Testimony of
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Before the U.S. House Committee on Financial Services

Hearing on "Proxy Power and Proposal Abuse: Reforming Rule 14a-8 to Protect Shareholder Value"

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Biography of Ferrell M. Keel

Ferrell Keel is a partner in the Financial Markets practice at Jones Day. She has significant experience representing clients in a broad range of complex capital markets transactions, as well as high-stakes corporate governance matters relating to Securities and Exchange Commission (SEC) and stock exchange rules and regulations. Ferrell also regularly advises boards on corporate governance matters and facilitates annual board evaluations.

Ferrell's corporate governance practice has recently focused on shareholder activism, particularly as it relates to environmental, social & governance (ESG) issues. She regularly counsels clients on risks stemming from ESG disclosures and shareholder proposals and was a leading member of the Jones Day team that represented ExxonMobil in its Rule 14a-8 shareholder proposal lawsuit against shareholder activists in 2024.

Ferrell is also an expert on proxy advisor matters, having testified to the Texas State Senate Committee on State Affairs on S.B. 2337, a first-of-its kind statute that seeks to regulate proxy advisors. In July 2025, ISS and Glass Lewis sued Texas Attorney General Ken Paxton to allege that S.B. 2337 is unconstitutional. In August 2025, the Texas Stock Exchange (TXSE) and Texas Association of Business intervened as defendants to defend S.B. 2337. Ferrell is a leading member of the Jones Day team representing TXSE and the Texas Association of Business in the suit, which is ongoing.

Ferrell has led the full range of capital markets transactions, including initial public offerings (IPOs) and follow-on equity offerings; spin-offs; high yield, investment-grade, and convertible debt offerings; commercial paper programs; rights offerings; private placements of equity and convertible securities; and tender and exchange offers. Ferrell works regularly with clients that span a wide range of industries including energy, technology, financial services, consumer, retail, industrials and health care.

Prior to joining Jones Day in 2019, Ferrell was an associate in the capital markets practice at Davis Polk & Wardwell LLP. She holds a J.D. from New York University and a B.S. in Economics and History from Vanderbilt University where she was a Walter C. Wattles Fellow.

Written Statement

Chairman Hill, Ranking Member Waters and members of the Committee, thank you for the invitation to testify today. My hope is to shed light on why Rule 14a-8 no longer effectively serves the interests of shareholders at large. My observations draw upon my experience counseling public companies—big and small—on securities, corporate governance and ESG activism, but I am here today in my individual capacity and not on behalf of any client. The views I express are my own, and not necessarily those of Jones Day or any client.

I will start by outlining a few of the challenges with Rule 14a-8 and then humbly offer a few ideas as to alternatives.

The Challenges

1. Shareholder democracy needs rationale bounds.

No right should be limitless—for example, if I buy a seat on an airplane, do I have the right to use it as a soap box and hold fellow passengers captive for the duration of the flight?

In the shareholder proposal world, any individual can buy a megaphone and a billboard on a company's proxy statement for $2,000. To put it in context, that represents 0.000002% of the market cap of the average S&P 500 company.[1] It would be like buying a Super Bowl ad for 14 cents. Proponents are getting prime proxy real estate at bargain basement prices.

It doesn't have to be this way. We see healthy shareholder engagement around the world despite much higher participation thresholds. Take Germany who has a €500,000 ownership requirement. Or the United Kingdom who requires 100 individuals to jointly own £10,000 in shares.

It is not a new idea to require individuals with influence to have meaningful ownership in a company. For example, companies require directors to own minimum amounts of a company's stock, and executive compensation is largely based on equity ownership to ensure alignment with shareholder interests. Similarly here, we need to think about how requiring a shareholder to have a bigger economic stake would safeguard against individuals acting in their own interest and therefore limiting proposals that do not further the broader shareholder interests.

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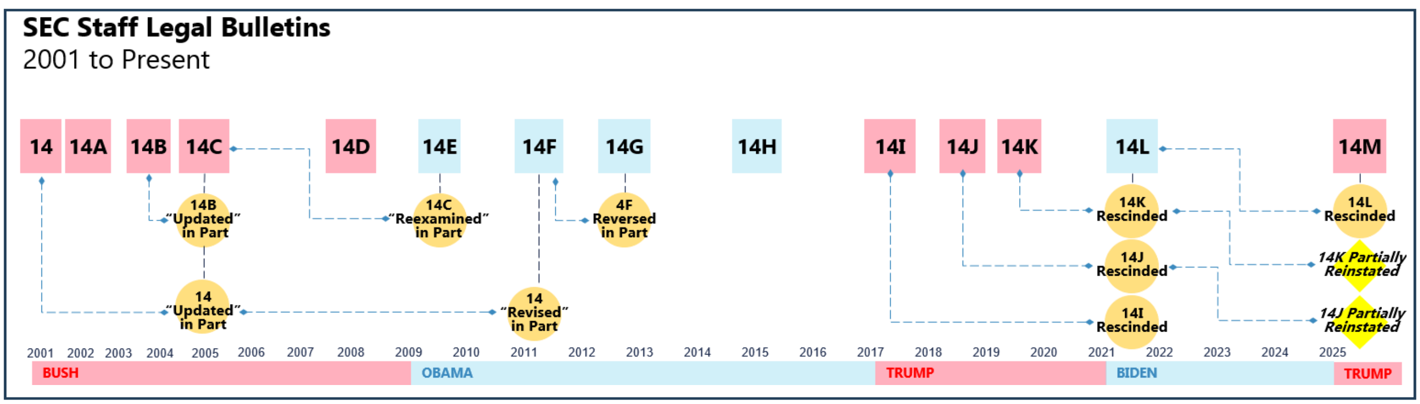
[1] Per Morningstar.com, *S&P 500 PR, Morningstar*, https://www.morningstar.com/indexes/spi/spx/quote (last visited Sept. 8, 2025), the S&P 500 total market cap was $54.8 trillion, resulting in an average market cap of $109.6 billion per company in the S&P 500.

2. Rule 14a-8 is too complex, making it subjective, inefficient and easy to manipulate.

The SEC has issued interpretive guidance on Rule 14a-8 through 18 Staff Legal Bulletins over the last two decades.[2] This guidance informs companies and shareholders alike as to whether a company is justified in excluding a proposal from a shareholder vote based on various procedural and substantive bases. These Staff Legal Bulletins change the goalposts with each new administration, and result in an iterative, complex and confusing web of standards that is difficult to apply with efficiency or consistency. The guidance contains exceptions to exclusions and highly subjective analytical frameworks that force companies and proponents alike to apply fuzzy standards like, does a proposal "transcend ordinary business," or does it fall short? Is it "significant" (or insignificant) to social policy? Will it have a "broad societal impact," or just a limited one? Does it "probe too deeply," or just the right amount? The answers can only be known to the eye of the beholder.

The image below shows each of the SEC's Staff Legal Bulletins ("SLBs") relating to Rule 14a-8. The red and blue SLBs represent guidance issued under Republican and Democratic presidential administrations, respectively. As a reminder, guidance is not law. As the SEC says itself, it has "no legal force or effect" and it "does not alter or amend applicable law."[3] Yet guidance changes with the political winds, resulting in inconsistent application. That is not an effective tool for investors or an efficient use of resources for companies.



Complexity has a cost, and that cost is that Rule 14a-8 is unusable to the ordinary shareholder. How valuable is a right to speak if the average shareholder can't even figure out how to submit a proposal?

The only people who have a shot at successfully submitting a proposal are professional activists—individuals and organizations who are oftentimes not even shareholders. These professionals do not merely help a shareholder navigate Rule 14a-8. Rather, they effectively

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[2] *Staff Legal Bulletins*, SEC, https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins (last updated Feb. 12, 2025).

[3] *Shareholder Proposals: Staff Legal Bulletin No. 14M (CF)*, SEC (Feb. 12, 2025), https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf.

borrow a shareholder's stake to get their foot in the door, and then control the process from start to finish. It's not uncommon for the named shareholder to not engage with a company a single time. This means that the term "shareholder" proposal is a misnomer. In reality, most proposals are "activist" proposals that are orchestrated by individuals who primarily care about the issue at hand—regardless of the cost and ultimate impact that a proposal will have on the value of a company, its shareholders and its stakeholders.

3. A proxy ballot is not an efficient place to hold a political referendum.

Rule 14a-8 has turned companies' annual meetings into political hot beds, putting companies in the middle of the crossfire. For example, this proxy season multiple companies had one shareholder ask them to promote DEI while another shareholder asked them to abolish it.[4]

More generally, proposals increasingly ask companies to opine on sensitive and polarizing issues, as if companies can solve the toughest legislative and regulatory questions of our day. For example, proposals have asked:

- A store that sells hammers and nails to make a public statement on reproductive rights[5]
- A theme park to state its position on geopolitical issues in China[6]
- A credit card company to unilaterally formulate and execute gun sale regulation[7]
- An e-commerce store to consider investing in Bitcoin[8]

I want to be clear: these are all critically important, or at least interesting, issues. But what we are really talking about can be summarized in three questions:

- Is a company's annual meeting the right forum to vote on public policies?
- Are companies best situated to serve as de facto regulators, or are you?
- Do shareholders at large garner value from political proposals that have a tenuous connection to a company?

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[4] Shirley Westcott, *2025 U.S. Proxy Season Review*, ALLIANCE ADVISORS, https://allianceadvisors.com/2025-u-s-proxy-season-review/ (last visited Sept. 8, 2025).

[5] Michelle Nicole Diamond et al, *Shareholder Focus on Reproductive Rights Post-Dobbs*, WILMERHALE (Oct. 4, 2022), https://www.wilmerhale.com/en/insights/blogs/esg-epicenter/20221003-shareholder-focus-on-reproductive-rights-post-dobbs#:~:text=1,and%20political%20and%20electioneering%20expenditures.

[6] *2022 Notice of Annual Meeting of Shareholders and Proxy Statement*, THE WALT DISNEY COMPANY (Jan. 19, 2022), https://thewaltdisneycompany.com/app/uploads/2022/01/2022-Proxy-Statement.pdf; *2023 Notice of Annual Meeting of Shareholders and Proxy Statement*, THE WALT DISNEY COMPANY (Feb. 10, 2023), https://thewaltdisneycompany.com/app/uploads/2023/02/2023-Proxy-Statement.pdf.

[7] Visa Inc., SEC Staff No-Action Letter (Oct. 30, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/sumofusvisa103019-14a8.pdf.

[8] Amazon.com, Inc., No-Action Request Letter (Jan. 20, 2025), https://www.sec.gov/files/corpfin/no-action/14a-8/rominencppramazon12025-14a8inc.pdf.

4. Shareholder proposals are not costless: a company's energy is expensive.

Companies pour an immense amount of energy into addressing proposals. Depending on the nature and number of proposals, it can take a company hundreds of employee hours to coordinate its engagement, strategy and response to a shareholder proposal. A company must consider whether a proposal would cause it to jeopardize legal privilege, breach non-disclosure provisions, disclose propriety or sensitive employee information or reveal competitive strategies. Employees from legal, investor relations, human resources and the business functions may be involved, depending on the topic. And of course, executive officers and the board are also consulted and involved in formulating a response. For proposals relating to polarizing matters, a company also has to carefully consider how its response will impact employees, customers and suppliers. Reducing the expense of a proposal to dollars and cents simply does not capture the intangible costs.

For a more detailed explanation of the steps a company may take upon receiving a proposal, see Annex A.

What is the alternative?

With a system that is three quarters of a century old, it is time to rethink the process if we want a system that allows for shareholder engagement and still serves the broader shareholder interests. I believe there are essentially three options.

Option 1: Keep Rule 14a-8 but significantly revamp it. At a minimum, the ownership requirement would need to be raised. But it could also include other modifications like:

- The SEC could get out of the business of adjudicating no-action letters. The SEC and shareholders could instead rely on independent boards to exercise their fiduciary duties and apply Rule 14a-8 in good faith.

- Companies could still be required to submit no-action letters to articulate their reasoning for the exclusion—but the SEC would not be expected to issue a no-action letter. There would be a presumption the SEC would not object to the exclusion if the company did not hear back from the SEC within a specified period of time. This is not a novel idea: it is similar to the SEC's review process for preliminary proxy statements.

Truthfully, companies may very well struggle with this version of the shareholder process given it is much easier to blame an umpire (here, the SEC) for a bad call. If companies made these decisions themselves, they would fear retaliation from shareholders who might, for example, try to enjoin their annual meeting and create chaos.

This version of the shareholder proposal process would only work if both companies and shareholders were held accountable to act in good faith. Companies would be held in check via the threat of SEC objection or enforcement and the board's fiduciary duties. For shareholders, there would have to be a mechanism to ensure that they could not enjoin the annual meeting—perhaps as a condition to using Rule 14a-8.

Option 2: Eliminate Rule 14a-8 and let states decide what is a "proper subject" matter for proposals—which is actually how Rule 14a-8 was originally intended to operate.[9]

Option 3: This option is something in between, and would best be described as "private ordering." This would involve keeping Rule 14a-8, but letting companies and their shareholders decide how Rule 14a-8 should be applied. For example, a company could articulate what "ordinary business" means in its bylaws. After all, the SEC's guidance is merely guidance, and a company's bylaws define its contractual rights with shareholders. And while figuring out the market standard would take some time, I believe companies and shareholders would get to a place that appropriately balances both shareholder rights and a workable system. We saw private ordering work with proxy access, which is a corporate governance mechanism that allows shareholders to nominate directors.

In this world, companies could still be required to notify the SEC if it intended to exclude a proposal, and companies could be required to publicly disclose what proposals they excluded so shareholders stayed fully informed.

I do not purport to know which answer is the best. But I do believe living with the current system does not serve the interests of investors in the long run, and it will ultimately hurt both companies and shareholders—the very thing that the rules were intended to protect.

Thank you again for the opportunity to speak to you today.

[9] SEC Division of Corporate Finance Letter Relating to Section 20 and to Rule X-14A07, Exchange Act Release No. 3638 (Jan. 3, 1945), 11 Fed. Reg. 10,995 (1946) (stating that the purpose of Rule 14a-8 (originally Rule X-14A-7) was to "place stockholders in the position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects of stockholders' action under the laws of the state under which it was organized.").

Annex A
Company Intake and Response Process

A proposal is typically received four months prior to when the company files its proxy statement in advance of the annual meeting.

Upon receipt, a company's legal team will inform the board. It will also analyze whether the proposal complies with Rule 14a-8, as it has 40 days to file a no-action request with the SEC if it believes it can and should be excluded.

The legal team will work closely with the company's various constituents to understand:

- Whether shareholders have historically raised the topic or expressed views on it;
- How the proposal's topic is currently been addressed by the company;
- The feasibility and legality of implementing the proposal, and whether it would jeopardize legal privilege, breach non-disclosure provisions, disclose propriety or sensitive employee information or reveal competitive strategies; and
- The expense of implementing the proposal.

Depending on the topic of the proposal, this analysis can take multiple months and typically involves coordinating with various business functions that may span multiple geographies, product lines or segments.

The company will typically engage with the proponent to understand the proponent's motivation. It is not uncommon for a proponent to submit a proposal on one topic but engage on something entirely different. Once the company understands the proponent's motives, the company may try to convince the proponent to withdraw if the company has already addressed the proposal. The company may also be willing to negotiate a withdrawal by agreeing to take certain actions that are responsive to the proponent's request.

When a company believes it can exclude a proposal under one of the exclusionary bases in Rule 14a-8, it will ask the SEC to grant it "no action relief." This involves writing a letter to the SEC that typically ranges between 7 and 15 pages of dense legal analysis and factual support for the company's position. Outside counsel is typically engaged in this process given the complexity of Rule 14a-8. A no-action letter will typically go through multiple rounds of review internally and also be reviewed by the board.

Companies will go through the "no-action" process even on clear-cut applications of Rule 14a-8—e.g., if a proposal missed the deadline or a proponent just did not provide proof of the requisite share ownership. This is for a couple of reasons. First, the proxy advisors will vote against one or more directors if a company excludes a proposal without explicit SEC no-action relief.[10] Given the proxy advisors' significant influence, companies are unwilling to risk not

[10] ISS United States Procedures & Policies (Non-Compensation), Frequently Asked Questions, https://www.issgovernance.com/file/policy/active/americas/US-Procedures-and-Policies-FAQ.pdf; Glass Lewis

getting their support. Second, if a shareholder disagrees with a company's decision, a proponent could sue to enjoin the annual meeting. It is difficult to understate the disruption and chaos that would ensue.

Because it is not predictable as to whether a company will receive no-action relief, the board will formulate a statement for the proxy statement to recommend to shareholders how they should vote on the proposal. This statement reflects an immense amount of diligence and strategic thought from both management and the board.

Days before the proxy statement is sent to shareholders, the company will receive a response from the SEC on the no-action request and finalize its proxy statement for distribution to shareholders.

If the proposal is included in the proxy statement, shareholders may want to discuss the company's proposal in the weeks leading up to the annual meeting. Once the proxy advisors' recommendations are issued—typically a few weeks before the annual meeting—the company will have insight as to the level of support the proposal is expected to receive. The company will also monitor for "exempt solicitation" filings with the SEC. These are filings where individuals (who may or may not be the proponent) can publicly offer their views to the company's shareholders and the public at large. These may prompt the company to issue additional clarifying communications.

After the annual meeting results are tallied, the company will report the results to its shareholders. If the proposal gets majority support, the company will oftentimes implement the proposal, even though it is non-binding. The proxy advisors also require that the company implement the proposal if a majority of the votes cast support the proposal, and Glass Lewis even requires companies to publicly address the proposal if the proposal gets just 30% support.

2025 Benchmark Policy Guidelines, https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf.