permits a company to exclude a proposal if the proposal relates to operations which account for less than 5% of the company's total assets at the end of its most recent fiscal year, and for less than 5% of the company's net earnings and gross sales for its most recent fiscal year, provided the proposal is not "otherwise significantly related to the company's business."<sup>376</sup> This "relevance" exclusion traces its roots to 1952, when the SEC amended the shareholder proposal rule to allow the exclusion of proposals submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."<sup>377</sup> In 1972, the SEC replaced that subjective inquiry, amending the exclusion to cover proposals consisting of

a recommendation, request, or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer.<sup>378</sup>

In 1976, the agency removed the language concerning "general economic, political, racial, religious, social or similar causes," deeming it "superfluous."<sup>379</sup> In adopting this change, the SEC rejected suggestions to expand the relevance exclusion to allow companies to omit any proposal that lacked a "significant *economic* relation to the issuer's business."<sup>380</sup> Instead, the SEC explained that the relevance exclusion was not "hinged solely on the economic relativity of a proposal," and that proposals involving governance and ethical issues may be significant to a company's business "even though such significance is not apparent from an economic viewpoint."<sup>381</sup> 1983 amendments to Rule 14a-8 gave the relevance exclusion its current form, adding the 5% numerical thresholds but preserving the permissibility of proposals that are "otherwise significantly related" to a company's business.<sup>382</sup>

For much of the shareholder proposal rule's history, SEC staff adopted a narrow interpretation of Rule 14a-8(i)(5), concluding that many matters that are not economically significant to a company may nevertheless qualify as "otherwise significantly related" to its business.<sup>383</sup> In a 1982 release, the SEC explained that staff had generally denied no-action relief under the relevance exclusion "where a proposal has reflected social or ethical issues, rather than economic

<sup>375</sup> Cabot Corp., SEC No-Action Letter, 1985 WL 54461 (Oct. 30, 1985).

<sup>376</sup> 17 C.F.R. § 240.14a-8(i)(5).

<sup>377</sup> 1952 Amendments, *supra* note 73, at \*8.

<sup>378</sup> 1972 Amendments, *supra* note 101, at \*4.

<sup>379</sup> 1976 Amendments, *supra* note 61, at \*9.

<sup>380</sup> *Id.* (emphasis added).

<sup>381</sup> *Id.*

<sup>382</sup> 1983 Amendments, *supra* note 120, at \*11. In 1997, the SEC proposed an amendment to the relevance exclusion that would have adopted a purely economic standard for relevance by eliminating the "otherwise significantly related" language. 1997 Proposed Amendments, *supra* note 140, at \*9. The SEC ultimately decided not to adopt that change. 1998 Amendments, *supra* note 142, at \*12.

<sup>383</sup> Haseley & Ising, *supra* note 65 § 12.09[B].

concerns, raised by the issuer's business, and the issuer conducts any such business, no matter how small."<sup>384</sup>

This approach continued after the SEC adopted the relevance exclusion's 5% numerical thresholds, partially as a result of *Lovenheim v. Iroquois Brands, Ltd.*, a 1985 decision from the U.S. District Court for the District of Columbia.<sup>385</sup> In *Lovenheim*, a shareholder sought an injunction requiring a company to include in its proxy materials a proposal that the board

study the methods by which its French supplier produces paté de foie gras, and report to the shareholders its findings and opinions, based on expert consultation, on whether this production method causes undue distress, pain or suffering to the animals involved and, if so, whether further distribution of this product should be discontinued until a more humane production method is developed.<sup>386</sup>

The company attempted to exclude the proposal under Rule 14a-8(i)(5) on the ground that paté de foie gras accounted for none of its earnings and less than .05% of its assets.<sup>387</sup> The court sided with the shareholder, relying on past SEC practice to conclude that the relevance exclusion does not apply to proposals that have "ethical and social significance," provided such proposals also have a meaningful relationship to a company's business.<sup>388</sup> Because the plaintiff's proposal involved issues of ethical and social significance and implicated "significant" levels of the company's sales, the court ordered the company to include the proposal in its proxy materials.<sup>389</sup>

The *Lovenheim* court's observation that the paté de foie gras proposal implicated "significant" levels of the company's sales is somewhat confusing; paté de foie gras accounted for \$79,000 of the company's \$141 million of annual revenue.<sup>390</sup> While the court cautioned in a footnote that the proposal would have been excludable if the company did not import *any* paté de foie gras,<sup>391</sup> *Lovenheim* suggests that even minimal participation in an activity may preclude reliance on the relevance exclusion in cases where the activity raises issues of ethical and social concern.

Before 2017, SEC staff's application of Rule 14a-8(i)(5) generally reflected this principle. In 1999, for example, SEC staff rejected a financial services company's effort to exclude a proposal advocating a policy against future purchases of tobacco stocks, even though tobacco stocks constituted less than 1% of the company's equity portfolio.<sup>392</sup> Presumably, this decision was based on the significance of tobacco sales as a social issue. In contrast, SEC staff has granted no-action relief under Rule 14a-8(i)(5) in cases where a company does not engage in the activity that is the subject of a proposal. For example, in 2003, SEC staff allowed a consumer goods company to exclude a proposal recommending a policy against human embryonic stem cell research based on the company's representation that it does not perform such research.<sup>393</sup>

Since 2017, SEC staff's approach to the relevance exclusion has shifted back and forth with changes in presidential administration and SEC leadership. In 2017, the SEC's Division of

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<sup>384</sup> 1982 Proposed Amendments, *supra* note 113, at \*16.

<sup>385</sup> 618 F. Supp. 554 (D.D.C. 1985); *see also* GUMBS & BROWN, *supra* note 262, at A-56 (explaining that *Lovenheim* "had a lasting impact on no-action positions under Rule 14a-8(i)(5)").

<sup>386</sup> *Lovenheim*, 618 F. Supp. at 556.

<sup>387</sup> *Id.* at 559.

<sup>388</sup> *Id.* at 561 & n.16.

<sup>389</sup> *Id.* at 561.

<sup>390</sup> *Id.* at 558.

<sup>391</sup> *Id.* at 561 n.16.

<sup>392</sup> Lincoln Nat'l Corp., SEC No-Action Letter, 1999 WL 160353 (Mar. 24, 1999).

<sup>393</sup> Procter & Gamble Co., SEC No-Action Letter, 2003 WL 21919560 (Aug. 11, 2003).

Corporation Finance issued SLB 14I, which announced a broader view of the relevance exclusion than SEC staff had historically applied.<sup>394</sup> SLB 14I observed that SEC staff had generally denied no-action relief under the relevance exclusion where a company conducted any business, no matter how small, related to an ethical or social issue raised by a proposal, even after the adoption of numerical tests for economic relevance in 1983.<sup>395</sup> That approach, SLB 14I said, had “unduly limited the [relevance] exclusion’s availability.”<sup>396</sup> Going forward, SLB 14I explained, SEC staff would adopt a more discerning approach when analyzing the relevance of social and ethical issues to a company’s business.<sup>397</sup> Under this framework, where a proposal’s significance to a company’s business is not apparent on its face, the proposal “may be excludable” unless the proponent demonstrates its significance—for example, with evidence that the proposal “may have a significant impact on ... segments of the issuer’s business or subject the issuer to significant contingent liabilities.”<sup>398</sup> The “mere possibility of reputational or economic harm,” however, would not preclude no-action relief.<sup>399</sup>

SEC staff’s posture toward Rule 14a-8(i)(5) shifted yet again with a change in the SEC’s composition after the 2020 presidential election. In 2021, SLB 14L rescinded SLB 14I and announced a return to SEC staff’s “longstanding approach” of analyzing the relevance exclusion “in a manner ... consistent with *Lovenheim v. Iroquois Brands, Ltd.*”<sup>400</sup>

After another change in SEC leadership, the pendulum swung back toward a broader view of the relevance exclusion. In 2025, SLB 14M rescinded SLB 14L and reinstated several of the key principles from SLB 14I.<sup>401</sup>

## Absence of Power/Authority

Rule 14a-8(i)(6) allows companies to exclude proposals that they lack the power or authority to implement.<sup>402</sup> SEC staff have granted no-action relief under this exclusion where proposals would have required a company to violate the law or breach existing contracts.<sup>403</sup> Other successful no-action requests under Rule 14a-8(i)(6) have involved proposals requesting action by separate legal entities that were not under the control of the company to which the proposals were submitted.<sup>404</sup>

Proposals calling for director independence requirements sometimes implicate Rule 14a-8(i)(6). Companies have sought to exclude some proposals advocating such requirements as beyond their power to implement based on two considerations. First, while a company’s board nominates a

<sup>394</sup> SEC Staff Legal Bulletin No. 14I (Nov. 1, 2017), <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14i-cf> <https://perma.cc/R5YF-H8S5>.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* In contrast, SLB 14I indicated that SEC staff would generally view “substantive governance matters” as being “significantly related” to almost all companies. *Id.*

<sup>398</sup> *Id.* (internal quotation marks omitted).

<sup>399</sup> *Id.*

<sup>400</sup> SEC Staff Legal Bulletin No. 14L (Nov. 3, 2021) [hereinafter SLB 14L], <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14l-cf> <https://perma.cc/G6H2-C8X5>.

<sup>401</sup> SEC Staff Legal Bulletin No. 14M (Feb. 12, 2025) [hereinafter SLB 14M], <https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf> <https://perma.cc/FUN9-G873>.

<sup>402</sup> 17 C.F.R. § 240.14a-8(i)(6).

<sup>403</sup> BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS HANDBOOK § 10:17 (2025); Donovan Gibbons, *Excluding Proposals in the Absence of Corporate Authority*, 94 DENV. L. REV. ONLINE 384, 389–90 (2017).

<sup>404</sup> GUMBS & BROWN, *supra* note 262, at A-61.

slate of director candidates each year, directors are ultimately elected by shareholders.<sup>405</sup> Second, directors may lose their independence as a result of changed circumstances outside of a board's control.<sup>406</sup>

SEC staff addressed these issues in SLB 14C, which explains that its analysis of director independence proposals under Rule 14a-8(i)(6) focuses primarily on whether a proposal “requires continued independence at all times.”<sup>407</sup> Under SLB 14C, proposals that would require directors to maintain their independence at all times are excludable as beyond a company's power to implement.<sup>408</sup> In contrast, proposals that permit companies to cure a director's loss of independence are not automatically excludable under Rule 14a-8(i)(6).<sup>409</sup> SLB 14C indicates that this approach is consistent with independence requirements in SEC regulations, which provide companies with an opportunity to cure a loss of independence.<sup>410</sup>

For companies incorporated in states where boards must obtain shareholder approval for charter amendments, Rule 14a-8(i)(6) allows the exclusion of proposals requesting or recommending that companies amend their charters in specified ways.<sup>411</sup> Such proposals are also generally excludable under Rule 14a-8(i)(1) (the “improper subject” exclusion) and Rule 14a-8(i)(2) (the “violations of law” exclusion).<sup>412</sup> In SLB 14D, however, the Division of Corporation Finance explained that proponents can avoid all three of these exclusions by requesting that the board “take the steps necessary” to amend a company's charter in particular ways.<sup>413</sup> SEC staff usually allows proponents to redraft improper charter-amendment proposals along these lines.<sup>414</sup>

## Ordinary Business

Rule 14a-8(i)(7) allows the exclusion of proposals that deal with a matter “relating to the company's ordinary business operations.”<sup>415</sup> The ordinary business exclusion (OBE) is grounded in “the policy of most state corporate laws,” which “confine the resolution of ordinary business problems to management and the board of directors since it is impracticable for shareholders to decide how to solve such problems.”<sup>416</sup>

The OBE has generated the most controversy of Rule 14a-8's substantive exclusions, playing a central role in disputes regarding E&S proposals.<sup>417</sup> In recent years, the OBE has also often been the substantive basis for exclusion that companies most frequently assert and that SEC staff most frequently rely upon to grant no-action relief.<sup>418</sup>

<sup>405</sup> DEL. CODE ANN. tit. 8, § 211(b); MODEL BUS. CORP. ACT § 8.03(c).

<sup>406</sup> See SEC Staff Legal Bulletin No. 14C (June 28, 2005), <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14c-cf> <https://perma.cc/3XLE-DQ34>.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> SLB 14D, *supra* note 322.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> 17 C.F.R. § 240.14a-8(i)(7).

<sup>416</sup> 1997 Proposed Amendments, *supra* note 140, at \*13.

<sup>417</sup> Haseley & Ising, *supra* note 65 § 12.06.

<sup>418</sup> Marc S. Gerber & Jeongu Gim, *Shareholder Proposal No-Action Requests in the 2025 Proxy Season: A Continuing* (continued...)

Originally adopted in 1954,<sup>419</sup> the OBE became the focal point for disputes regarding social policy proposals in the 1970s.<sup>420</sup> In 1976, the SEC issued guidance on the OBE in response to concerns that the exclusion was being used to omit proposals that were important to shareholders.<sup>421</sup> In that guidance, the SEC took the position that proposals involving issues with “significant policy, economic or other implications” cannot be omitted under the OBE.<sup>422</sup> As an illustration, the SEC explained that a proposal recommending that a company not construct a nuclear power plant would not be excludable under the OBE in light of the important economic and safety considerations surrounding nuclear power plants.<sup>423</sup> In the 1976 guidance, the SEC indicated that a company may omit a proposal under the OBE only if the proposal (1) involves “mundane” business matters, and (2) does not involve “any substantial policy or other considerations.”<sup>424</sup>

The SEC has further explained that the policy underlying the OBE rests on “two central considerations.”<sup>425</sup>

First, the OBE is based on the premise that certain tasks are “so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.”<sup>426</sup> As examples, the SEC has cited “management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers.”<sup>427</sup> Proposals related to such matters are excludable under the OBE unless they involve “sufficiently significant social policy issues” that “transcend ... day-to-day business matters.”<sup>428</sup>

Second, the OBE permits the omission of proposals that seek to “micromanage” a company, even if those proposals implicate significant policy questions.<sup>429</sup> Proposals involving “intricate detail” or that seek to impose “specific time-frames or methods for implementing complex policies” may run afoul of this rule.<sup>430</sup> The prohibition of micromanagement appears to be based in part on the D.C. Circuit’s 1992 decision in *Roosevelt v. E.I. Du Pont de Nemours & Co.*, which held that the OBE permitted a company to exclude a proposal requesting that it accelerate by one year a plan to phase out its production of chlorofluorocarbons (CFCs).<sup>431</sup> While the D.C. Circuit seemed to accept that the production of CFCs was a significant policy issue, it sided with the company

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*Surge in Requests and a Favorable Regulatory Environment*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Sept. 25, 2025), <https://www.skadden.com/insights/publications/2025/09/insights-september-2025/corporate/shareholder-proposal-noaction-requests-in-the-2025-proxy-season> <https://perma.cc/986S-7QKD>.

<sup>419</sup> 1954 Amendments, *supra* note 74, at \*4.

<sup>420</sup> ARANOW & EINHORN, *supra* note 259 § 16.04[G].

<sup>421</sup> 1976 Amendments, *supra* note 61, at \*11.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at \*12.

<sup>425</sup> 1998 Amendments, *supra* note 142, at \*4.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* The SEC has taken the position that proposals requesting the preparation of a report or the formation of a board committee are to be analyzed based on whether the subject matter of the report or committee involves a matter relating to ordinary business operations. 1983 Amendments, *supra* note 120, at \*7.

<sup>428</sup> 1998 Amendments, *supra* note 142, at \*4.

<sup>429</sup> *Id.* at \*5.

<sup>430</sup> *Id.*

<sup>431</sup> 958 F.2d 416, 425–28 (D.C. Cir. 1992).

because the proposal involved a minor difference in the timing of an existing management plan.<sup>432</sup>

There is no bright-line rule for determining whether an issue qualifies for the “significant policy” exception to the OBE. In analyzing that exception, SEC staff have appeared to give weight to media coverage, public debate, and legislative and regulatory activity regarding a subject matter.<sup>433</sup> Over the years, SEC staff has changed its position on the “significant policy” exception’s application to a range of topics, including plant closings, the sale of tobacco products, executive compensation, golden parachutes, and net neutrality.<sup>434</sup> Some have attributed these types of changes to the subjectivity involved in determining whether a proposal implicates significant policy issues,<sup>435</sup> while the SEC has emphasized the need to account for changed circumstances.<sup>436</sup>

One of the SEC’s highest-profile reversals involving the shareholder proposal rule emerged from an effort to inject greater certainty into the OBE’s application. As discussed, in 1992, SEC staff announced a categorical rule allowing the exclusion of all proposals concerning a company’s employment policies and practices for the general workforce, even if such proposals implicated significant social issues.<sup>437</sup> SEC staff adopted this position in granting a no-action request from Cracker Barrel Old Country Store, which sought to exclude a proposal requesting that the company implement a non-discrimination policy concerning sexual orientation.<sup>438</sup> In granting the no-action request based on the OBE and announcing a new categorical rule, SEC staff contended that “the line between includable and excludable employment-related proposals based on social policy considerations has become increasingly difficult to draw.”<sup>439</sup> After the *Cracker Barrel* no-action letter received significant criticism,<sup>440</sup> the SEC reversed course in 1998 and returned to a case-by-case approach of evaluating whether employment-related proposals qualify for the OBE’s “significant policy” exception.<sup>441</sup>

### ***Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3d Cir. 2015)**

In 2015, the U.S. Court of Appeals for the Third Circuit grappled with the OBE in *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3d Cir. 2015). In that case, Wal-Mart sought to exclude a proposal requesting that its board amend the charter of its governance committee to require oversight of whether Wal-Mart should sell products that endanger public safety, impair Wal-Mart’s reputation, and/or would reasonably be considered offensive to family and community values integral to Wal-Mart’s brand. *Id.* at 329. A narrative accompanying the proposal made clear that the proposal was referencing the sale of firearms. *Id.* at 330. SEC staff agreed with Wal-Mart that the proposal was excludable under the OBE, explaining that the OBE generally allows the exclusion of proposals concerning the sale of particular products. *Id.* at 331. A federal district court disagreed, reasoning that the proposal implicated significant social policy issues. *Id.* at 333.

The Third Circuit reversed the district court and allowed Wal-Mart to exclude the proposal. In doing so, the court endorsed a two-step approach to the OBE’s “significant policy” exception. The first step is an assessment of whether a proposal raises a “significant” policy issue. *Id.* at 345–46. If so, the second step is an analysis of whether that policy issue “transcends” the company’s ordinary business operations. *Id.* at 346–47. In bifurcating this inquiry,

<sup>432</sup> *Id.*

<sup>433</sup> GUMBS & BROWN, *supra* note 262, at A-67.

<sup>434</sup> 1998 Amendments, *supra* note 142, at \*3; Haseley & Ising, *supra* note 65 § 12.06.

<sup>435</sup> Manesh, *supra* note 310, at 12 & n.83.

<sup>436</sup> 1998 Amendments, *supra* note 142, at \*3.

<sup>437</sup> 1992 *Cracker Barrel* No-Action Letter, *supra* note 126.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> Haseley & Ising, *supra* note 65 § 12.06[C].

<sup>441</sup> 1998 Amendments, *supra* note 142, at \*3.

the court explained that, in its view, SEC guidance had used the “transcendence” language “to refer to a policy issue that is divorced from how a company approaches the nitty-gritty of its core business.” *Id.* at 347. Thus, under the court’s test, even if a proposal implicates a significant policy issue, it is excludable if that issue does not “transcend” ordinary business operations.

The court ultimately held that the proposal at issue was excludable because it did not meet the “transcendence” standard. *Id.* at 345–51. While the court concluded that the proposal implicated significant policy issues, it determined that those issues did not “transcend” Wal-Mart’s ordinary business operations because decisions regarding product offerings are “the essence of a retailer’s business.” *Id.* at 348. A concurring judge agreed with the majority that the proposal was excludable, but rejected the majority’s two-step approach to the “significant policy” exception. *Id.* at 353–55 (Shwartz, J., concurring). In the concurring judge’s view, the proposal was excludable because it did not focus on firearms specifically and was instead concerned with public safety generally, Wal-Mart’s reputation, and Wal-Mart’s brand—none of which qualified as significant policy issues. *Id.* at 354 (Shwartz, J., concurring). The concurring judge disagreed with the majority’s reading of SEC guidance. She argued that whether a policy issue “transcends” ordinary business operations is part of the inquiry into whether the issue is “significant,” as opposed to representing a separate analytical step. *Id.* at 353 (Shwartz, J., concurring).

Following the *Trinity* decision, SLB 14H announced that SEC staff agreed with the outcome of the case, but did not endorse the majority’s two-part approach to the OBE’s “significant policy” exception. SEC Staff Legal Bulletin No. 14H (Oct. 22, 2015). In SEC staff’s view, whether an issue is “significant” is not analytically distinct from whether the issue “transcends” ordinary business operations. *Id.* Instead, SLB 14H endorsed the position adopted by the concurring judge in *Trinity*: an issue is “significant” because it “transcends” a company’s ordinary business operations. *Id.* SLB 14H thus explained that SEC staff would continue to apply its traditional approach to the OBE’s “significant policy” exception rather than adopt the Third Circuit’s two-part inquiry. *Id.*

As with the “relevance” exclusion, SEC staff’s approach to the OBE has shifted with changes in presidential administration and the composition of the SEC. In 2019, SLB 14K endorsed a “company-specific” approach to the OBE’s “significant policy” exception.<sup>442</sup> Under that approach, SEC staff evaluate the relationship between a policy issue and a given company, as opposed to focusing “solely” on the policy issue’s significance in the abstract.<sup>443</sup> Accordingly, under the company-specific approach, a policy issue that is significant to one company may not be significant to another.<sup>444</sup> For example, under SLB 14K, an energy company might be required to include a proposal involving climate change in its proxy materials, while a software company might be permitted to exclude an identical proposal.<sup>445</sup>

SLB 14K also discussed the micromanagement component of the OBE. Under SLB 14K’s approach to micromanagement arguments, SEC staff “look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board.”<sup>446</sup> Under this framework, proposals requesting that a company “consider, discuss the feasibility of, or evaluate the potential for a particular issue” generally do not constitute micromanagement.<sup>447</sup> Proposals that involve specific timeframes or methods for implementing complex policies, however, may represent micromanagement under SLB 14K, even if they are drafted in precatory form.<sup>448</sup>

To illustrate this distinction, SLB 14K offered two examples from the previous proxy season. The first example—which SEC staff deemed to constitute micromanagement—requested that a

<sup>442</sup> SEC Staff Legal Bulletin No. 14K (Oct. 16, 2019), <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/staff-legal-bulletin-14k-shareholder-proposals> <https://perma.cc/XZ63-DRF2>.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

company annually report on “short-, medium- and long-term greenhouse gas targets” aligned with the targets in the 2016 Paris Climate Agreement.<sup>449</sup> SEC staff concluded that this proposal was excludable because it “effectively requir[ed] the adoption of time-bound targets (short, medium, and long) that the company would measure itself against,” along with “changes in operations to meet those goals, thereby imposing a specific method for implementing a complex policy.”<sup>450</sup> In contrast, SEC staff denied no-action relief for a proposal requesting a report discussing if and how a company planned to reduce its contribution to climate change and “align its operations and investments” with the Paris Climate Agreement’s goals.<sup>451</sup> That proposal did not constitute micromanagement, according to SLB 14K, because it “deferred to management’s discretion to consider if and how the company plans to reduce its carbon footprint.”<sup>452</sup>

In 2021, SLB 14L—discussed above in connection with the “relevance” exclusion—rescinded SLB 14K.<sup>453</sup> SLB 14L repudiated the company-specific approach to the OBE’s “significant policy” exception, arguing that SLB 14K had drawn SEC staff into “factual considerations that do not advance the policy objectives” behind the OBE while failing to yield “consistent, predictable results.”<sup>454</sup> SLB 14L thus announced that SEC staff would “no longer focus on determining the nexus between a policy issue and the company” receiving a proposal, but “instead focus on the social policy significance of the issue” raised by the proposal.<sup>455</sup>

SLB 14L also rejected SLB 14K’s framework for analyzing micromanagement, instead endorsing what it described as a “measured approach” to that issue.<sup>456</sup> Specifically, SLB 14L explained that proposals “seeking detail or seeking to promote timeframes or methods” would not automatically run afoul of the OBE’s prohibition of micromanagement.<sup>457</sup> Rather, SLB 14L indicated that SEC staff would focus on the “level of granularity” a proposal seeks and “whether and to what extent it inappropriately limits discretion of the board or management.”<sup>458</sup>

SLB 14L was widely viewed as reflecting a more favorable view of E&S proposals from SEC staff.<sup>459</sup> The 2022 proxy season appeared to confirm this perception, as the success rate for no-action requests under the OBE—along with overall no-action success rates—plummeted to the lowest levels in decades amid a surge in E&S proposals.<sup>460</sup> This shift moderated during the 2023

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<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> SLB 14L, *supra* note 400.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> *E.g.*, Maia Gez et al., *A Win for Environmental and Social Shareholder Proponents? Corp Fin Issues SLB 14L, Rescinding Prior SLBs on Economic Relevance and Ordinary Business Exclusions*, WHITE & CASE LLP (Nov. 4, 2021), <https://www.whitecase.com/insight-alert/win-environmental-and-social-shareholder-proponents-corp-fin-issues-slb-14l> <https://perma.cc/73LF-29ST>.

<sup>460</sup> GIBSON, DUNN & CRUTCHER LLP, *SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2022 PROXY SEASON 2* (2022), <https://www.gibsondunn.com/wp-content/uploads/2022/07/shareholder-proposal-developments-during-the-2022-proxy-season.pdf> <https://perma.cc/BNC6-BZLG>.

and 2024 proxy seasons, however, as no-action success rates climbed closer to pre-SLB 14L averages.<sup>461</sup>

In February 2025, after another change in the SEC’s leadership, SLB 14M rescinded SLB 14L and announced a return to the company-specific approach to the OBE’s “significant policy” exception.<sup>462</sup> SLB 14M also reinstated SLB 14K’s approach to micromanagement.<sup>463</sup>

## Director Elections

Rule 14a-8(i)(8) permits companies to exclude proposals that

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- question the competence, business judgment, or character of one or more nominees or directors;
- seek to include a specific individual in the company’s proxy materials for election to the board of directors; or
- otherwise could affect the outcome of the upcoming election of directors.<sup>464</sup>

Earlier iterations of this exclusion were broader and served as a flashpoint in debates surrounding proxy access.<sup>465</sup> While a detailed history of proxy access is beyond the scope of this report, some episodes in that narrative intersect with the history of the shareholder proposal rule and the election exclusion. For present purposes, the story begins in 2003, when the SEC declined to adopt a proposed rule that would have mandated proxy access in certain circumstances.<sup>466</sup> In response, shareholder activists sought to promote proxy access via private ordering, relying on Rule 14a-8 to submit proxy access proposals at several companies.<sup>467</sup> In 2006, the U.S. Court of Appeals for the Second Circuit held that an earlier version of the election exclusion—which allowed companies to exclude proposals that “relate[d] to” an election—did not bar proxy access proposals, contrary to the SEC’s position at the time.<sup>468</sup> A year later, however, the SEC amended the election exclusion to specifically prohibit proxy access proposals, functionally overturning the result of the Second Circuit’s decision.<sup>469</sup>

In 2010, the SEC reversed course, adopting amendments to the proxy rules that (1) mandated proxy access for certain large long-term shareholders (Rule 14a-11), and (2) modified Rule 14a-8’s election exclusion to permit proxy access proposals that did not conflict with

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<sup>461</sup> GIBSON, DUNN & CRUTCHER LLP, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2024 PROXY SEASON 2 (2024), <https://www.gibsondunn.com/wp-content/uploads/2024/07/shareholder-proposal-developments-during-the-2024-proxy-season.pdf> <https://perma.cc/XK5P-ZD5A>.

<sup>462</sup> SLB 14M, *supra* note 401.

<sup>463</sup> *Id.*

<sup>464</sup> 17 C.F.R. § 240.14a-8(i)(8).

<sup>465</sup> Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 444–45 (2012).

<sup>466</sup> *Id.* at 444.

<sup>467</sup> *Id.*

<sup>468</sup> *AFSCME v. AIG*, 462 F.3d 121, 131 (2d Cir. 2006).

<sup>469</sup> Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56914, 2007 WL 4442610 (Dec. 6, 2007).

Rule 14a-11.<sup>470</sup> The 2010 amendment to the election exclusion thus allowed shareholders to submit proposals seeking proxy access regimes that were less restrictive than the mandatory floor established by Rule 14a-11—i.e., proxy access regimes with lower ownership thresholds for eligible shareholders, shorter holding period requirements, and/or higher limits on the number of director seats an eligible shareholder could seek to fill.<sup>471</sup> (Rule 14a-11 was available to shareholders or groups of shareholders holding at least 3% of a company’s voting power for at least three years and allowed eligible shareholders to nominate candidates for up to 25% of a company’s board seats.<sup>472</sup>)

In its 2011 decision in *Business Roundtable v. SEC*, the U.S. Court of Appeals for the D.C. Circuit vacated Rule 14a-11.<sup>473</sup> While the SEC has not attempted to issue another rule mandating proxy access, the 2010 amendment to the election exclusion remains in place, allowing shareholders to pursue proxy access through shareholder proposals.

The years following the *Business Roundtable* decision witnessed a flood of proxy access proposals, many of which received majority votes in their favor.<sup>474</sup> Corporations generally proved responsive to these votes.<sup>475</sup> As of 2024, 85% of S&P 500 companies had adopted some form of proxy access,<sup>476</sup> compared to less than 1% in 2014.<sup>477</sup> The evolution of the election exclusion thus highlights the shareholder proposal rule’s potential role in facilitating governance changes and private ordering.

## Conflicts with Company Proposal

Rule 14a-8(i)(9) allows a company to exclude proposals that directly conflict with one of the company’s own proposals to be submitted to shareholders at the same meeting.<sup>478</sup> Like the election exclusion, Rule 14a-8(i)(9) has played a role in disputes regarding proxy access. In response to the wave of proxy access proposals discussed above, several corporations developed their own proxy access proposals.<sup>479</sup> Some of these company proposals had more restrictive terms than those favored by shareholder activists—for example, higher ownership thresholds and/or longer holding period requirements.<sup>480</sup> These differences raised a question: do proxy access proposals offered by shareholders “directly conflict” with more restrictive proxy access proposals

<sup>470</sup> Facilitating Shareholder Director Nominations, Exchange Act Release No. 34-62764, 2010 WL 3343532, at \*2 (Aug. 25, 2010) [hereinafter Proxy Access Rule]. While the election exclusion no longer prohibits proxy access proposals, such proposals must comply with the other provisions of Rule 14a-8. *Id.* at \*103 n.685.

<sup>471</sup> In modifying the election exclusion, the 2010 amendments codified several traditional grounds for excluding proposals that attempt to use Rule 14a-8 to circumvent standard director election procedures. GUMBS & BROWN, *supra* note 262, at A-82–83.

<sup>472</sup> Proxy Access Rule, *supra* note 470, at \*14.

<sup>473</sup> *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

<sup>474</sup> Avrohom J. Kess, *Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 10, 2015), <https://corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals/> <https://perma.cc/2PWU-MDJV>.

<sup>475</sup> Some proxy access proposals were binding bylaw amendments, but the majority were nonbinding precatory proposals. Bernard S. Sharfman, *What Shareholder Proposals on Proxy Access Tell Us About its Value*, YALE J. REGUL. BULLETIN (2016).

<sup>476</sup> Mishra, *supra* note 212.

<sup>477</sup> Gregory et al., *supra* note 209.

<sup>478</sup> 17 C.F.R. § 240.14a-8(i)(9).

<sup>479</sup> HONABACH & SARGENT, *supra* note 67 § 5:42.

<sup>480</sup> *Id.*

offered by management, such that the shareholder proposals are excludable under Rule 14a-8(i)(9)?

While SEC staff initially deemed shareholder proxy access proposals excludable in these circumstances,<sup>481</sup> it ultimately reached the opposite conclusion.<sup>482</sup> In SLB 14H, SEC staff explained that a “direct conflict” exists under Rule 14a-8(i)(9) if a reasonable shareholder could not logically vote in favor of two proposals.<sup>483</sup> Thus, if a company seeks shareholder approval of a merger at an annual meeting, a proposal asking shareholders to vote against the merger would be excludable.<sup>484</sup> A “direct conflict” would not exist, however, where a “reasonable shareholder, although possibly preferring one proposal over the other, could logically vote for both.”<sup>485</sup> For example:

a shareholder proposal that would permit a shareholder or group of shareholders holding at least 3% of the company’s outstanding stock for at least 3 years to nominate [for inclusion in the company’s proxy statement] up to 20% of the directors would not be excludable if a management proposal would allow shareholders holding at least 5% of the company’s stock for at least 5 years to nominate for inclusion in the company’s proxy statement 10% of the directors.<sup>486</sup>

The shareholder proposal would not be excludable in these circumstances because the two proposals “generally seek a similar objective” and a reasonable shareholder could logically vote in favor of both proposals.<sup>487</sup> SLB 14H’s standard of logical inconsistency thus prevents companies from using Rule 14a-8(i)(9) to exclude shareholder proposals by introducing narrower proposals addressing the same subject.<sup>488</sup>

## Substantially Implemented

Rule 14a-8(i)(10) allows companies to exclude proposals that they have already “substantially implemented.”<sup>489</sup> A company may be able to rely on this exclusion even if its practices do not precisely mirror the terms of a proposal. Under SEC staff’s longstanding approach, a determination that a company has “substantially implemented” a proposal depends on whether the company’s policies, practices, and procedures “compare favorably” with those recommended by the proposal.<sup>490</sup> Typically, this inquiry evaluates whether a company’s existing policies or practices satisfy the “essential objective” of a proposal.<sup>491</sup> While these tests depend heavily on the details of individual cases, commentators have made the following observations regarding SEC staff’s administration of Rule 14a-8(i)(10):

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<sup>481</sup> Whole Foods Mkt., Inc., SEC No-Action Letter, 2014 WL 5426272 (Dec. 1, 2014).

<sup>482</sup> SEC Staff Legal Bulletin No. 14H (Oct. 22, 2015), <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14h-cf> <https://perma.cc/PSM2-MLXU>.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> HONABACH & SARGENT, *supra* note 67 § 5:42.

<sup>489</sup> 17 C.F.R. § 240.14a-8(i)(10).

<sup>490</sup> Texaco, Inc., SEC No-Action Letter, 1991 WL 178690 (Mar. 28, 1991).

<sup>491</sup> GUMBS & BROWN, *supra* note 262, at A-94.

- SEC staff has generally concluded that a company’s corporate governance policies addressing a given topic cannot “substantially implement” proposals requesting charter or bylaw amendments regarding that topic.<sup>492</sup>
- In recent years, SEC staff has denied no-action relief under Rule 14a-8(i)(10) where a proposal requests that a company lower the ownership threshold at which shareholders may call a special meeting.<sup>493</sup>
- SEC staff has generally granted no-action relief regarding proposals requesting that a company adopt a policy of submitting poison pills to a shareholder vote where the company’s existing policy to that effect includes a “fiduciary out”—i.e., a clause lifting the vote requirement where directors determine that their fiduciary duties compel the adoption of a pill without a shareholder vote.<sup>494</sup>
- SEC staff’s approach to proxy access proposals under Rule 14a-8(i)(10) appears to have varied based on several considerations, including whether a company had adopted proxy access in response to a proposal, the nature of the proposed changes to an existing proxy access regime, and—in some cases—the level of detail that companies offered to bolster the claim that an existing proxy access regime “compared favorably” with a proposal.<sup>495</sup>

## Duplication

Rule 14a-8(i)(11) permits a company to exclude a proposal that substantially duplicates a proposal previously submitted to the company by another proponent that will be included in the company’s proxy materials for the same meeting.<sup>496</sup> In applying this exclusion, SEC staff have evaluated whether two proposals have the same “principal thrust” or “principal focus.”<sup>497</sup> Accordingly, the exclusion may be available even if two proposals addressing the same issue have different terms or breadth. For example, SEC staff has determined that a proposal requesting disclosures and an advisory shareholder vote on various aspects of a company’s political contributions and communications “substantially duplicated” a proposal requesting that the company make no political contributions without supermajority shareholder approval.<sup>498</sup> In that case, the company argued successfully that the proposals shared the same “principal thrust and focus”—providing a shareholder vote on political expenditures—even though one proposal was broader than the other.<sup>499</sup>

Rule 14a-8(i)(11) does not allow companies to choose which of two duplicative proposals to include in their proxy materials. For Rule 14a-8(i)(11) to apply, a company must include the previously submitted proposal in its proxy materials.<sup>500</sup>

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<sup>492</sup> Haseley & Ising, *supra* note 65 § 12.08 (citing examples).

<sup>493</sup> *Id.*

<sup>494</sup> GUMBS & BROWN, *supra* note 262, at A-95.

<sup>495</sup> Haseley & Ising, *supra* note 65 § 12.08.

<sup>496</sup> 17 C.F.R. § 240.14a-8(i)(11).

<sup>497</sup> GUMBS & BROWN, *supra* note 262, at A-98–99.

<sup>498</sup> Johnson & Johnson, SEC No-Action Letter, 2011 WL 6837553 (Feb. 3, 2012).

<sup>499</sup> *Id.*

<sup>500</sup> 17 C.F.R. § 240.14a-8(i)(11).

## Resubmissions

Rule 14a-8(i)(12) allows a company to exclude proposals that address substantially the same subject matter as a proposal included in the company’s proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was

- less than 5% of the votes cast if previously voted on once;
- less than 15% of the votes cast if previously voted on twice; or
- less than 25% of the votes cast if previously voted on three or more times.<sup>501</sup>

The SEC adopted these thresholds as part of a package of 2020 amendments to the shareholder proposal rule.<sup>502</sup> The 2020 amendments raised the exclusion’s previous thresholds for resubmitted proposals (3%, 6%, and 10%) based on a concern that those thresholds were not effectively screening proposals that were unlikely to garner significant shareholder support.<sup>503</sup>

## Specific Amount of Dividends

Rule 14a-8(i)(13) allows companies to exclude proposals that relate to specific amounts of cash or stock dividends.<sup>504</sup> While SEC staff has granted no-action relief under this exclusion for proposals recommending a specific formula for determining dividends,<sup>505</sup> it has denied no-action relief for proposals requesting that a company increase or begin paying a dividend.<sup>506</sup>

## Issues for Congress

As previous sections of this report have explained, the future of the shareholder proposal rule is uncertain.<sup>507</sup> In addition to announcing a new approach to precatory proposals, SEC Chairman Paul Atkins has said that the agency should reevaluate the rule’s “fundamental premise” that shareholders “should be able to force companies to solicit for their proposals” at little or no personal expense.<sup>508</sup> The SEC’s regulatory flexibility agenda suggests that the SEC may propose amendments to the rule in the spring of 2026.<sup>509</sup>

Congress is also considering a range of legislative proposals that would affect the shareholder proposal ecosystem. This final section of the report discusses proposals that would reform the shareholder proposal rule itself, those that would regulate institutional voting on shareholder proposals, and those that would regulate proxy advisors. Before reviewing the relevant legislation, however, the report outlines the primary justifications that have been offered for the shareholder proposal rule, along with the main criticisms that have been leveled against it.

<sup>501</sup> *Id.* § 240.14a-8(i)(12).

<sup>502</sup> Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. 70240, 70258 (Nov. 4, 2020).

<sup>503</sup> *Id.*

<sup>504</sup> 17 C.F.R. § 240.14a-8(i)(13).

<sup>505</sup> *E.g.*, Microsoft Corp., SEC No-Action Letter, 2002 WL 1677440 (July 19, 2002).

<sup>506</sup> *E.g.*, Constellation Energy Partners LLC, SEC No-Action Letter, 2011 WL 2906770 (July 18, 2011).

<sup>507</sup> *See supra* “The Future of Shareholder Proposals.”

<sup>508</sup> Atkins Speech, *supra* note 8.

<sup>509</sup> *SEC Regulatory Flexibility Agenda*, *supra* note 9.

## Justifications for and Criticisms of the Shareholder Proposal Rule

Supporters of the shareholder proposal rule have argued that the rule (1) promotes corporate social responsibility, (2) encourages value-enhancing governance reforms, (3) facilitates the production and dissemination of valuable information, and (4) preserves process values associated with “corporate democracy.” Critics of the current shareholder proposal regime have challenged each of these claims, in addition to contending that the rule results in costly distractions for corporate management.

### Corporate Social Responsibility

Some observers tout the shareholder proposal rule as an important tool for encouraging corporations to engage in socially responsible behavior.<sup>510</sup> As earlier sections of this report detail, E&S proposals have played a central role in the rule’s history.<sup>511</sup> While E&S proposals rarely obtained significant shareholder support before the 21<sup>st</sup> century, activists championed the proposal process as a means of drawing attention to E&S issues and pressuring corporations to implement suggested reforms.<sup>512</sup> In the 2010s and 2020s, E&S proposals gained greater traction, with some E&S proposals garnering majority votes and many corporations entering settlements with proposal proponents.<sup>513</sup>

The social responsibility justification for the shareholder proposal rule raises a question: why do shareholders—who presumably buy shares to earn a financial return—concern themselves with E&S issues? The theoretical literature offers three possible answers. First, shareholders may care about things other than maximizing their wealth.<sup>514</sup> Accordingly, shareholders may be willing to sacrifice some level of financial return to promote non-pecuniary objectives such as a clean environment or income equality.<sup>515</sup> This report will refer to this approach to E&S proposals as “concessionary” activism.<sup>516</sup> Second, shareholders may believe that companies that act in socially responsible ways perform better over the long term than those that do not.<sup>517</sup> This theory is often called “enlightened shareholder value” (ESV).<sup>518</sup> Third, diversified shareholders may want companies to act in socially responsible ways to maximize the value of their portfolios.<sup>519</sup> Proponents of this view—sometimes labeled “portfolio primacy”—argue that most shareholders are highly diversified, meaning their stock wealth depends on the value of the overall equity

<sup>510</sup> 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, 80–84 (1997); Schwartz, *supra* note 84, at 430.

<sup>511</sup> See *supra* “Social Policy Proposals in the 1960s and 1970s” & “Environmental and Social Proposals.”

<sup>512</sup> Schwartz, *supra* note 84, at 481.

<sup>513</sup> See *supra* “Environmental and Social Proposals.”

<sup>514</sup> Robert P. Bartlett III & Ryan Bubb, *Corporate Social Responsibility Through Shareholder Governance*, 97 S. CAL. L. REV. 417, 434 (2024).

<sup>515</sup> *Id.*

<sup>516</sup> In the academic literature, this approach is sometimes called “shareholder welfare” maximization, as distinct from the traditional corporate objective of shareholder value maximization. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. FIN. & ACCT. 247 (2017). Its advocates argue that, while shareholders can sometimes promote social goals most efficiently by simply donating their stock wealth to charity, there are some instances in which a corporation’s money-making activities are “inseparable” from social concerns. *Id.* at 249. For example, in their view, it is likely more efficient for shareholders to pressure a corporation to stop selling a harmful (but legal) product than it is for shareholders to donate to organizations advocating a ban of that product. *Id.*

<sup>517</sup> Lipton, *supra* note 228, at 1594.

<sup>518</sup> *Id.*

<sup>519</sup> Bartlett & Bubb, *supra* note 514, at 436.

market or some close approximation of it.<sup>520</sup> As a result, these commentators contend, actions that decrease the value of individual companies within a portfolio—for example, costly efforts to reduce negative externalities or increase positive externalities—may increase shareholder wealth by maximizing the value of diversified portfolios.<sup>521</sup>

The concessionary and portfolio primacy rationales for E&S activism have generated controversy. While proposal sponsors rarely state explicitly that their proposals are motivated by concessionary objectives,<sup>522</sup> critics argue that many E&S proposals pursue non-pecuniary goals at the expense of shareholder value.<sup>523</sup> Recent years have also witnessed a resurgence of debates over whether corporate managers should seek to maximize shareholder value (with non-shareholder interests receiving only instrumental consideration) or attempt to balance the interests of shareholders with those of other constituencies.<sup>524</sup> Legislation in the 115<sup>th</sup> Congress, for example, would have required the directors of certain large corporations to “balance[] the pecuniary interests of the shareholders ... with the best interests of persons that are materially affected by” a covered corporation’s conduct.<sup>525</sup> Concessionary defenses of E&S activism thus remain influential even if proposal sponsors usually avoid justifying E&S proposals on concessionary grounds for legal or strategic reasons.

One objection to concessionary activism involves the role of institutional intermediaries in shareholder voting. As discussed, institutional investors such as mutual funds and pension funds have the capacity to play a decisive role in the outcome of many proposal votes.<sup>526</sup> Some commentators have argued that it is illegitimate (and potentially a breach of fiduciary duty) for institutional investors to vote based on concessionary objectives not shared by all of their clients or beneficiaries.<sup>527</sup> Some writers also contend that, even if concessionary votes by intermediaries can be legitimate in principle, the legitimacy of such votes depends on the extent to which they reflect the actual preferences of an intermediary’s clients or beneficiaries.<sup>528</sup> It is unclear whether

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<sup>520</sup> *Id.*

<sup>521</sup> Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 631 (2022); John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 610 (2021); Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 12–18 (2020). Some strategies that follow from portfolio primacy may not correspond to traditional notions of corporate social responsibility. Portfolio primacy might, for example, suggest that rival companies compete less intensely or even outright collude to maximize industry-wide profits. Marcel Kahan & Edward Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANALYSIS 108, 111 (2023). Advocates of portfolio primacy have emphasized areas in which intra-portfolio externalities also constitute social externalities. *E.g.*, *Why System Stewardship?*, THE SHAREHOLDER COMMONS (2025), <https://theshareholdercommons.com/system-stewardship-primer/> <https://perma.cc/24TE-TCRU> (last visited Jan. 7, 2026).

<sup>522</sup> Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE WESTERN RES. L. REV. 863, 878 (2019) (“As though in concession to the notion that it would be illegal for managers to act for non-wealth-maximizing reasons, it is practically *de rigueur* for shareholder proposals—even those plainly grounded in ethical concerns—to offer up some fig leaf of a financial justification.”).

<sup>523</sup> *E.g.*, *The Corporate Proxy Flight From ESG*, WALL ST. J. (Nov. 17, 2025), <https://www.wsj.com/opinion/proxy-voting-esg-committee-to-unleash-prosperity-investment-firms-7b165473>.

<sup>524</sup> Lipton, *supra* note 228, at 1593.

<sup>525</sup> Accountable Capitalism Act, S. 3348, 115<sup>th</sup> Cong. § 5(c)(1)(A)(ii) (2018).

<sup>526</sup> Griffin, *supra* note 236.

<sup>527</sup> Griffith, *supra* note 168, at 1027 (“It is a strained interpretation of fiduciary duty that would allow a mutual fund intermediary to sacrifice the college or retirement savings of one investor in favor of a social policy favored by another.”).

<sup>528</sup> Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 7–8 (2023).

institutional votes on E&S proposals reflect those preferences. These types of concerns underpin suggestions to require mutual funds to offer pass-through voting, which are discussed below.<sup>529</sup>

Whether concessionary conduct by corporate directors constitutes a breach of fiduciary duty is a longstanding debate within corporate law. This report cannot review that dispute exhaustively, but will highlight certain general principles that have emerged from it. Many states, but not Delaware, have adopted “constituency” statutes that allow directors to consider the interests of non-shareholder constituencies in making certain types of business decisions.<sup>530</sup> Scholars have debated whether these statutes permit directors to harm shareholder interests to benefit other constituencies.<sup>531</sup> There is little case law addressing that issue.<sup>532</sup>

While there was once a vibrant debate over whether Delaware law allows corporate directors to sacrifice shareholder interests to benefit non-shareholders,<sup>533</sup> recent Delaware Chancery Court decisions are explicit in declaring such conduct impermissible.<sup>534</sup> The Delaware Supreme Court’s seminal *Revlon* decision also explained that boards may confer benefits on non-shareholder constituencies only insofar as doing so is “rationally related” to the promotion of shareholder interests.<sup>535</sup> The relevant portions of these decisions, however, address the applicable standard of *conduct*; the standard of *review* that courts use to determine whether directors met the standard of conduct varies based on the context.<sup>536</sup> The default standard of review in Delaware corporate law is the business judgment rule, which affords broad deference to informed, good-faith decisions made by unconflicted directors.<sup>537</sup> Unless a plaintiff rebuts one of those elements, Delaware courts “merely look[] to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation’s objectives.”<sup>538</sup> As a practical matter,

<sup>529</sup> See *infra* “Institutional Voting.”

<sup>530</sup> GEVURTZ, *supra* note 354, at 335. Some of these statutes are limited to the takeover context, while others extend more broadly. *Id.*

<sup>531</sup> STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 71 (2023).

<sup>532</sup> *Id.*

<sup>533</sup> E.g., LYNN STOUT, THE SHAREHOLDER VALUE MYTH 24–32 (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

<sup>534</sup> *McRitchie v. Zuckerberg*, 315 A.3d 518, 544 (Del. Ch. 2024) (“The duty of loyalty includes a duty of good faith, which requires that directors subjectively seek to maximize the value of the firm for the benefit of its stockholders.”); *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. CV 12108–VCL, 2017 WL 1437308, at \*17 (Del. Ch. Apr. 14, 2017) (“Delaware case law is clear that the board of directors of a for-profit corporation ... must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.”) (quotation marks omitted); *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) (“In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital.”); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (“Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders.”).

<sup>535</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173, 182 (Del. 1986); see also *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007) (“The directors of Delaware corporations have ‘the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners.’”) (quoting *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998)). This language from *Revlon* describes the standard of conduct for ordinary-course business decisions. *Revlon*, 506 A.2d at 182. *Revlon* held that, when selling a company, directors may not consider the interests of non-shareholders even for instrumental purposes. *Id.*

<sup>536</sup> *In re MultiPlan Corp. S’holders Litig.*, 268 A.3d 784, 809 (Del. Ch. 2022) (“When determining whether [directors] have breached their fiduciary duties, Delaware corporate law distinguishes between the standard of conduct and the standard of review. The standard of conduct ... describes what directors are expected to do and is defined by the content of the duties of loyalty and care. The standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct.”) (quotation marks and citations omitted).

<sup>537</sup> *In re Trados Inc.*, 73 A.3d at 44.

<sup>538</sup> *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010).

the business judgment rule gives directors considerable scope to confer benefits on non-shareholder constituencies as long as doing so bears some rationally conceivable relationship to long-term shareholder value.<sup>539</sup> This deferential standard of review, however, does not change the applicable standard of conduct, which allows directors to advance non-shareholder interests only to the extent that directors believe those interests are consistent with shareholder value.<sup>540</sup> If directors admit to sacrificing shareholder interests to benefit non-shareholders, Delaware courts are likely to conclude that they have breached their fiduciary duty of loyalty.<sup>541</sup> While these types of “confessional” cases are extremely rare, they have resulted in findings that fiduciaries acted unlawfully.<sup>542</sup>

Portfolio primacy has been criticized on practical and legal grounds. On a practical level, critics have doubted that institutional investors have the ability to evaluate the complex inter-firm tradeoffs that portfolio primacy contemplates.<sup>543</sup> Others have argued that efforts by mutual fund managers to reduce negative externalities produced by their portfolio companies are unlikely to eliminate those externalities.<sup>544</sup> Mutual fund sponsors may, for example, have difficulty altering the behavior of privately held companies, public companies with a controlling shareholder, or foreign state-owned companies, which may increase their output (along with the associated negative externalities) if non-controlled public companies accede to shareholder demands for costly mitigation measures.<sup>545</sup>

Portfolio primacy may also face legal difficulties. For mutual fund sponsors, portfolio primacy may raise fiduciary conflicts. Large mutual fund sponsors operate many different funds with different portfolios.<sup>546</sup> A fund sponsor might, for example, offer both an S&P 500 index fund and a fund that tracks the energy companies within the S&P 500. In these cases, a fund sponsor owes independent fiduciary duties to each fund;<sup>547</sup> its obligation “runs not to all of [its] clients in the

<sup>539</sup> David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 527 (2011).

<sup>540</sup> See *supra* notes 534–35.

<sup>541</sup> Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 776–77 (2015). Strine is a former Chief Justice of the Delaware Supreme Court.

<sup>542</sup> The Delaware Chancery Court confronted one such case in *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). In *eBay*, the court held that directors breached their fiduciary duties by adopting a poison pill to deter a minority shareholder from acquiring a controlling stake. *Id.* at 32–35. The directors attempted to justify the pill on the ground that the minority shareholder sought to alter the company’s “public-service mission” in favor of “increased monetization.” *Id.* at 32. The court rejected this justification because the directors “did not make any serious attempt to prove that [the company’s] culture, which rejects any attempt to further monetize its services, translates into increased profitability for stockholders.” *Id.* at 33. “Having chosen a for-profit corporate form,” the court explained, directors “are bound by the fiduciary duties and standards that accompany that form,” including a duty to “promote the value of the corporation for the benefit of its stockholders.” *Id.* at 34. Another confessional case, *Dodge v. Ford Motor Co.*, is a fixture in the corporate law canon. 170 N.W. 668 (Mich. 1919). In *Dodge*, the Michigan Supreme Court held that Henry Ford breached his duties to minority shareholders by refusing to pay a dividend based on an admitted desire to benefit non-shareholder constituencies. *Id.* at 683–85. Applying Michigan law, the Court explained: “[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.” *Id.* at 684.

<sup>543</sup> Griffith, *supra* note 168, at 1018–19.

<sup>544</sup> Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511, 533–36 (2023).

<sup>545</sup> *Id.*

<sup>546</sup> John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1412 (2019).

<sup>547</sup> Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 TENN. J. BUS. L. 175, 180 (2017).

aggregate, but to each client individually.”<sup>548</sup> Portfolio primacy, however, prescribes that asset managers encourage measures that may reduce the value of some companies to increase the value of others.<sup>549</sup> If such measures harm some of a sponsor’s funds—for example, because those funds overweight harmed companies relative to a market benchmark—the sponsor may be precluded from voting the shares held by those funds in favor of the relevant measures.<sup>550</sup>

Delaware law may also prohibit corporate directors from implementing portfolio primacy. In 2024, the Delaware Chancery Court held in *McRitchie v. Zuckerberg* that the fiduciary duties of corporate directors are “firm-specific”—i.e., owed to shareholders in their capacity as shareholders of particular firms but not in other capacities, such as diversified investors.<sup>551</sup> While the question at issue in *McRitchie* was whether fiduciaries breached their duties by taking actions that allegedly *harmed* shareholders in their capacity as diversified investors, the decision also suggests it is impermissible for directors to intentionally sacrifice firm-specific value to *benefit* diversified investors.<sup>552</sup> Accordingly, while the business judgment rule gives directors expansive discretion to mitigate negative externalities produced by their companies and thereby improve the performance of the overall stock market, Delaware courts are likely to evaluate whether such measures are rationally related to the long-term value of the particular companies that directors serve.<sup>553</sup> Directors who concededly sacrifice firm-specific profits to maximize the value of diversified portfolios would likely violate Delaware law based on the Delaware Chancery Court’s reasoning in *McRitchie*.

Unlike concessionary and portfolio-based justifications for E&S proposals, ESV arguments embrace the traditional goal of firm-specific shareholder value maximization. Disputes regarding ESV arguments thus involve disagreements over the best means of achieving that goal or allegations that ESV arguments are being offered as subterfuge to conceal other motivations.<sup>554</sup> Critics of the shareholder proposal regime have argued that E&S proposals generally do not contribute to shareholder value and needlessly embroil companies in social and political controversies.<sup>555</sup>

<sup>548</sup> Morley, *supra* note 546, at 1417.

<sup>549</sup> See *supra* note 521.

<sup>550</sup> Tallarita, *supra* note 544, at 563–65; *but see* Fisch & Schwartz, *supra* note 528, at 30 (characterizing mutual fund advisers’ fiduciary duty to vote shares in the best interests of their clients as “toothless” and explaining that, to the authors’ knowledge, “there has not been a successful claim that institutional investors have failed the best-interest standard when voting shares in their portfolio companies”). In a recent article, a pair of scholars concluded that State Street generally appears to vote proxies with an aim of maximizing the value of “host companies”—i.e., that State Street votes shares in Company X with an aim of maximizing the value of Company X. Henry T. C. Hu & Lawrence A. Hamermesh, *Reconceptualizing Stockholder “Disinterestedness”: Transformative Institutional Investor Changes and Motivational Misalignments in Voting*, 80 BUS. LAW. 311, 361 (2025). They concluded that Vanguard, in contrast, appears to pursue a policy of “fund-by-fund portfolio value maximization,” whereby it votes proxies held by a Vanguard fund with an aim of maximizing the value of that particular fund. *Id.* at 366.

<sup>551</sup> 315 A.3d 518, 528 (Del. Ch. 2024).

<sup>552</sup> See *id.* at 564 (“The fiduciary duties owed by directors of a Delaware corporation require the directors to seek to maximize the value of the corporation over the long-term for the benefit of the stockholders as residual claimants to the value created by the specific firm that the directors serve. It does not mean striving to maximize value for diversified investors who own equity investments across all firms.”).

<sup>553</sup> *Id.*

<sup>554</sup> E.g., Mike Pence, *Republicans Can Stop ESG Political Bias*, WALL ST. J. (May 26, 2022).

<sup>555</sup> Mueller Testimony, *supra* note 261, at 16.

## Governance Reforms

Some commentators have argued that the shareholder proposal rule has played an important role in catalyzing value-enhancing corporate governance reforms.<sup>556</sup> As discussed, Rule 14a-8 has been instrumental in encouraging many companies to de-stagger their boards, adopt majority voting for uncontested director elections, and implement proxy access.<sup>557</sup> Shareholder proposals also served as a staging ground for say-on-pay until its codification in 2010.<sup>558</sup>

Skeptics of the shareholder proposal rule question whether these reforms have in fact improved shareholder value.<sup>559</sup> A related concern is that proposals, coupled with pressure from institutional investors and proxy advisors, have caused companies to adopt “one-size-fits-all” governance arrangements that may not be appropriate for particular firms.<sup>560</sup> Some critics have also argued that shareholder proposals produce costs that must be weighed against any financial benefits, including legal costs, the opportunity costs associated with management distraction, and the SEC’s administrative costs in reviewing and responding to no-action requests.<sup>561</sup>

## Information Production and Disclosure

Another family of justifications for the shareholder proposal rule involves the rule’s role in producing and disseminating information. Some supporters of the rule contend that proposal votes may improve corporate decision-making by aggregating private information held by shareholders and transmitting that information to management.<sup>562</sup> Other arguments emphasize the benefits of forcing management to articulate its reasons for opposing proposals, which may prompt closer examination of the relevant issues.<sup>563</sup> One of the original justifications for the shareholder proposal rule was rooted in disclosure—specifically, the notion that it is misleading for companies to fail to disclose matters they know will be raised at an annual meeting.<sup>564</sup>

Critics of the shareholder proposal rule have responded to information-based justifications by arguing that shareholders—who typically lack the business acumen and industry expertise of corporate executives—generally do not have valuable information to contribute to corporate

<sup>556</sup> *E.g.*, *Proxy Power and Proposal Abuse, Hearing Before the H. Comm. on Fin. Servs.*, 119<sup>th</sup> Cong. at 1–2 (Sept. 10, 2025) (statement of Brad Lander, New York City Comptroller).

<sup>557</sup> *See supra* “Governance Proposals.”

<sup>558</sup> *Id.*

<sup>559</sup> *E.g.*, BRYCE C. TINGLE, *HARD LESSONS IN CORPORATE GOVERNANCE* 120–22, 131–32, 174 (2024) (discussing empirical scholarship regarding shareholder proposals and staggered boards); Griffith, *supra* note 166, at 1032 (arguing that different governance arrangements may be optimal for different firms and that recent empirical scholarship “demonstrates that many widely held views concerning the effects of corporate governance are wrong or, at least, overstated”).

<sup>560</sup> TINGLE, *supra* note 559, at 120, 220–21.

<sup>561</sup> George W. Dent, Jr., *SEC Rule 14a-8: A Study in Regulatory Failure*, 30 N.Y. L. REV. 1, 14–16 (1985); Liebler, *supra* note 108, at 454.

<sup>562</sup> Bonnie G. Buchanan et al., *Shareholder Proposal Rules and Practice: Evidence from a Comparison of the United States and United Kingdom*, 49 AM. BUS. L.J. 739, 783 (2012).

<sup>563</sup> Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 112 (1988).

<sup>564</sup> Fisch, *supra* note 33, at 1143–44. Some federal courts appear to have endorsed this reasoning. *E.g.*, *New York City Emps. Ret. Sys. v. Am. Brands, Inc.*, 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) (stating that the omission of a shareholder proposal from proxy materials in violation of Rule 14a-8 is “inherently misleading”).

decision-making.<sup>565</sup> Forcing management to respond to shareholder proposals, they contend, amounts to a costly disruption that diverts attention from other matters.<sup>566</sup>

At one point, opponents of the shareholder proposal rule responded to disclosure-based justifications by contending that proposals were not material to shareholders.<sup>567</sup> This categorical argument appears to have fallen by the wayside as certain types of proposals gained significant support in the 1980s and 1990s.<sup>568</sup> After these developments, some critics of the shareholder proposal regime advocated reforms to screen out and deter proposals they deemed immaterial, as opposed to outright repeal of the rule.<sup>569</sup>

## Corporate Democracy

The shareholder proposal rule is often celebrated as a vindication of “corporate democracy.”<sup>570</sup> On this view, consultation with shareholders can “make management decisions more ‘legitimate’ if a weak form of democratic theory is applied and the public corporation is considered as a social institution.”<sup>571</sup> This legitimacy could derive from shareholders’ role as corporate “owners,”<sup>572</sup> or from the “expressive interests” that arise as a result of shareholders’ “essential role in the corporation.”<sup>573</sup>

Other commentators have argued that advocates of corporate democracy commit a category error.<sup>574</sup> Corporations, these commentators contend, are not democracies, nor should they be.<sup>575</sup> Skeptics of corporate democracy argue that the hierarchical, board-centric governance model reflected in corporate law is responsible for the success of the corporate form.<sup>576</sup> Efforts to democratize corporations, they maintain, threaten to erode that model and reduce economic efficiency.<sup>577</sup> It is also unclear how literal arguments based on corporate democracy are intended to be. Democratic principles could plausibly support a wide range of governance reforms, including a one-vote-per-shareholder rule (as opposed to one vote per share) and voting rights for employees and other constituencies affected by corporate activities.<sup>578</sup> Accordingly, justifications

<sup>565</sup> George W. Dent, Jr., *Proxy Regulation in Search of a Purpose: A Reply to Professor Ryan*, 23 GA. L. REV. 815, 820 (1989).

<sup>566</sup> *Id.* at 819–20.

<sup>567</sup> *Id.* at 819; Liebler, *supra* note 108, at 453.

<sup>568</sup> Dent, *supra* note 565, at 821 (modifying previous criticism of Rule 14a-8 along these lines).

<sup>569</sup> *Id.* at 822–25.

<sup>570</sup> *E.g.*, Lazaroff, *supra* note 510, at 78–79; *see also* Med. Comm. for Human Rts. v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970) (interpreting Section 14(a) of the Exchange Act as embodying a “philosophy of corporate democracy”).

<sup>571</sup> Ryan, *supra* note 563, at 112.

<sup>572</sup> Lazaroff, *supra* note 510, at 79.

<sup>573</sup> Haan, *supra* note 220, at 291.

<sup>574</sup> *E.g.*, Griffith, *supra* note 76, at 466.

<sup>575</sup> Stephen Bainbridge, *A Corporation is Not a Democracy*, BAINBRIDGE ON CORPORATIONS (Sept. 14, 2025), <https://www.bainbridgeoncorporations.com/p/a-corporation-is-not-a-democracy> <https://perma.cc/E9D9-NSX3>.

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

<sup>578</sup> Grant M. Hayden & Matthew T. Bodie, *A Democratic Participation Model for Corporate Governance*, 109 MINN. L. REV. 1579, 1612–51 (2025) (explaining that, “[i]n democratic political systems, participation rights are typically extended to people who have an interest or stake in governmental decision-making” and advocating the extension of voting rights to non-shareholder constituencies); Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354–55 (2006) (characterizing the one-vote-per-share model as “plutocratic,” as distinct from a “democratic” model of one vote per shareholder, which was not uncommon in the early 1800s).

for the shareholder proposal rule grounded in the intrinsic value of democratic procedures may commit proponents to more far-reaching changes to corporate governance.

## Proposals to Reform the Shareholder Proposal Regime

The concerns with shareholder proposals discussed throughout this report have prompted a variety of suggestions to reform various aspects of the proposal regime. The following subsections discuss reform options that focus on Rule 14a-8, institutional proxy voting, and proxy advisors.

### The Shareholder Proposal Rule

Some reform proposals target the shareholder proposal rule itself. This subsection reviews bills in the 118<sup>th</sup> and 119<sup>th</sup> Congresses that would change elements of Rule 14a-8, along with suggestions to tighten the rule’s eligibility requirements and allow companies to adopt their own proposal procedures and standards.

#### *Legislation*

In the 119<sup>th</sup> Congress, H.R. 52, the Stop Woke Investing Act, would adopt limits on the number of proposals companies are required to include in their proxy materials for a given meeting.<sup>579</sup> The limits would vary based on a company’s size.<sup>580</sup> Companies would be permitted to develop their own methods for determining which proposals to include in their proxy materials in cases where the number of submitted proposals exceeds the relevant limit.<sup>581</sup> The bill also would allow companies to exclude proposals that do not have a material effect on their financial performance.<sup>582</sup>

The 118<sup>th</sup> Congress considered several bills that would have reformed various aspects of the shareholder proposal rule. Those bills are summarized below.

- S. 3703, the Rejecting Extremist Shareholder Proposals that Inhibit and Thwart Enterprise for Business Act (the RESPITE for Business Act), and H.R. 4657 would have eliminated the “significant policy” exception to the ordinary business exclusion.<sup>583</sup>
- H.R. 4640 would have allowed companies to exclude from their proxy materials proposals whose subject matter is “environmental, social, or political (or a similar subject matter).”<sup>584</sup>
- H.R. 4641, the Performance over Politics Act, would have increased the vote thresholds that are necessary for resubmitted proposals to avoid exclusion under Rule 14a-8(i)(12).<sup>585</sup> The bill would have allowed companies to exclude proposals addressing substantially the same subject matter as a proposal

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<sup>579</sup> Stop Woke Investing Act, H.R. 52, 119<sup>th</sup> Cong. § 2(b) (2025).

<sup>580</sup> *Id.* § 2(b)(1).

<sup>581</sup> *Id.* § 2(b)(3).

<sup>582</sup> *Id.* § 2(b)(2).

<sup>583</sup> H.R. 4657, 118<sup>th</sup> Cong. § 1 (2023).

<sup>584</sup> H.R. 4640, 118<sup>th</sup> Cong. § 1 (2023).

<sup>585</sup> Performance over Politics Act, H.R. 4641, 118<sup>th</sup> Cong. § 2 (2023).

submitted within the preceding five calendar years if the most recent vote on the latter proposal occurred within the preceding three calendar years and was

- less than 10% of votes cast if the proposal was voted on once during such five-year period (up from 5% in the current rule);
  - less than 20% of votes cast if the proposal was voted on twice during such five-year period (up from 15% in the current rule); or
  - less than 40% of votes cast if the proposal was voted on three or more times during such five-year period (up from 25% in the current rule).<sup>586</sup>
- H.R. 4644, the No Expensive, Stifling Governance Act of 2023 (the No ESG Act), would have included the same changes to the resubmission thresholds as H.R. 4641, in addition to provisions addressing Rule 14a-8’s exclusions for duplicative proposals and proposals that companies have “substantially implemented.”<sup>587</sup> The No ESG Act’s provisions regarding the “duplication” and “substantial implementation” exclusions would have codified SEC staff’s current interpretive gloss on those exclusions.<sup>588</sup> The bill also would have prohibited the SEC from finalizing a 2022 proposed rule that would have narrowed those exclusions or any substantially similar rule.<sup>589</sup>
  - H.R. 4655, the Business Over Activists Act, would have eliminated the SEC’s authority to require companies to include shareholder proposals in their proxy materials, thereby repealing the shareholder proposal rule.<sup>590</sup>

A broader corporate governance bill in the 118<sup>th</sup> Congress—H.R. 4767, the Protecting Americans’ Retirement Savings from Politics Act—would have included all of the above measures except for H.R. 4655’s repeal of the shareholder proposal rule.<sup>591</sup> In September 2024, the House of Representatives passed the Protecting Americans’ Retirement Savings from Politics Act as part of H.R. 4790, the Prioritizing Economic Growth Over Woke Policies Act, which also included a provision that would have repealed the shareholder proposal rule altogether.<sup>592</sup>

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<sup>586</sup> *Id.*

<sup>587</sup> No Expensive, Stifling Governance Act of 2023, H.R. 4644, 118<sup>th</sup> Cong. § 2 (2023).

<sup>588</sup> *Id.* § 2(a)(1)-(2). Specifically, the bill would have codified SEC staff’s positions that (1) a proposal “substantially duplicates” another previously submitted proposal that will be included in a company’s proxy materials if the two proposals share the same “principal thrust” or “principal focus,” and (2) a company has “substantially implemented” a proposal if its policies, practices, or procedures “compare favorably” with those recommended by the proposal. *Id.*

<sup>589</sup> *Id.* § 2(b). The SEC’s 2022 proposed rule would have amended (1) the “duplication” exclusion to specify that a proposal “substantially duplicates” another proposal for the same meeting if it “addresses the same subject matter and seeks the same objective by the same means,” (2) the “substantial implementation” exclusion to allow companies to exclude a proposal if they have implemented its “essential elements,” and (3) the “resubmission” exclusion to apply to proposals that “substantially duplicate” a previously voted-upon proposal, thereby aligning the “resubmission” standard with the “duplication” standard. Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, 87 Fed. Reg. 45052, 45055 (July 27, 2022).

<sup>590</sup> Business Over Activists Act, H.R. 4655, 118<sup>th</sup> Cong. § 2 (2023).

<sup>591</sup> Protecting Americans’ Retirement Savings from Politics Act, H.R. 4767, 118<sup>th</sup> Cong. §§ 101, 202, 301, 401 (2023).

<sup>592</sup> Prioritizing Economic Growth Over Woke Policies Act, H.R. 4790, 118<sup>th</sup> Cong. Div. B-C (2024).

## Eligibility Requirements

Some commentators have proposed tightening the shareholder proposal rule’s eligibility requirements.<sup>593</sup> Such changes could involve raising the ownership thresholds for proposal proponents, lengthening the required holding periods, or both.<sup>594</sup>

The SEC has explained that Rule 14a-8’s eligibility requirements are intended to ensure that proposal proponents “have a meaningful economic stake or investment interest in a company before [they] may draw on company resources to require the inclusion of a proposal in the company’s proxy statement.”<sup>595</sup> Rule 14a-8’s critics have for some time voiced concerns about the role that a handful of individual proposal proponents play in corporate governance.<sup>596</sup> One study has found that, between 2003 and 2014, five individuals were responsible for 27% of all shareholder proposals submitted to S&P 1500 companies.<sup>597</sup> In 2023, five individuals submitted approximately 55% of all proposals.<sup>598</sup>

Whether these figures evince misuse of the proposal process has been the subject of debate. Some have argued that individual proponents use proposals to pursue personal agendas unrelated to shareholder value.<sup>599</sup> Others have responded that the most active individual proponents focus primarily on core governance issues and that their proposals tend to enjoy relatively high levels of shareholder support.<sup>600</sup>

## Private Ordering

Another option for shareholder proposal reform would involve explicitly authorizing companies to adopt their own proposal procedures and standards. This type of private-ordering approach could involve minimum requirements specified by the SEC or allow companies to opt out of the shareholder proposal rule altogether.<sup>601</sup> As discussed, the SEC contemplated the former possibility in its 1982 proposed amendments to Rule 14a-8, but ultimately declined to adopt such changes.<sup>602</sup>

Suggestions to allow private ordering of shareholder proposals raise questions regarding whether—and the extent to which—companies can adopt their own procedural requirements and substantive standards for shareholder proposals under existing law. In a 2023 speech, SEC Commissioner Mark Uyeda said that Rule 14a-8’s “procedural bases for exclusion”—including the rule’s ownership and holding-period requirements—“should be viewed as default

<sup>593</sup> E.g., Mueller Testimony, *supra* note 260, at 23.

<sup>594</sup> Stephen Bainbridge, *SEC Chair Paul Atkins Continues His Focus on Reforming SEC Rule 14a-8 (The Shareholder Proposal Rule): Part II*, BAINBRIDGE ON CORPORATIONS (Oct. 13, 2025), <https://www.bainbridgeoncorporations.com/p/sec-chair-paul-atkins-continues-his> <https://perma.cc/586X-2NCT>.

<sup>595</sup> Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. 70240, 70258, 70241 (Nov. 4, 2020) (internal quotation marks omitted).

<sup>596</sup> Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 618–24 (2021).

<sup>597</sup> Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 84 Fed. Reg. 66485, 66483 (Dec. 4, 2019).

<sup>598</sup> Uyeda Speech, *supra* note 247. In popular commentary and the academic literature, these individuals are often referred to as “corporate gadflies.” Kastiel & Nili, *supra* note 596, at 571. Commentators disagree as to whether that label is pejorative. Jonathan Kalodimos, *A Gadfly’s Perspective*, HARV. L. SCH. F. ON CORP. GOV. (Sept. 21, 2016), <https://corpgov.law.harvard.edu/2016/09/21/a-gadflys-perspective/> <https://perma.cc/3VGJ-AUZC>.

<sup>599</sup> BUS. ROUNDTABLE, RESPONSIBLE SHAREHOLDER ENGAGEMENT AND LONG-TERM VALUE CREATION: MODERNIZING THE SHAREHOLDER PROPOSAL PROCESS 2 (2016).

<sup>600</sup> Kastiel & Nili, *supra* note 596, at 592–97.

<sup>601</sup> Bainbridge, *supra* note 594 (suggesting an opt-out mechanism).

<sup>602</sup> 1983 Amendments, *supra* note 120, at \*1–2.

standards that apply only if companies decline to establish their own standards in their governing documents.”<sup>603</sup> Commissioner Uyeda based this conclusion on the proposition that Rule 14a-8 is intended to facilitate shareholders’ ability to exercise their state law governance rights—not to create governance rights that do not exist under state law.<sup>604</sup> Accordingly, Commissioner Uyeda argued, disputes regarding the propriety of a company’s procedural restrictions on shareholder proposals should be resolved by state courts based on state corporate law—not by the SEC.<sup>605</sup> In October 2025, SEC Chairman Paul Atkins endorsed Commissioner Uyeda’s view that federal law does not preclude companies from adopting their own procedural rules for shareholder proposals.<sup>606</sup>

While the aforementioned remarks from Commissioner Uyeda and Chairman Atkins address only “procedural” rules, some commentators have argued that existing law likely permits companies to adopt substantive limits on shareholder proposals beyond those in Rule 14a-8.<sup>607</sup> Like Commissioner Uyeda, these writers rely on the premise that Rule 14a-8 does not preempt state law by creating new substantive rights for shareholders to present and vote on proposals.<sup>608</sup> Rather, in their view, Rule 14a-8 provides shareholders with a federal right to include a proposal in a company’s proxy materials only if shareholders have an independent right to present the proposal under applicable state law.<sup>609</sup> These commentators further contend that a range of substantive restrictions on precatory shareholder proposals would likely be facially valid under Delaware law given Delaware’s strong preference for contractual freedom and private ordering.<sup>610</sup> Thus, under this line of reasoning, neither federal law nor Delaware law prevents companies from adopting substantive limits on precatory shareholder proposals that are more restrictive than Rule 14a-8’s substantive exclusions.<sup>611</sup>

The U.S. Court of Appeals for the Third Circuit’s 1947 decision in *SEC v. Transamerica Corp.* looms in the background of discussions regarding private ordering and shareholder proposals.<sup>612</sup> In *Transamerica*, the Third Circuit held that a corporation was required to include certain proposals in its proxy materials notwithstanding a corporate bylaw (Bylaw 47) that effectively gave management the authority to decide whether to submit bylaw-amendment proposals for a shareholder vote.<sup>613</sup> The case involved several proposals, some of which were bylaw amendments.<sup>614</sup> The Third Circuit held that all of the proposals were proper subjects for shareholder action under Delaware law even though management sought to exclude some of the proposals pursuant to Bylaw 47.<sup>615</sup> In reaching this conclusion, the court appeared to hold that Bylaw 47, when applied “in all its strictness,” was invalid under Delaware law because the DGCL

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<sup>603</sup> Uyeda Speech, *supra* note 247.

<sup>604</sup> *Id.*

<sup>605</sup> *Id.*

<sup>606</sup> Atkins Speech, *supra* note 8.

<sup>607</sup> Manesh, *supra* note 310, at 25–26; Pinder, *supra* note 299.

<sup>608</sup> Manesh, *supra* note 310, at 36.

<sup>609</sup> *Id.* at 30.

<sup>610</sup> *Id.* at 27–31.

<sup>611</sup> Under Delaware law, such limits would be subject to equitable review even if facially valid. *Id.* at 31–35. It is possible that Delaware courts would deem certain restrictions—such as charter or bylaw provisions barring all precatory shareholder proposals—unreasonable and inequitable. *Id.* at 34.

<sup>612</sup> 163 F.2d 511 (3d Cir. 1947).

<sup>613</sup> *Id.* at 515–18.

<sup>614</sup> *Id.* at 513.

<sup>615</sup> *Id.* at 517–18.

grants shareholders the power to amend bylaws.<sup>616</sup> While this holding was sufficient to resolve the case, the court proceeded to explain that, even if Bylaw 47 was valid as a matter of Delaware law, the bylaw could not be used to circumvent Section 14(a) of the Exchange Act and Congress's intent to "require fair opportunity for the operation of corporate suffrage."<sup>617</sup>

Scholars have disagreed about the implications of the latter aspect of the *Transamerica* decision. Some have read *Transamerica's* language regarding circumvention of congressional intent to mean that federal law precludes companies from adopting limits on shareholder proposals beyond those in Rule 14a-8.<sup>618</sup> Others have argued that the relevant language was nonbinding dicta and that a broad reading of that passage would be difficult to square with principles of corporate law federalism reflected in more recent appellate decisions.<sup>619</sup> Accordingly, these writers contend, *Transamerica* should not be interpreted as barring companies from adopting limits on shareholder proposals in their charters or bylaws.<sup>620</sup>

## Institutional Voting

The shareholder proposal rule owes much of its significance to the growth and increased engagement of institutional investors since the 1980s.<sup>621</sup> The heightened influence of institutional investors has not, however, been without controversy. While corporate law has long focused on issues arising from the separation of ownership and control of operating companies, divergences between the interests of institutional investors and their beneficiaries generate an additional layer of agency costs.<sup>622</sup>

One concern along these lines is the claim that mutual fund sponsors do not engage in enough value-enhancing shareholder activism and stewardship activities.<sup>623</sup> Theoretical arguments to this effect emphasize the business relationships between fund sponsors and corporate management, in addition to fee structures that allow mutual fund sponsors to capture only a small fraction of the benefits that activism and stewardship would produce.<sup>624</sup> Because of the incentives that result from these arrangements, some argue, mutual fund sponsors are unlikely to engage in the level of activism and stewardship that would be optimal from the perspective of fund beneficiaries.<sup>625</sup>

Another concern in the literature is that institutional investors may support E&S proposals that seek to promote non-pecuniary values not shared by all their beneficiaries.<sup>626</sup> Some scholars have suggested that mutual fund sponsors might support such proposals to market themselves to

<sup>616</sup> *Id.* at 518.

<sup>617</sup> *Id.*

<sup>618</sup> *E.g.*, Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 *BUS. LAW.* 329, 355 (2010).

<sup>619</sup> Manesh, *supra* note 310, at 42–44; Liebel, *supra* note 108, at 461.

<sup>620</sup> Manesh, *supra* note 310, at 42–44; Liebel, *supra* note 108, at 461–65.

<sup>621</sup> *See supra* "Institutional Investor Activism in the 1980s and 1990s" & "Governance Proposals."

<sup>622</sup> Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 *COLUM. L. REV.* 863, 865 (2013) (explaining that the shift from dispersed stock ownership to a regime in which ownership is concentrated in financial intermediaries gives rise to "a double set of agency relationships: between shareholders and managers and between beneficial owners and record owners").

<sup>623</sup> Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 *J. ECON. PERSP.* 89, 90, 95–97 (2017).

<sup>624</sup> *Id.*

<sup>625</sup> *Id.* at 93.

<sup>626</sup> *E.g.*, Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 *COLUM. BUS. L. REV.* 840, 856 (2021).

millennial investors,<sup>627</sup> implement the personal views of their executives,<sup>628</sup> or as part of an effort to please government officials and forestall regulation.<sup>629</sup> The largest fund sponsors have rejected these assertions; they claim to evaluate shareholder proposals based on considerations of long-term shareholder value.<sup>630</sup>

Some analysts have focused their criticism of institutional voting on the influence that the leading proxy advisors—ISS and Glass Lewis—allegedly have on institutional voting decisions. These observers claim that many small and mid-size institutions vote in lockstep with ISS and Glass Lewis recommendations without performing independent analysis—a practice dubbed “robovoting.”<sup>631</sup>

To address some of the concerns with institutional voting discussed above, commentators have proposed a requirement that certain mutual funds offer “pass-through” voting to their investors—i.e., allow fund investors to direct the voting of the fund’s proxies.<sup>632</sup> The “Big Three” index fund managers—BlackRock, Vanguard, and State Street Global Advisors—have all experimented with pass-through voting, offering it as an option for certain funds.<sup>633</sup> These pass-through arrangements have allowed investors to direct the voting of shares in accordance with plans developed by proxy advisors.<sup>634</sup> State Street, for example, allows investors in eligible funds to direct the voting of shares in accordance with board recommendations, the proxy advisor ISS’s benchmark recommendations, or various specialized policies developed by ISS, including a “Sustainability Policy,” a “Socially Responsible Investment Policy,” and a “Catholic Faith-Based Policy.”<sup>635</sup>

Pass-through voting has also attracted congressional interest. In the 119<sup>th</sup> Congress, S. 1670, the Investor Democracy is Expected Act or INDEX Act, would require investment advisers that control more than 1% of a company’s voting securities to vote proxies held by the advisers’ passively managed funds in accordance with the instructions of fund investors, subject to certain exceptions.<sup>636</sup> It is not clear whether the types of pass-through programs offered by the Big Three—which allow investors to direct fund proxy voting in accordance with proxy advisor

<sup>627</sup> Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

<sup>628</sup> Mahoney & Mahoney, *supra* note 626, at 865–66.

<sup>629</sup> Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 1, 34–37 (2022).

<sup>630</sup> STATE STREET GLOBAL ADVISORS, GLOBAL PROXY VOTING AND ENGAGEMENT POLICY 13 (2025), <https://www.ssga.com/library-content/assets/pdf/global/asset-stewardship/proxy-voting-and-engagement-policy.pdf> <https://perma.cc/W597-BCF7>; VANGUARD, PROXY VOTING POLICY FOR U.S. PORTFOLIO COMPANIES 10 (2025), [https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us\\_proxy\\_voting\\_policy\\_2025.pdf](https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_proxy_voting_policy_2025.pdf) <https://perma.cc/3WA7-D6C3>; BLACKROCK INVESTMENT STEWARDSHIP: GLOBAL PRINCIPLES 14 (2024), <https://www.blackrock.com/us/individual/literature/shareholder-letters/proxy-voting-guidelines.pdf> <https://perma.cc/4FPK-YDE7>.

<sup>631</sup> Paul Rose, *Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting* (Ohio State Legal Studies Rsch. Paper No. 631, 2021).

<sup>632</sup> *E.g.*, James R. Copland, *Index Funds Have Too Much Voting Power: A Proposal for Reform*, MANHATTAN INST. (Jan. 25, 2024), <https://manhattan.institute/article/index-funds-have-too-much-voting-power-a-proposal-for-reform> <https://perma.cc/V9UX-6FS4>.

<sup>633</sup> Caleb N. Griffin, *Open Proxy*, 99 TUL. L. REV. 247, 269–72 (2024).

<sup>634</sup> *Id.*

<sup>635</sup> *Id.* at 272.

<sup>636</sup> Investor Democracy is Expected Act, S. 1670, 119<sup>th</sup> Cong. § 2 (2025).

plans—would satisfy this requirement. The legislation could be construed to require “pure” pass-through voting in which fund investors can vote on individual proposals directly.<sup>637</sup>

Skeptics of pure pass-through voting argue that most fund investors would be unlikely to vote their shares under such a system, citing the low voting rates of retail investors who own shares directly.<sup>638</sup> Under a pure pass-through system, an investor in an S&P 500 index fund would be presented with hundreds of proposals every year, which would likely take significant time to read and analyze.<sup>639</sup> If predictions of low investor participation proved correct, mandatory pass-through voting could potentially sacrifice the monitoring benefits of institutional ownership without major improvement in the degree to which fund proxy votes mirror the preferences of fund beneficiaries.<sup>640</sup>

The pass-through programs offered by the Big Three have been criticized for failing to give retail investors a sufficiently broad selection of voting plans and offering limited guidance about how the available plans intend to vote.<sup>641</sup> Policymakers concerned with the concentration of power in large institutions may also be unsatisfied by a voting regime that shifts power from mutual fund sponsors to ISS and Glass Lewis.

Several bills in recent Congresses have sought to address other aspects of institutional proxy voting, including the “best interest” standard governing proxy voting by investment advisers and the ways in which institutions use proxy voting advice.<sup>642</sup> Those bills are discussed below.

- H.R. 3402 (119<sup>th</sup> Cong.) would require institutional investment managers that utilize the services of a proxy advisor to file an annual report with the SEC that, among other things, discloses the percentage of their proposal votes that were consistent with proxy advisor recommendations, explains how the investment managers utilized proxy voting advice, and certifies that their voting decisions were based solely on the best economic interest of the shareholders on behalf of whom they hold shares.<sup>643</sup> The bill also would require institutional investment managers with at least \$100 billion in assets under management to perform an economic analysis of each shareholder proposal for which they vote, except for proposals supported by majority-independent boards.<sup>644</sup> The analyses would need to determine that such votes are in the best economic interest of the shareholders on behalf of whom the institutional investment managers hold shares.<sup>645</sup>

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<sup>637</sup> Copland, *supra* note 632 (stating that it is “not at all clear” that a pass-through program offered by BlackRock, which allowed investors to direct the voting of shares in accordance with proxy advisor plans, would satisfy the INDEX Act’s requirements); *see also* SAHAND MOAREFY, *THE NEW POWER BROKERS: THE RISE OF ASSET MANAGER CAPITALISM AND THE NEW ECONOMIC ORDER* 136–40 (2024) (distinguishing “pure” pass-through voting from more limited systems of pass-through voting).

<sup>638</sup> Fisch & Schwartz, *supra* note 528, at 44.

<sup>639</sup> Bebchuk & Hirst, *supra* note 185, at 2118–19.

<sup>640</sup> Fisch & Schwartz, *supra* note 528, at 44. Because pass-through voting would deprive institutional investors of governance power, it is unlikely to be favored by those who believe that the primary problem with institutional investors is excessive passivity. *E.g.*, Bebchuk & Hirst, *supra* note 185, at 2119.

<sup>641</sup> Griffin, *supra* note 633, at 282–85.

<sup>642</sup> Another bill in the 118<sup>th</sup> Congress, H.R. 4645, the Empowering Shareholders Act of 2023, would have required advisers to passively managed funds to vote in accordance with instructions from fund beneficiaries, vote in accordance with management recommendations, or abstain from voting, with certain exceptions. Empowering Shareholders Act of 2023, H.R. 4645, 118<sup>th</sup> Cong. § 2 (2023).

<sup>643</sup> H.R. 3402, 119<sup>th</sup> Cong. § 1 (2025).

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

- H.R. 4600, the Protecting Retail Investors’ Savings Act (118<sup>th</sup> Cong.), would have amended the Investment Advisers Act of 1940 to provide that the “best interest” of an investment advisers’ customers “shall be determined using pecuniary factors, which may not be subordinated to or limited by non-pecuniary factors, unless the customer provides informed consent, in writing, that such non-pecuniary factors be considered.”<sup>646</sup>
- H.R. 4656, the Protecting American’s [sic] Savings Act (118<sup>th</sup> Cong.), would have directed the SEC to prohibit “robovoting,” defined to mean “the practice of automatically voting in a manner consistent with the recommendations of a proxy advisory firm or pre-populating votes on a proxy advisory firm’s electronic voting platform with the proxy advisor’s recommendations, in either case, without independent review and analysis.”<sup>647</sup> The bill also would have prohibited institutional investors from outsourcing voting decisions to any person other than an SEC-registered investment adviser, broker, or dealer with a fiduciary or best-interest duty to the institutional investor.<sup>648</sup>

In the 118<sup>th</sup> Congress, H.R. 4767, the Protecting Americans’ Retirement Savings from Politics Act (discussed earlier), would have included all the above measures.<sup>649</sup>

## Proxy Advisors

Another category of possible reforms to the shareholder proposal regime would regulate proxy advisors directly. This subsection of the report provides background on previous efforts to regulate proxy advisors, discusses a December 2025 executive order targeting proxy advisors, and reviews proposed legislation concerning proxy advisors.

### *Background*

As discussed, proxy advisors first emerged in the 1980s with the beginnings of institutional activism.<sup>650</sup> They gained prominence in the 21<sup>st</sup> century, particularly after the SEC adopted rules governing proxy voting by mutual funds in 2003.<sup>651</sup> As shareholder proposals began to exert a greater influence in boardrooms, the role that proxy advisors play in corporate governance became increasingly controversial. Critics of the industry have raised a variety of concerns, which are summarized below.<sup>652</sup>

### **Outsized Influence**

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<sup>646</sup> Protecting Retail Investors’ Savings Act, H.R. 4600, 118<sup>th</sup> Cong. § 2 (2023).

<sup>647</sup> Protecting American’s [sic] Savings Act, H.R. 4656, 118<sup>th</sup> Cong. § 2 (2023).

<sup>648</sup> *Id.*

<sup>649</sup> Protecting Americans’ Retirement Savings from Politics Act, H.R. 4767, 118<sup>th</sup> Cong. §§ 801, 901, 1101 (2023). The bill also included a provision that would have required advisers to passively managed funds to vote in accordance with instructions from fund beneficiaries, vote in accordance with management recommendations, or abstain from voting, with certain exceptions. *Id.* § 1001.

<sup>650</sup> Sarro, *supra* note 178, at 378.

<sup>651</sup> *See supra* “Governance Proposals.”

<sup>652</sup> Much of this background discussion is drawn from CRS Report R48691, *Proxy Advisor Regulation: Recent Litigation, State Law Developments, and Federal Legislation*, by Jay B. Sykes, which provides a more detailed overview of the history of proxy advisor regulation.

Some observers argue that the leading proxy advisors—ISS and Glass Lewis—have an inappropriate level of influence on corporate America.<sup>653</sup> This influence, they contend, is in part a result of the highly concentrated structure of the proxy advisor industry.<sup>654</sup> ISS and Glass Lewis reportedly have a combined market share exceeding 90%, with some estimates reaching 97%.<sup>655</sup> The three other U.S. proxy advisors—Egan-Jones Proxy Services, Segal Marco Advisors, and ProxyVote Plus—are considerably smaller.<sup>656</sup> As discussed, some commentators have also criticized the way in which institutional investors utilize proxy voting advice, claiming that many small and mid-size institutions follow proxy advisor recommendations without conducting independent analysis.<sup>657</sup>

The level of influence that proxy advisors have on shareholder votes is contested, with empirical studies reaching differing conclusions.<sup>658</sup> In evaluating the effect of a proxy advisor recommendation, it can be difficult to distinguish correlation from causation. When casting votes, institutional investors may be independently influenced by the same factors that drive proxy advisors' analyses.<sup>659</sup> In addition, proxy advisors develop their voting policies based on input from their institutional clients,<sup>660</sup> while institutions may select a given advisor based on prior agreement with the advisor's policies.<sup>661</sup> These factors complicate efforts to assess the causal significance of proxy advisor recommendations.<sup>662</sup>

Defenders of the proxy advisor industry claim that critics overstate its influence. They argue that the largest institutional investors have their own voting policies and conduct independent analysis

<sup>653</sup> STAFF OF ESG WORKING GRP., H. COMM. ON FIN. SERVS., 118<sup>TH</sup> CONG., *THE FAILURE OF ESG: AN EXAMINATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS IN THE AMERICAN BOARDROOM AND NEEDED REFORMS* 12 (2024).

<sup>654</sup> *Id.*

<sup>655</sup> Press Release, H. Comm. on Fin. Servs., Capital Markets Subcommittee Examines Market Influence by Proxy Advisory Firms (Apr. 29, 2025), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409711> <https://perma.cc/2VC6-2KGU>.

<sup>656</sup> Segal Marco Advisors and ProxyVote Plus also target a narrower range of clients than the other proxy advisors, focusing primarily on multiemployer pension plans. Dominic P. Keilty, *Solving the Proxy Advisory Problem: Minimum Regulation for Maximum Competition*, 14 MICH. BUS. & ENTREPRENEURIAL L. REV. 67, 74 (2025).

<sup>657</sup> Rose, *supra* note 631.

<sup>658</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-47, *CORPORATE SHAREHOLDER MEETINGS: PROXY ADVISORY FIRMS' ROLE IN VOTING AND CORPORATE GOVERNANCE PRACTICES* 20 (2016) [GAO PROXY ADVISOR REPORT].

<sup>659</sup> Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 879 (2010).

<sup>660</sup> GAO PROXY ADVISOR REPORT, *supra* note 658, at 20.

<sup>661</sup> Choi, Fisch & Kahan, *supra* note 654, at 879.

<sup>662</sup> ISS and Glass Lewis have also emphasized that their institutional clients choose among different voting policies, including a benchmark policy, various specialized policies (e.g., policies that incorporate climate-related considerations or Catholic moral values), and custom policies tailored to particular clients. ISS has said that approximately 86% of the shares for which it processes voting instructions are tied to custom policies, while Glass Lewis claims that a “significant majority” of its institutional clients vote according to a custom policy or a custom process for reaching voting decisions. Complaint for Declaratory and Injunctive Relief ¶ 28, *ISS v. Paxton*, No. 1:25-cv-01160 (W.D. Tex. July 24, 2025); Complaint ¶ 41, *Glass, Lewis & Co. v. Paxton*, No. 25-cv-1153 (W.D. Tex. July 24, 2025).

In October 2025, Glass Lewis announced that it would no longer issue benchmark voting recommendations beginning in 2027. Raquel Fox et al., *Glass Lewis To End Benchmark Proxy Voting Policy: What Companies Should Know*, HARV. L. SCH. F. ON CORP. GOV. (Oct. 29, 2025), <https://corpgov.law.harvard.edu/2025/10/29/glass-lewis-to-end-benchmark-proxy-voting-policy-what-companies-should-know>.

of contested issues,<sup>663</sup> relying on proxy advisors primarily for research and to identify matters that warrant further examination.<sup>664</sup>

### Conflicts of Interest

Some commentators argue that ISS and Glass Lewis operate with conflicts of interest because they provide both proxy voting advice to investors and consulting services to corporations that are the subject of their proxy voting advice.<sup>665</sup> Critics have claimed that the proxy advisors' voting recommendations may be influenced by whether a corporation has purchased their consulting services.<sup>666</sup> Glass Lewis also offers to engage with companies on behalf of investor clients regarding governance issues,<sup>667</sup> which observers say incentivizes the firm to favor activist investors that purchase its engagement services.<sup>668</sup>

ISS and Glass Lewis indicate that they maintain structural safeguards to ensure the independence of their proxy advice and consulting businesses.<sup>669</sup> Both firms also say they disclose potential conflicts of interest to their clients.<sup>670</sup>

### Errors

A third category of concerns regarding proxy advisors involves alleged errors in their work product. Some commentators contend that ISS and Glass Lewis frequently make factual and analytical mistakes and are insufficiently responsive when companies attempt to correct such errors.<sup>671</sup> (In 2020, ISS discontinued a policy of allowing S&P 500 companies to review draft copies of its research reports.<sup>672</sup> Glass Lewis allows companies to respond to its analysis and recommendations and makes those responses available to clients.<sup>673</sup>)

<sup>663</sup> GAO PROXY ADVISOR REPORT, *supra* note 658, at 16.

<sup>664</sup> Sarro, *supra* note 178, at 402.

<sup>665</sup> ISS offers both corporate governance and executive compensation consulting. *Governance Advisory Services*, ISS, <https://www.issgovernance.com/solutions/governance-advisory-services> <https://perma.cc/VC6G-EPDH> (last visited Feb. 3, 2026); *Executive Compensation*, ISS, <https://www.iss-corporate.com/solutions/executive-compensation> <https://perma.cc/ZYW8-MGSM> (last visited Feb. 3, 2026).

Glass Lewis offers compensation consulting. *Equity Compensation Plan Advisory*, GLASS LEWIS, <https://www.glasslewis.com/corporate-solutions/equity-compensation-plan-advisory> (last visited Feb. 3, 2026).

<sup>666</sup> *E.g.*, Letter from Clifton A. Pemble, President & Chief Exec. Officer, Garmin Ltd., to Vanessa A. Countryman, Sec'y, SEC (Jan. 27, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6703085-206073.pdf>.

<sup>667</sup> *Active Stewardship Engagement Program*, GLASS LEWIS, <https://www.glasslewis.com/investor-solutions/active-stewardship-engagement> (last visited Feb. 3, 2026).

<sup>668</sup> *Cracking the Proxy Advisor Duopoly*, WALL ST. J. (July 12, 2023), <https://www.wsj.com/opinion/proxy-advisory-firms-glass-lewis-institutional-shareholder-services-esg-investing-761e044f>.

<sup>669</sup> GLASS LEWIS, POLICIES AND PROCEDURES FOR MANAGING AND DISCLOSING CONFLICTS OF INTEREST 8 (2024) [hereinafter GLASS LEWIS CONFLICT POLICIES]; ISS, COMMENTS ON PROPOSED AMENDMENTS TO EXEMPTIONS FROM THE PROXY RULES FOR PROXY VOTING ADVICE, FILE NO. S7-22-19, at 32 (2020) [hereinafter ISS COMMENT LETTER], <https://www.issgovernance.com/file/duediligence/31012020-ISS-Comments-Filing.pdf>.

<sup>670</sup> GLASS LEWIS CONFLICT POLICIES, *supra* note 668, at 8; ISS COMMENT LETTER, *supra* note 669, at 34–36.

<sup>671</sup> Kyle Isakower, Am. Council for Cap. Formation, Proxy Advisors Remain a Problem: 2024 Proxy Season Analysis Shows Companies Report—Persistent Errors in Proxy Advisors' Analyses (2025), [https://accf.org/wp-content/uploads/2025/07/ACCF-2024-Proxy-Report\\_7.7.25.pdf](https://accf.org/wp-content/uploads/2025/07/ACCF-2024-Proxy-Report_7.7.25.pdf) <https://perma.cc/NB86-2FWF>.

<sup>672</sup> Edward Greene, *ISS to No Longer Provide S&P 500 Companies with Draft Proxy Research Reports for Review*, GEORGESON (Nov. 5, 2020), <https://www.georgeson.com/us/iss-to-no-longer-provide-sp-500-companies-with-draft-proxy-research-reports-for-review> <https://perma.cc/GK39-QJ2X>.

<sup>673</sup> *Report Feedback Statement (RFS)*, GLASS LEWIS, <https://www.glasslewis.com/issuer-relations/report-feedback-statement-rfs> <https://perma.cc/SQ6S-GSNU> (last visited Jan. 2, 2026).

The industry’s defenders contend that claims of analytical error often amount to disputes over methodology or policy and that proxy advisors’ work exhibits low rates of factual error.<sup>674</sup>

### Environmental and Social Agendas

ISS and Glass Lewis have been criticized for supporting shareholder proposals on E&S issues that allegedly harm shareholder value.<sup>675</sup> To address this concern, a 2024 staff report from the House Committee on Financial Services recommended that proxy advisors be required to “disclose their economic analysis and provide financial justifications” for vote recommendations that diverge from the judgments of independent boards of directors.<sup>676</sup> ISS and Glass Lewis have also faced investigations from state attorneys general (AGs) involving the role that E&S considerations play in their recommendations.<sup>677</sup>

Both ISS and Glass Lewis have said that their benchmark voting policies evaluate E&S proposals based on how the proposals are likely to contribute to shareholder value.<sup>678</sup> ISS has also made changes to its benchmark voting policy for certain types of E&S proposals. ISS’s 2026 benchmark proxy voting policy indicates that ISS will take a case-by-case approach to proposals involving climate change, diversity, human rights, and corporate political contributions.<sup>679</sup> Previous ISS benchmark policies said that ISS would generally recommend voting in favor of certain types of proposals within those categories.<sup>680</sup>

### The SEC’s Effort to Regulate Proxy Advisors

For many years, the regulatory status of proxy advisors was uncertain. Section 14(a) of the Exchange Act makes it unlawful to “solicit” proxies in contravention of SEC rules, but does not define the term “solicit.”<sup>681</sup> Since 1956, the SEC has defined that term to include not only requests to execute or revoke a proxy, but also any communications to shareholders “under circumstances reasonably calculated to result in” the procurement, withholding, or revocation of a proxy.<sup>682</sup> The SEC has recognized the breadth of this definition and adopted various exemptions to the proxy rules’ information and filing requirements to mitigate its expansiveness.<sup>683</sup> Those exemptions include carveouts for persons who do not seek proxy authority and persons who

<sup>674</sup> Letter from Kenneth A. Bertsch, Exec. Dir. & Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Investors, to Vanessa A. Countryman, Sec’y, SEC 3–4 (Feb. 4, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6764339-208028.pdf> <https://perma.cc/3R8B-N2C3>.

<sup>675</sup> STAFF OF ESG WORKING GRP., H. COMM. ON FIN. SERVS., 118<sup>TH</sup> CONG., THE FAILURE OF ESG: AN EXAMINATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS IN THE AMERICAN BOARDROOM AND NEEDED REFORMS 14 (2024).

<sup>676</sup> *Id.*

<sup>677</sup> *Missouri AG Investigates Proxy Advisors Over ESG and DEI Practices*, STATE AG REPORT (July 17, 2025), <https://www.stateagreport.com/news/missouri-ag-investigates-proxy-advisors-over-esg-and-dei-practices> <https://perma.cc/E6ZB-55F4>.

<sup>678</sup> ISS, PROXY VOTING GUIDELINES, BENCHMARK POLICY CHANGES FOR 2026, at 29 (2025), <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf> [hereinafter ISS BENCHMARK POLICY CHANGES]; Letter from Kevin Cameron, Exec. Chair, Glass, Lewis & Co., to State Att’y’s Gen. Listed, at 3 (Jan. 31, 2023), <https://resources.glasslewis.com/hubfs/Compliance/2023%20Letter%20to%20State%20AGs.pdf> <https://perma.cc/C9QD-9X2G>.

<sup>679</sup> ISS BENCHMARK POLICY CHANGES, *supra* note 678, at 17, 19, 20, 22.

<sup>680</sup> *Id.*

<sup>681</sup> 15 U.S.C. § 78n(a).

<sup>682</sup> 17 C.F.R. § 240.14a-1(l)(1)(iii).

<sup>683</sup> Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55088 (Sept. 3, 2020) (codified at 17 C.F.R. pt. 240).

furnish proxy voting advice under specified circumstances.<sup>684</sup> Proxy advisors have relied upon both of these exemptions. ISS and Glass Lewis have also argued that they are not subject to *any* of the SEC’s proxy rules because proxy voting advice does not constitute proxy “solicitation” under Section 14(a) of the Exchange Act.<sup>685</sup>

In a 2020 final rule, the SEC rejected this argument and codified its view that selling proxy voting advice generally constitutes proxy “solicitation,” bringing proxy advisors within the ambit of the proxy rules.<sup>686</sup> The 2020 rule also imposed conditions on the availability of certain exemptions from the proxy rules’ information and filing requirements.<sup>687</sup> Specifically, the 2020 amendments provided that proxy advisors could rely on the relevant exemptions only if they (1) made specified conflict-of-interest disclosures, and (2) allowed companies to review their voting recommendations and informed clients of company responses.<sup>688</sup>

ISS challenged the 2020 rule, arguing that disinterested proxy voting advice does not constitute proxy “solicitation” under Section 14(a) of the Exchange Act.<sup>689</sup> In February 2024, a federal district court agreed and vacated the rule.<sup>690</sup> In July 2025, the U.S. Court of Appeals for the D.C. Circuit affirmed that decision.<sup>691</sup>

Because of the D.C. Circuit’s decision, any future SEC efforts to regulate proxy advisors would, absent legislative changes, need to rely on authorities other than Section 14(a) of the Exchange Act. One possible alternative to Section 14(a) is the Investment Advisers Act (IAA), which establishes federal fiduciary standards for investment advisers.<sup>692</sup> Three of the five U.S. proxy advisors, including ISS, are registered with the SEC as investment advisers.<sup>693</sup> While Glass Lewis has traditionally maintained that it is not subject to the IAA,<sup>694</sup> a company executive said in November 2025 that Glass Lewis is “seriously considering” registering with the SEC as an investment adviser.<sup>695</sup>

<sup>684</sup> 17 C.F.R. §§ 240.14a-2(b)(1), 240.14a-2(b)(3).

<sup>685</sup> Letter from Kevin Cameron, Exec. Chair, and Nichol Garzon-Mitchell, Senior Vice President, Gen. Counsel, Glass, Lewis & Co., to Vanessa A. Countryman, Sec’y, SEC 61–67 (Feb. 3, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6745349-207938.pdf> <https://perma.cc/M33H-RLEB>; ISS COMMENT LETTER, *supra* note 669, at 4–11.

<sup>686</sup> 85 Fed. Reg. at 55091.

<sup>687</sup> The exemptions are important to proxy advisors because compliance with the proxy rules’ information and filing requirements would allow investors to obtain proxy voting advice without paying for it. *Id.* at 55085.

<sup>688</sup> *Id.* at 55098, 55109. The 2020 rule also added an explanatory note to the proxy rules’ anti-fraud provision, which indicated that the failure to disclose material information regarding proxy voting advice—such as a proxy advisor’s methodology, sources of information, or conflicts of interest—may be considered misleading in certain circumstances. *Id.* at 55155.

<sup>689</sup> ISS v. SEC, 718 F. Supp. 3d 7 (D.D.C. 2024), *aff’d*, 142 F.4th 757 (D.C. Cir. 2025).

<sup>690</sup> *Id.* at 12.

<sup>691</sup> ISS v. SEC, 142 F.4th 757 (D.C. Cir. 2025).

<sup>692</sup> 15 U.S.C. §§ 80b-1–80b-21.

<sup>693</sup> ISS COMMENT LETTER, *supra* note 669, at 19.

<sup>694</sup> Katherine Rabin, *Statement of Record for SEC Roundtable on the Proxy Process*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 21, 2018), <https://corpgov.law.harvard.edu/2018/11/21/statement-of-record-for-sec-roundtable-on-the-proxy-process> <https://perma.cc/UY9N-WJNZ>.

<sup>695</sup> Ross Kerber, *Exclusive: Glass Lewis Mulls US Investment Adviser Registration, Could Ease Criticism*, REUTERS (Nov. 21, 2025), <https://www.reuters.com/sustainability/boards-policy-regulation/glass-lewis-mulls-us-investment-adviser-registration-could-ease-criticism-2025-11-21> <https://perma.cc/Z5XU-K74W>.

### Executive Order 14366

In December 2025, President Trump signed Executive Order 14366, Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors (E.O. 14366).<sup>696</sup> E.O. 14366 included many of the criticisms of proxy advisors discussed above and indicated that “the United States must ... increase oversight of and take action to restore public confidence in the proxy advisor industry, including by promoting accountability, transparency, and competition.”<sup>697</sup> The order also issued a variety of instructions to the heads of the SEC, Federal Trade Commission (FTC), and Department of Labor.<sup>698</sup> E.O. 14366 directs the Chairman of the SEC to

- review all rules, regulations, guidance, bulletins, and memoranda relating to proxy advisors and consider revising or rescinding those that are “inconsistent with the purpose of this order, especially to the extent that they implicate [DEI] and [ESG] policies”,<sup>699</sup>
- consider revising or rescinding all rules, regulations, guidance, bulletins, and memoranda relating to shareholder proposals, including Rule 14a-8, that are “inconsistent with the purpose of this order”,<sup>700</sup>
- enforce the federal securities laws’ anti-fraud provisions with respect to material misstatements or omissions contained in proxy advisors’ voting recommendations;<sup>701</sup>
- assess whether to require proxy advisors whose activities fall within the scope of the IAA to register as investment advisers;<sup>702</sup>
- consider requiring proxy advisors to provide increased transparency on their recommendations, methodology, and conflicts of interest, especially regarding DEI and ESG factors;<sup>703</sup>
- analyze whether, and under what circumstances, a proxy advisor serves as a vehicle for investment advisers to coordinate and augment their voting decisions, resulting in the formation of a “group” for purposes of Sections 13(d)(3) and 13(g)(3) of the Exchange Act;<sup>704</sup> and
- direct SEC staff to examine whether the practice of registered investment advisers engaging proxy advisors to advise on (and following the recommendations of such proxy

<sup>696</sup> E.O. 14366, *supra* note 6. For background on the legal significance of executive orders, see CRS Report R46738, *Executive Orders: An Introduction*, coordinated by Abigail A. Graber.

<sup>697</sup> E.O. 14366, *supra* note 6 § 1.

<sup>698</sup> *Id.* §§ 2–4.

<sup>699</sup> *Id.* § 2(a).

<sup>700</sup> *Id.* § 2(b).

<sup>701</sup> *Id.* § 2(c)(i).

<sup>702</sup> *Id.* § 2(c)(ii).

<sup>703</sup> *Id.* § 2(c)(iii).

<sup>704</sup> *Id.* § 2(c)(iv). In a December 2025 speech, SEC Commissioner Mark Uyeda suggested that institutional investors who engage in “robovoting”—i.e., voting based on proxy advisor recommendations without independent analysis—may form a “group” within the meaning of Sections 13(d)(3) and 13(g)(3) of the Exchange Act, triggering disclosure obligations. Mark T. Uyeda, Comm’r, SEC, Remarks at the 2025 Institute for Corporate Counsel (Dec. 3, 2025), <https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-institute-corporate-counsel-120325> <https://perma.cc/8G6U-UYT7>. For a discussion of Commissioner Uyeda’s speech and the legal principles surrounding “group” formation, see Ann Lipton, *13(d) Daisy Chains*, BUS. L. PROF BLOG (Dec. 5, 2025), <https://www.businesslawprofessors.com/2025/12/13d-daisy-chains/> <https://perma.cc/8RK6-ZA88>.

advisors with respect to) non-pecuniary factors in investing—including, as appropriate, DEI and ESG factors—is inconsistent with investment advisers’ fiduciary duties.<sup>705</sup>

E.O. 14366 instructs the Chairman of the FTC to investigate whether proxy advisors engage in unfair methods of competition or unfair or deceptive acts or practices in violation of the Federal Trade Commission Act.<sup>706</sup> It directs the Secretary of Labor to consider revisions to regulations and guidance under the Employee Retirement Income Security Act of 1974, which governs the fiduciary duties of private pension plan sponsors.<sup>707</sup>

## Legislation

Several bills regarding proxy advisors have circulated in recent Congresses. Examples are discussed below.

- H.R. 4098, the Stopping Proxy Advisor Racketeering Act (119<sup>th</sup> Cong.), would prohibit proxy advisors from providing proxy voting advice while facing a “conflict of interest.”<sup>708</sup> Conflicts of interest would include conflicts arising from the provision of consulting services to securities issuers; a proxy advisor’s modification of recommendations based on whether a company subscribes to the proxy advisor’s services; the provision of stewardship or engagement services related to matters covered by a proxy advisor’s voting advice; and membership in an organization that supports a shareholder proposal that is the subject of a proxy advisor’s voting advice.<sup>709</sup>
- H.R. 4590 (118<sup>th</sup> Cong.) would have amended Section 14 of the Exchange Act to provide that a proxy advisor’s failure to disclose its methodology, sources of information, or conflicts of interest, along with material misstatements by a proxy advisor regarding proxy voting advice, “shall be considered to be false or misleading with respect to a material fact.”<sup>710</sup>
- H.R. 4589 (118<sup>th</sup> Cong.) would have required proxy advisors to register with the SEC.<sup>711</sup> The bill would have instructed the SEC to deny applications for registration (and suspend or revoke a registration) if a proxy advisor failed to certify to the SEC’s satisfaction that it was “able to consistently provide proxy advice based on accurate information,” would provide voting advice “only in the best economic interest” of shareholders, and complied with requirements governing conflicts of interest and the reliability of its recommendations.<sup>712</sup> The reliability requirements included a requirement to adopt procedures under which companies could review and respond to voting recommendations before the recommendations were sent to proxy advisors’ clients.<sup>713</sup> The bill also would have directed the SEC to issue rules prohibiting proxy advisors from engaging in

<sup>705</sup> E.O. 14366, *supra* note 6 § 2(c)(v).

<sup>706</sup> *Id.* § 3.

<sup>707</sup> *Id.* § 4.

<sup>708</sup> H.R. 4098, 119<sup>th</sup> Cong. § 2 (2025).

<sup>709</sup> *Id.*

<sup>710</sup> H.R. 4590, 118<sup>th</sup> Cong. § 1 (2023).

<sup>711</sup> H.R. 4589, 118<sup>th</sup> Cong. § 1(a) (2023).

<sup>712</sup> *Id.*

<sup>713</sup> *Id.*

practices the SEC deemed “unfair, coercive, or abusive,” including practices related to corporate governance consulting services.<sup>714</sup>

In the 118<sup>th</sup> Congress, H.R. 4767, the Protecting Americans’ Retirement Savings from Politics Act (discussed above), included the anti-fraud measure from H.R. 4590 and the requirements from H.R. 4589.<sup>715</sup>

## Concluding Thoughts

The attractiveness of some of the reforms discussed above is likely to depend on one’s normative priors—in particular, which justifications for the shareholder proposal rule (if any) one deems persuasive. Those who believe that Rule 14a-8 plays an important role in promoting corporate social responsibility, for example, may not favor reforms designed to restrict or eliminate E&S proposals. Conversely, those concerned that the costs of E&S proposals exceed the benefits may support such reforms.

One consideration raised by several of the relevant legislative options is the desirability of mandatory rules regarding shareholder proposals. Corporate law scholars have long debated the optimal mix of mandatory and default rules.<sup>716</sup> Some scholars argue that corporations should have close to unfettered freedom to adopt governance arrangements tailored to their unique circumstances.<sup>717</sup> Others contend that certain mandatory rules are necessary to address market failures.<sup>718</sup> Related debates involve the appropriate content of corporate law default rules and the processes by which corporations should be allowed to opt out of such rules.<sup>719</sup> Different positions in these disputes have different implications for shareholder proposal reform. Proponents of expansive contractual freedom, for example, may favor allowing corporations to adopt their own proposal procedures and standards. Skeptics of managerial power, in contrast, may support a core set of mandatory rules or a requirement that shareholders approve decisions to opt out of default rules.

In considering possible reforms to Rule 14a-8, Congress may seek to shine a light on the legal architecture underpinning shareholder proposals. As discussed, there is lingering uncertainty over whether federal law gives shareholders a right to submit proposals or merely imposes disclosure obligations that depend on the existence of state law proposal rights. While the SEC’s current chairman has endorsed the latter view,<sup>720</sup> recent history confirms that the agency’s approach to shareholder proposals can change based on its leadership.

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<sup>714</sup> *Id.*

<sup>715</sup> Protecting Americans’ Retirement Savings from Politics Act, H.R. 4767, 118<sup>th</sup> Cong. §§ 601, 701 (2023).

<sup>716</sup> Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989).

<sup>717</sup> *E.g.*, Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990).

<sup>718</sup> *E.g.*, Bebchuk, *supra* note 716, at 1399–1408 (arguing that collective action problems among shareholders, externalities, and information asymmetries may justify some limits on contractual freedom in corporate law).

<sup>719</sup> Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007); Lucian A. Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002).

<sup>720</sup> Atkins Speech, *supra* note 8.

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