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

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Chairman Hill, Ranking Member Waters and members of the Committee, thank you for the invitation to testify today. I appreciate the opportunity to share with you my observations on why Exchange Act Rule 14a-8 ("Rule 14a-8" or the "Rule"), the SEC's shareholder proposal rule, needs to be revised and to address regulation of proxy advisory firms, all of which is necessary in order to protect shareholder value and maintain the strength and leadership of the U.S. economy. My observations are based on over 35 years as a securities and corporate governance lawyer, including as a partner at Gibson, Dunn & Crutcher, as a founding member of the firm's Securities Regulation and Corporate Governance practice group, and as a former counsel to SEC Commissioner Edward Fleischman.[1] During that time, I have worked with a wide range of publicly traded companies in connection with their shareholder engagement activities and their responses to literally thousands of shareholder proposals that were submitted under Rule 14a-8.

There are two aspects of the SEC's shareholder proposal rule on which most U.S. public companies, shareholders, and proxy process participants would agree. First, Rule 14a-8 is highly consequential, impacting many U.S. public companies with significant and long-term effects. Second, the Rule 14a-8 and shareholder engagement landscapes have changed dramatically over the past decade, and the Rule is in need of reform. Beyond those two statements, you will find widely varying views on whether the past and potential future consequences of Rule 14-8 are beneficial or harmful to companies, their shareholders, and our economy, and widely varying views on what reforms are needed. In my view, those debates demonstrate why it is appropriate and necessary for this Committee to hold this hearing and to act on legislation to rein in the abuses of the Rule and to minimize some of the adverse consequences we have seen.

U.S. public companies of all sizes take shareholder relations seriously and welcome the opportunity to engage productively with their investors. But public companies also recognize that not all shareholders have the same priorities, and board of directors and company management have fiduciary responsibilities to act in the best interests of shareholders at large. Thus, one has to question why a single shareholder owning shares with a value of just $2,000 can initiate a process that imposes significant costs and, more importantly, diverts key company

[1] My comments and the views that I express are my own and not those of Gibson, Dunn & Crutcher LLP or attributable to any client or any association of which I am a member.

personnel, executives, and directors from other business activities, which costs and consequences are borne by all of the company's shareholders.

Moreover, the nature of shareholder proposals being submitted to companies in recent years have changed significantly from the proposals submitted in prior decades. Shareholder proposals no longer are primarily focused on corporate governance issues or on providing information or input on important business activities, but instead increasingly are crafted by special interest groups focused on narrow policy issues or specific outcomes, without regard to whether or how companies may already be addressing the issue, or to other considerations that may be more significant and consequential.

As well, the shareholder proposal process itself has changed over the past decade. Rule 14a-8 has become subject to dramatic swings in how the rule is interpreted, resulting in uncertainty over how Rule 14a-8 will be applied and increasing the cost and burdens of the shareholder proposal process for companies as well as for shareholder proponents.

In light of these changes, the case for reform of Rule 14a-8 and for regulatory oversight of proxy advisory firms is compelling.

History of Rule 14a-8

In order to understand the need for reform, it is important to understand what Rule 14a-8 is and where the controversies exist around its operation, the impact the Rule has on U.S. public companies, and the abuses and changes that have developed in recent years.

The predecessor to what is now Rule 14a-8 was adopted by the SEC in 1942, as Rule X-14A-7 under Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act").[2] Section 14(a) of the Exchange Act provides the SEC broad authority to regulate any company or other person who solicits proxies or consents[3] in respect of any registered security, including to adopt "such rules and regulations as the SEC may prescribe as necessary or appropriate in the public interest or for the protection of investors."

The Rule was entitled "Duty of Management to Set Forth Stockholders' Proposals" and applied only to proposals that were a proper subject for action by the security holders.[4] The Chairman of

[2] Securities Exchange Act of 1934 Release No. 3347 (Dec. 18,1942), 7 Fed. Reg. 10,653 (1942).

[3] Proxies and the proxy process are essential to allowing companies and shareholders to take important actions, including the election of directors and approval of certain transactions, due to the widely distributed holdings of public companies' voting securities, and the separation that exists between the beneficial owners who are the ultimate owners of voting stocks and the depositories, banks, brokers, and others who actually hold shares and thus are entitled to vote under state corporate law.

[4] The text of the rule read as follows:

> Rule X-14A-7. Duty of Management to Set Forth Stockholders' Proposals.
>
> In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means

the SEC at the time explained that the provision reflected the fact that, for publicly traded companies, voting decisions are made not at the annual meeting, but at the time that shareholders grant voting authority by executing their proxy cards, and that to make informed voting decisions, shareholders should receive information about every proposal being voted on at the annual meeting.[5]

Interpretive and administrative issues quickly arose under the Rule, and it began to take on a life of its own. In 1945, the SEC issued an opinion of its Director of the Division of Corporation Finance interpreting the Rule's phrase "proper subject for action" to mean proposals which relate directly to the affairs of the particular corporation and concluding that proposals which deal with general political, social, or economic matters are not "proper subjects for action by security holders."[6] In 1947, the SEC amended the Rule to provide that if a company received a shareholder proposal but intended to exclude the proposal from its proxy materials, either because it claimed that the proposal was not a proper subject for action or was not timely received, the company had to file a copy of the proposal with the SEC together with a statement of the reasons the company was excluding the proposal from its proxy materials.[7] In 1948, the SEC adopted the first substantive bases for excluding shareholder proposals from company proxy statements.[8] In 1953, the Rule was amended to add an exclusion if a proposal "consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."[9] Over time, additional procedural and eligibility provisions were added to the Rule, and the substantive bases for exclusion of proposals were expanded and revised.

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by which security holders can make a specification as provided in Rule X-14A-2. Further, if the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material the name and address of such security holder and a statement of such security holder setting forth the reasons advanced by him in support of such proposal; Provided however, that a statement of reasons in support of a proposal shall not be longer than 100 words and provided further that such security holder and not the management shall be responsible for such statement. For the purposes of this rule notice given more than thirty days in advance of a day corresponding to the date on which proxy soliciting material was released to security holders in connection with the last annual meeting of security holders shall, prima facie, be deemed to be reasonable notice.

[5] *Hearings on H.R. 1498, H.R. 1821, and H.R. 2019, Before the House Committee on Interstate and Foreign Commerce*, 78th Cong., 1st Sess., pt. 2, at 174-75 (1943) (Statement of Chairman Purcell) ("Once a shareholder could address a meeting[;] today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has of expressing his judgment comes at the time when he considers the execution of the proxy form, and we believe, whether we are right and whether we are wrong—and I think we are right—that that is the time he should have the full information before him and the ability to take action as he sees fit.")

[6] Securities Exchange Act Release No. 3638 (Jan. 3, 1945).

[7] Securities Exchange Act Release No. 3998 (Oct. 10, 1947).

[8] Securities Exchange Act Release No. 4185 (Nov. 5, 1948). Specifically, proposals could be excluded if submitted primarily for the purpose of enforcing a personal claim or of redressing a personal grievance, if the shareholder proponent had proposed but failed to present the proposal at the prior year's annual meeting, or if substantially the same proposal was presented at the prior year's annual meeting and received less than 3% support.

[9] Securities Exchange Act Release No. 4950 (Oct. 9, 1953)

How Rule 14a-8 Operates Today

Today, Rule 14a-8 has the same basic outcome as the 1942 version of the Rule. Under today's rule, if a qualified shareholder has given a company timely notice that it intends to present a proposal that is a proper subject for shareholder action at the company's annual meeting, the company is required to include the proposal and the shareholder's supporting statement in the company's proxy statement and to include the proposal on the company's proxy card, thereby providing a means for all shareholders to vote for or against or to abstain from voting on the proposal. However, today's rule has detailed eligibility and procedural provisions defining how much stock one must have owned and for how long in order to be a "qualified shareholder," as well as addressing how a shareholder demonstrates that it has satisfied those ownership requirements.[10] Today's rule continues to specify when notice of a proposal is deemed timely, but also limits each person to submitting no more than one proposal to a company for a particular shareholders' meeting, and requires certain undertakings.[11] Today's rule requires a company to notify the shareholder within a specific timeframe if the shareholder has failed to satisfy any of these procedural requirements and provides the shareholder an opportunity to correct those deficiencies.[12] And today's rule includes 13 substantive bases for excluding a proposal from the company's proxy materials even when it was timely and properly submitted in accordance with the Rule. Those substantive bases continue to allow exclusion if the proposal is not a proper subject for action by shareholders under the laws of the state in which a company is incorporated or organized.[13] Rule 14a-8's significant substantive bases for exclusion of proposals include:

- Rule 14a-8(i)(7), the **ordinary business** exclusion, which allows a company to exclude a proposal that deals with a matter relating to the company's ordinary business operations, including if it seeks to "micromanage" the company, such as where the proposal involves intricate detail, or seeks to impose specific timeframes or methods for implementing complex policies;
- Rule 14a-8(i)(5), the **economic relevance** exclusion, which allows exclusion if the proposal relates to operations which account for less than 5% of the company's total assets, net earnings, and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;
- Rule 14a-8(i)(10), the **substantial implementation** exclusion, which allows exclusion if the company has already substantially implemented the proposal;
- Rule 14a-8(i)(11), the **duplicative proposal** exclusion, which allows exclusion if the proposal substantially duplicates another proposal previously submitted to the company by another shareholder for the same meeting; and
- Rule 14a-8(i)(12), the **resubmission** exclusion, which allows exclusion if the proposal addresses substantially the same subject matter as a proposal included in the company's

[10] 17 C.F.R. § 240.14a-8(b)(1)(i), 17 C.F.R. § 240.14a-8(b)(2).

[11] 17 C.F.R. § 240.14a-8(b)(1)(ii)-(iii), 17 C.F.R. § 240.14a-8(e).

[12] 17 C.F.R. § 240.14a-8(f)(1).

[13] 17 C.F.R.§ 14a-8(i)(1).

proxy materials either one, two, or three or more times in the past five years, and the most recent vote failed to achieve support of at least 5%, 15%, or 25% of shareholders, respectively.[14]

Rule 14a-8 continues to require a company to notify the SEC whenever it receives a shareholder proposal that it intends to exclude from the company's proxy materials. These notices must include a statement of the company's reasons for excluding the proposal. In practice, these notices have evolved to consist of "no-action requests," in which the company explains the facts and one or more bases under Rule 14a-8 supporting the company's view that the shareholder proposal may properly be excluded from the company's proxy materials. The no-action requests typically require extensive legal work to research relevant interpretive statements by the SEC and the SEC Staff, to identify and analyze prior no-action requests that are relevant to the current proposal, and to draft the legal analysis that supports exclusion of the proposal based on the prior interpretations and precedents. Once a company has filed a no-action request with the SEC, the shareholder proponent or the proponent's representative is permitted, but not required, to submit its arguments as to why the proposal should not be viewed as excludable under Rule 14a-8.

Although not required under Rule 14a-8, as a matter of policy the SEC Staff in the SEC's Division of Corporation Finance generally will issue a response to each no-action request, in which the SEC Staff states whether or not it concurs with the company's analysis that a proposal may properly be excluded from the company's proxy materials under either the eligibility and procedural requirements or under one or more of the substantive bases of Rule 14a-8.[15] While the SEC Staff's work in reviewing and responding to no-action requests is similar to the SEC Staff's other actions to monitor and comment on public companies' compliance with SEC rules, in the shareholder proposal context their work requires an immense effort as a small "task force" works during the year-end holidays and through the early months of proxy season to review and

[14] The other substantive grounds for exclusion are:

- Rule 14a-8(i)(2), the **violation of law** exclusion (available if implementation of the proposal would cause the company to violate any state, federal, or foreign law to which it is subject);
- Rule 14a-8(i)(3), the **violation of proxy rules** exclusion (available if the proposal or 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 materials);
- Rule 14a-8(i)(4), the **personal grievance/special interest** exclusion (available if the proposal relates to a personal claim or grievance against the company or any other person, or if it 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);
- Rule 14a-8(i)(6), the **absence of power/authority** exclusion (available if the company would lack the power or authority to implement the proposal);
- Rule 14a-8(i)(8), the **director elections** exclusion (available if the proposal relates to the election of specific nominees for directors or otherwise could affect the outcome of the upcoming election of directors);
- Rule 14a-8(i)(9), the **conflicting proposal** exclusion (available if the proposal conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting); and
- Rule 14a-8(i)(13), the **amount of dividends** exclusion (available if the proposal relates to specific amounts of cash or stock dividends).

[15] 17 C.F.R. §§ 202.1(d), 202.2.

respond to hundreds of fact-intensive no-action requests. The determinations reached by the SEC Staff in response to no-action requests reflect only the SEC Staff's informal views,[16] and "do not constitute an official expression of the Commission's views."[17] As such, only a court can authoritatively determine whether a Rule 14a-8 shareholder proposal can be excluded from a company's proxy materials.[18] In practice, however, most companies and shareholder proponents defer to the SEC Staff's no-action determinations and accept those determinations as the final arbiter of whether a proposal can be excluded from a company's proxy statement.

Rule 14a-8 Imposes Significant Costs and Burdens on Public Companies

The Rule 14a-8 shareholder proposal process imposes significant costs on companies, not just in terms of out-of-pocket expenses but more significantly in terms of the time and attention of key personnel who are diverted from their regular job functions in order to respond to the issues raised by a shareholder proposal. Notably, these costs and consequences are borne by all of a company's shareholders, and can be initiated by the action of a single shareholder owning as little as $2,000 worth of company stock.

Even though most Rule 14a-8 shareholder proposals are phrased as non-binding requests that companies take a particular action (commonly referred to as "precatory" proposals), companies take shareholder proposals seriously. The effort and expense that a company devotes to work on a shareholder proposal matter may commence long before a proposal is actually submitted to the company. Shareholders and environmental, social, or political advocacy groups, which themselves may not be shareholders but which work with shareholders and serve as "representatives," sometimes contact a company well in advance of submitting a shareholder proposal, and the context for this contact is either explicitly or implicitly threatening to submit a shareholder proposal. They will request a meeting so that they may present their views, understand the company's position on an issue, and perhaps reach a resolution that may involve the company agreeing to take some action or provide some additional disclosures. In cooperating in this manner, the company's goal is to avoid a proposal actually being submitted by the shareholder or group. Whether a company is dealing with this situation, or the far more common situation of receiving a shareholder proposal without any advance discussion, this engagement process can involve countless hours of work by: the company's legal department; personnel within the company's operations who are subject matter experts on the often obscure topics targeted by a shareholder or group; the company's investor relations, public relations, and public policy group; and senior management and members of the board of directors.

More commonly, companies receive shareholder proposals without advance engagement by the shareholder proponent, which puts pressure on the company to devote all of the foregoing

[16] *See* Division of Corporation Finance: Informal Procedures Regarding Shareholder Proposals, https://www.sec.gov/rules-regulations/shareholder-proposals/division-corporation-finance-informal-procedures-regarding-shareholder-proposals.

[17] 17 C.F.R. §§ 202.1(d).

[18] Nat'l. Ctr. for Pub. Policy Research v. SEC, No. 23-60230 (5th Cir. 2024).

resources and actions to the proposal during the relatively short time between its receipt of the proposal and the date when it is scheduled to print its proxy materials.

Regardless of whether a company received advance notice of a shareholder proposal, its actual receipt of a proposal triggers additional workstreams. Due to the technical and prescriptive nature of the shareholder proposal process, companies typically work with outside law firms to assist in responding to shareholder proposals. Our work with clients that have received a shareholder proposal typically includes the following steps:

- reviewing the submission to determine whether the shareholder has satisfied the procedural and eligibility requirements under Rule 14a-8;
- drafting and sending to the shareholder a letter notifying the shareholder of any procedural or eligibility deficiencies in their submission, and explaining what the shareholder needs to do to correct those deficiencies;
- determining whether any response to the deficiency letter cures the deficiencies;
- researching the past shareholder proposal activities of the shareholder, and of any advocacy group serving as the shareholder's representative, to assess their policy position on the topics addressed in the proposal and to assess how often they reach an agreement with companies resulting in their withdrawal of their shareholder proposals;
- researching whether the same or similar proposals have been submitted to and voted on at other companies, and analyzing any prior voting results;
- researching whether the company's significant shareholders have voting policy statements on the topic covered by the proposal and otherwise assessing whether and how they have previously voted on similar proposals; and
- researching whether proxy advisory firms have voting policies on the topic covered by the proposal or otherwise assessing whether they have previously issued voting recommendations on similar proposals, and if so, analyzing the factors that influenced their votes.

Informed with the results of the foregoing research and analysis, a company can pursue several courses of action:

- the company can seek to engage with the shareholder and negotiate a withdrawal of the proposal, which may involve the company agreeing to take some action or provide some additional disclosures;
- the company can unilaterally implement some or all of the actions requested by the proposal;
- the company can seek to exclude the proposal as improper under Rule 14a-8, typically through the SEC's no-action request process; and
- the company can include the proposal in its proxy statement, typically (but not always) together with the company's arguments as to why it recommends that shareholders vote against the proposal.

Companies often pursue more than one of these courses of action concurrently, further increasing the costs and burdens of the process on the company, given the compressed timeframes and the uncertainty as to which outcome will be successful. Each course of action involves differing considerations.

Companies may for a variety of reasons determine to implement a shareholder proposal by taking some or all of the actions that the proposal requests. This decision may be based on the determination that the proposal, if presented at the annual meeting, will likely garner support from at least a majority of shares voting at the meeting, as is often the case with proposals seeking popular corporate governance changes, such as elimination of a staggered board, elimination of a poison pill rights plan, or adoption of proxy access. A company may also implement the actions requested in a shareholder proposal because it determines that the proposal is consistent with management's view on the topic, otherwise can be implemented without controversy or disruption, or – as addressed below – simply because the proposal is a good idea. In the foregoing scenarios, if the company is not implementing the proposal exactly as requested, the company typically will engage with the shareholder proponent and request that the shareholder withdraw the proposal in light of the actions the company has or will take to implement it. If the shareholder refuses to withdraw the proposal, the company may seek to exclude the proposal from its proxy materials under Rule 14a-8(i)(10), arguing that the company has already substantially implemented the proposal. If the company is unsuccessful in excluding the proposal under Rule 14a-8(i)(10), or if the company decides to allow the proposal to appear in its proxy statement, the company will seek to convince holders of at least a majority of the shares voting at its annual meeting that the company's actions to implement the proposal are sufficient and that they should therefore vote against the shareholder proposal.

A company may seek exclusion of a shareholder proposal, either through the SEC's no-action process discussed above or alternatively (but much less commonly and with far greater costs) by filing a lawsuit. I know from thirty years' experience that drafting a winning no-action request to exclude a shareholder proposal is not an easy task, and the costs, considerations, and uncertainty involved are some of the most vexing aspects of the shareholder proposal process. Extensive research is often required to identify relevant no-action precedents, and extensive coordination with the company's subject matter experts can be required to fully and accurately include relevant facts regarding the company's operations. Because companies' no-action requests under Rule 14a-8 are publicly available, the requests also raise concerns about proprietary or strategic information,[19] as well as investor relations, customer relations, and public policy concerns. Moreover, despite the thousands of no-action requests issued under Rule 14a-8, the SEC Staff's rationale for concurring or not concurring with exclusion of a shareholder proposal is often opaque. This is because the SEC Staff typically provides little or no explanation as to why it did or did not concur with a company's analysis of the bases for excluding a proposal under Rule

[19] For example, a company might be unwilling to assert Rule 14a-8(i)(5)'s economic relevance exclusion due to competitive concerns around disclosing the extent to which particular operations account for a percentage of its net earnings or gross sales.

14a-8, and as discussed below, the SEC Staff's interpretations have frequently shifted under different administrations.

An entirely additional set of dynamics, costs, and company efforts come into play when a shareholder proposal is included in a company's proxy statement. Typically, companies recommend that their shareholders vote against a shareholder proposal, either because they have determined that the subject of the proposal is not in the best interests of shareholders or they have determined that the actions requested in the proposal are not an appropriate way to address a particular topic. These determinations reflect the work and input from internal personnel and external advisors as discussed above, including briefings to and input from senior management and the board of directors, or a committee of the board. The company and its advisors then must draft disclosure that will respond to the proposal and the company's voting recommendation in the company's proxy statement. This disclosure sets forth the company's perspective on the shareholder's proposal, typically explaining any nuance or context that is relevant for a company-specific consideration of the proposal, and often addressing how the company's management and board of directors have already considered or acted upon the topic addressed by the proposal. The company's disclosures also often must correct inaccurate, misleading, mischaracterized, or outdated assertions made in the shareholder proponent's supporting statement that accompanies its proposal.

A company's shareholders at large are directly pulled into the shareholder proposal process once the company's proxy statement is filed and disseminated to its shareholders, as they then are put in the position of evaluating and determining how to vote on the proposal. But it is important to bear in mind that by this time the company's shareholders have already borne costs, both in terms of expenses and diversion of many company personnel, management, and the board of directors, resulting from a single shareholder's submission of a proposal. Institutional shareholders devote significant time and expense to analyzing proposals and companies' responses, at times meeting with companies and with shareholder proponents, to try to assess the significance of the issues raised in proposals and other factors relevant to their voting decisions.

Rule 14a-8 Empowers Proxy Advisory Firms

When a shareholder proposal is included in a company's proxy statement, the role and influence of the proxy advisory firms cannot be overstated. Due to "robo-voting" and other default voting policies that rely on proxy advisory firm recommendations, as well as the need for diversified institutional investors to be able to assess and vote on the hundreds of shareholder proposals that are presented during peak proxy and annual meeting season, both companies and shareholder proponents typically cater to the proxy advisory firms' voting policies. Companies will often take actions designed to align with the advisory firms' voting policies, even when those actions do not fully implement the shareholder proposal, and shareholder proponents seek to position their proposals in terms that they hope the advisory firms will support. For example, shareholder proposals often ask for a company to evaluate and issue a report on a particular topic, instead of asking that the company actually take an action to address the topic, since proxy advisory firms are generally viewed as more likely to support a proposal requesting a report (which is less

disruptive to company operations) than a proposal requesting specific action to address an issue.[20] As another example, shareholder proponents often describe proposals addressing labor and employment issues or environmental issues as raising human rights concerns, which may be designed to increase the likelihood of garnering support under various proxy advisory firm voting policies.[21]

The proxy advisory firms' objectivity in this process is easily and reasonably questioned. As others have noted,[22] widespread support by Institutional Shareholder Services ("ISS") and Glass Lewis for shareholder proposals contributes to more shareholder proposals for the proxy advisory firms to assess. Proxy advisory firm recommendations "for" shareholder proposals enable proponents to achieve sufficient votes for their proposals that, even though representing only minority support, allow resubmitted proposals to avoid future exclusion under the SEC's shareholder proposal rule[23] and, in some instances, trigger a proxy advisory firm's "board accountability" voting policies. Under these "board accountability" policies, the proxy advisory firms expect boards of directors to take action in response to a shareholder proposal that receives a specified level of voting support, and the firms may recommend votes against some or all of a company's directors at the next annual meeting if the proxy advisory firm views the board's response as insufficient. The "board accountability" policies apply regardless of whether a shareholder proposal was phrased as a non-binding precatory request and, in Glass Lewis's case,

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[20] For example, ISS's proxy voting policies on a number of topics indicate a preference for reports on an issue over proposals requesting specific action on the same topic. For instance, ISS states that it will "[g]enerally vote for requests for reports on the feasibility of developing renewable energy resources," but "against proposals requesting that the company invest in renewable energy." Likewise, ISS will "[g]enerally vote for proposals seeking a report on the company's animal welfare standards," but "against proposals to phase out the use of animals in product testing" (except in certain circumstances). *See* Institutional Shareholder Services, Inc., *United States Proxy Voting Guidelines Benchmark Policy Recommendations* at pages 71 and 67, https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=2025.2.

In contrast, the SEC Staff does not draw a distinction on whether a proposal requests a specific action or only a report when evaluating whether the proposal is excludable as implicating a company's ordinary business operations under Rule 14a-8(i)(7). Staff Legal Bulletin No. 14E (Oct. 27, 2009) ("[S]imilar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document — where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business — we will consider whether the underlying subject matter of [a proposal requesting a] risk evaluation involves a matter of ordinary business to the company."), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14e-cf.

[21] For example, ISS's "Socially Responsible Investor" voting policy takes into account "not only … sustainable economic returns to shareholders and good corporate governance but also … the ethical behavior of corporations and the social and environmental impact of their actions."

[22] *Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets Before the Subcomm. on Capital Markets of the H. Comm. on Financial Services*, 117th Cong. 4 (2025) (statement of Elizabeth Ising).

[23] *See* 17 C.F.R.§ 14a-8(i)(12) (permitting the exclusion of a shareholder proposal if it "addresses substantially the same subject matter as a proposal, or proposals, previously 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: (i) Less than 5 percent of the votes cast if previously voted on once; (ii) Less than 15 percent of the votes cast if previously voted on twice; or (iii) Less than 25 percent of the votes cast if previously voted on three or more times").

the policy may apply even if a majority of the shares present at a company's annual meeting voted against the shareholder proposal.[24]

At the same time, it is unclear whether the proxy advisory firms are in a position, resource-wise and economically, to evaluate the specifics of each proposal at each company. For example, I have occasionally seen the advisory firms' reports merely repeat competing claims made by a shareholder proponent and a company, without seeking to determine which claim is accurate. And, of course, to state the obvious, the proxy advisory firms have no economic stake or interest in any shareholder proposal and do not have fiduciary duties to a company's shareholders.

The Volume and Evolution of Rule 14a-8 Proposals

In recent years, the number of shareholder proposals submitted to public companies have increased significantly. The 2024 proxy season was a high-water mark, with at least 976 shareholder proposals submitted to companies.[25] During the 2025 proxy season, at least 805 proposals were submitted, compared to 502 proposals during the 2011 proxy season, representing a 60% increase over 15 proxy seasons. Despite this significant increase, the number of governance- and executive compensation-related proposals submitted has declined slightly over the years. For example, an average of 267 governance proposals were submitted annually over the last 15 proxy seasons, while 233 governance proposals were submitted during the 2025 season. Likewise, an average of 67 executive compensation-related proposals were submitted over the past 15 proxy seasons, while only 56 were submitted during the 2025 season.

In contrast, the number of proposals addressing social and environmental topics has skyrocketed, with 324 social-oriented proposals and 194 environmental proposals submitted during the 2024 proxy season, respectively, representing increases of approximately 200% and 150% compared to the 2011 season.[26] Further, whereas governance-related proposals historically have represented the largest category of proposals, in the 2022 proxy season the number of social-oriented proposals submitted (286) for the first time surpassed the number of governance-related proposals (246). The number of social-oriented proposals has exceeded the number of governance-related proposals for each proxy season since 2022.

[24] ISS's policy is triggered only if a shareholder proposal receives a majority vote, while Glass Lewis expects to see board "responsiveness" to a shareholder proposal before the next annual meeting if at least 30% of the shares voted supported the shareholder proposal.

[25] Statistics on the number of proposals submitted each year invariably undercount the actual amounts, since some proponents do not publicize proposals that are submitted and then withdrawn as a result of engagement with a company. Unless otherwise noted, the statistical data on shareholder proposals (including proponent data) presented here generally is derived from Institutional Shareholder Services ("ISS") publications and the ISS shareholder proposals and voting analytics databases. Statistics for the 2025 proxy season include proposals for 2025 annual meetings of shareholders at Russell 3000 companies submitted on or before August 27, 2025.

[26] The total number of proposals submitted, as well as proposals related to social and environmental topics, decreased slightly in 2025, but still remain at historically high levels.

The volume of no-action requests made to the SEC has also risen—378 no-action requests were submitted in the 2025 proxy season, up 41% from 269 during the 2024 season and more than doubling the 176 no-action requests submitted during the 2023 season.[27]

For over a decade, shareholder proposal submissions have been dominated by a single individual named John Chevedden, together with a few other individuals with whom he coordinates. For example, during the 2025 proxy season, Mr. Chevedden submitted over 250 shareholder proposals, representing almost one-third of all of this season's shareholder proposals. Most of Mr. Chevedden's proposals relate to corporate governance or executive compensation matters, although he was also a leading submitter of proposals requesting enhanced disclosure of companies' lobbying activities, and he occasionally coordinates with social and environmental advocacy groups to submit shareholder proposals.

Shareholder proposals have also become a niche market for special interest groups and organizations. Many of these organizations are not actually shareholders but instead serve as "representatives" of shareholders, and in that role, take on all or most of the tasks of drafting shareholder proposals: submitting them to companies, defending the proposals from no-action exclusion requests, and advocating for the proposals once they appear in companies' proxy statements. When shareholder representatives are involved in the process, companies often have little or no contact with the actual beneficial owner whose shares serve as the basis for a proposal's submission, with the shareholder serving as no more than the nominal "ticket" to provide the representative access to companies' proxy statements.

As You Sow, a foundation focused on sustainability and environmental-related shareholder activism,[28] is one of the most active shareholder representatives. Its website states that it "represents investors across a broad range of ESG issue areas, empowering shareholders through the use of shareholder resolutions to drive companies toward a sustainable future."[29] As You Sow either submitted or served as the representative for shareholders that submitted 57 proposals so far in the 2025 proxy season and has served in that role for at least 738 shareholder proposals over the past 15 proxy seasons. Trillium Asset Management[30] and Green Century Capital Management,[31] other environmental-focused shareholder advocacy groups, have submitted or served as representatives for at least 353 and 215 proposals over the past 15 proxy seasons, respectively. Mercy Investment Services, a faith-based asset management program focused on social and civic engagement issues such as human rights and lobbying in addition to

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[27] *See* Gibson Dunn Client Alert, *Shareholder Proposal Developments During the 2025 Proxy Season* (August 8, 2025), https://www.gibsondunn.com/wp-content/uploads/2025/08/DC-Shareholder-Proposal-Developments-Proxy-Season-080625.pdf.

[28] *See About Us*, As You Sow, https://www.asyousow.org/about-us.

[29] *See Resolutions*, As You Sow, https://www.asyousow.org/resolutions-tracker.

[30] *See Our Investment Approach*, Trillium Asset Management, https://www.trilliuminvest.com/investment-approach/overview.

[31] *See About Green Century*, Green Century, https://www.greencentury.com/about-us/.

environmental causes,[32] has submitted or served as representative for at least 365 proposals over the past 15 proxy seasons. The National Center for Public Policy Research ("NCPPR"), a "non-partisan, free-market, independent conservative think tank," has submitted at least 284 proposals over the past 15 proxy seasons.

At the same time that the volume of proposals has increased, proposals have increasingly focused on narrow topics, have become increasingly prescriptive, and frequently appear designed to second-guess management decisions. As an example, in the 2006 proxy season, Wendy's received a proposal requesting that the board of directors "issue a sustainability report to shareholders."[33] During the same proxy season, Smithfield Foods received a slightly more company-specific, but still very broad informational request for a "sustainability report…examining the impacts of both company-owned and contract farms,"[34] and Intel likewise received a proposal in the 2009 proxy season requesting the board of directors create a "comprehensive policy articulating [the] [c]ompany's respect for and commitment to the Human Right to Water."[35]

In contrast, recent environmental-related proposals have been more prescriptive and focused on specific approaches to addressing an issue. In my view, all of these types of proposals go beyond seeking information on whether and how companies are addressing a particular issue – which information shareholders, in turn, could consider as part of their investment decisions – and instead seek to interfere with management's decisions on how best to run the business, and therefore should be excludable under the ordinary business prong of Rule 14a-8(i)(7). For instance, Caterpillar received a proposal for its 2023 annual meeting requesting that the company issue a report "describing if, and how, [the company's] lobbying and policy influence activities (both direct and indirect through trade associations, coalitions, alliances, and other organizations) align with the goal of the Paris Agreement to limit average global warming to well below 2°C above pre-industrial levels, and to pursue efforts to limit temperature increase to 1.5°C, and how [the company] plans to mitigate the risks presented by any misalignment."[36] During the most recent proxy season, Duke Energy (and other companies) received a request for the company's "net zero-related activities and progress, including: (1) memberships in organizations advocating net zero goals and policies; (2) activities and transactions involving net zero goals and policies; and/or (3) corporate commitments or agreements involving net zero goals and policies."[37]

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[32] *See* Mercy Investment Services, Inc., https://mercyinvestmentservices.org/.

[33] *See* Wendy's Int. Inc., Proxy Statement (Schedule 14A) (Mar. 13, 2006), https://www.sec.gov/Archives/edgar/data/105668/000119312506052305/ddef14a.htm.

[34] *See* Smithfield Foods, Inc., Proxy Statement (Schedule 14A) (July 31, 2006), https://www.sec.gov/Archives/edgar/data/91388/000119312506156775/ddef14a.htm.

[35] *See* Intel Corp., SEC No-Action Request (Mar. 13, 2009), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2009/northstarasset031309-14a8.pdf.

[36] *See* Caterpillar Inc., Proxy Statement (Schedule 14A) (May 1, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/18230/000130817923000830/lcat2023_def14a.htm.

[37] *See* Duke Energy Corp., Proxy Statement (Schedule 14A) (Mar. 14, 2025), https://www.sec.gov/ix?doc=/Archives/edgar/data/1326160/000110465925023754/tm2430172-3_def14a.htm.

Similarly, whereas financial institutions in the past received proposals requesting assessments of the greenhouse gas emissions resulting from their lending portfolios,[38] they more recently have received requests for "a policy for a time-bound phase-out of [] lending and underwriting to projects and companies engaging in new fossil fuel exploration and development,"[39] and requests for annual disclosure of "the proportion of sector emissions attributable to clients that are not aligned with a credible Net Zero pathway."[40]

Other examples of recent, prescriptive proposals abound, including proposals submitted over the past three proxy seasons to credit card companies requesting reports disclosing "management's decision-making regarding the potential use of a merchant category code ('MCC') for standalone gun and ammunition stores,"[41] and a proposal at Delta during the most recent proxy season requesting a report on the company's "efforts to address heat-related dangers to workers throughout its operations."[42]

While shareholder proposals have long been viewed as a bastion of liberal ideas, it was perhaps inevitable that shareholder proposals would come to represent the full spectrum of political ideas. As noted above, NCPPR was early to the game and has submitted numerous shareholder proposals advocating that companies pursue conservative policies, but the overall increase in such proposals, sometimes referred to as "anti-ESG" proposals, has been notable. For example, in each of the 2024 and 2025 proxy seasons, more than 102 anti-ESG proposals were submitted, representing approximately one out of every eight shareholder proposals. These proposals cover a full range of social and environmental topics, generally questioning or opposing companies' diversity, equity, and inclusion programs or greenhouse gas reduction efforts, or raising concerns over actions or operations that are perceived to be biased against conservative values.

As proposals have become more prescriptive, companies also increasingly receive proposals with competing requests. During the 2024 proxy season, JPMorgan Chase & Co. received a proposal requesting that the company annually disclose its "Clean Energy Supply Financing Ratio [], defined as its total financing through equity and debt underwriting, and project finance in low-carbon energy supply relative to that in fossil-fuel energy supply"[43] as well as a competing proposal advocating against the company's "climate transition policies" and for greater

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[38] *See, e.g.*, The PNC Financial Services Grp., Inc., Proxy Statement (Schedule 14A) (Mar. 14, 2013), https://www.sec.gov/Archives/edgar/data/713676/000130817913000071/lpnc_def14a.htm.

[39] *See, e.g.*, JPMorgan Chase & Co., Proxy Statement (Schedule 14A) (Apr. 4, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/0000019617/000001961723000281/jpm-20230403.htm.

[40] *See, e.g.*, JPMorgan Chase & Co., SEC No-Action Request (Mar. 29, 2024), https://www.sec.gov/files/corpfin/no-action/14a-8/karigerjpmorgan032924-14a8.pdf.

[41] *See, e.g.*, American Express Co., Proxy Statement (Schedule 14A) (Mar. 15, 2024), https://www.sec.gov/ix?doc=/Archives/edgar/data/0000004962/000119312524068837/d558747ddef14a.htm.

[42] *See* Delta Air Lines Inc., SEC No-Action Request (Mar. 3, 2025), https://www.sec.gov/files/corpfin/no-action/14a-8/nyrsdelta3325-14a8.pdf.

[43] *See* JPMorgan Chase & Co., SEC No-Action Request (Mar. 4, 2024), https://www.sec.gov/files/corpfin/no-action/14a-8/nyjpmorgan030424-14a8.pdf.

investment in non-renewable sources of power, such as fossil fuels and nuclear energy.[44] Likewise, in the 2023 proxy season, the Coca-Cola Company received a proposal requesting that the company conduct and publish a third party racial equity audit "to review its corporate policies, practices, products, and services, above and beyond legal and regulatory matters, and assess their impact on nonwhite stakeholders,"[45] and then in its 2024 proxy season received a proposal requesting the company publish a report regarding the risks associated with its "diversity, equity and inclusion (DEI) initiatives."[46] Notably, the 2024 proposal's supporting statement referenced that the requested assessment would "cost much less" than "racial equity audits."[47]

Tactics of Shareholder Proponents and Shareholder Representatives

Shareholder proponents and their representatives engage in a number of tactics that increase the burden and angst associated with the shareholder proposal process. One of the more common complaints is that shareholders and their representatives use the shareholder proposal process to pursue objectives that are different from the proposals they submit. For example, energy companies frequently receive shareholder proposals asking for reports about various climate change initiatives, but when the companies meet with the proponents' representatives, it becomes clear that the proponents' real goal is for the companies to exit fossil fuels. Companies that receive proposals asking for a report on their respect for freedom of association and collective bargaining have reported that the shareholder proponents' actual intention is for the companies to remain neutral in labor organizing campaigns. As noted above, these tactics may reflect the perception that proxy advisory firms are more likely to support proposals requesting a report than proposals requesting specific changes in a company's operations. However, sometimes it becomes clear that a proposal is simply being used to press entirely unrelated issues, or to provide the shareholder or its representative with an opportunity to speak at a company's annual meeting. For example, one organization has submitted numerous proposals asking companies to maintain an independent director as chair of the board, but that organization has instead focused on animal rights concerns when meeting with companies to which it has submitted its proposal. Other shareholder proponents and representatives have submitted independent chair proposals only to use time allotted for presenting their proposals at a company's annual meeting to complain about the company's involvement in a lawsuit or complain about perceived anti-conservative bias by company management. At one prominent company, a disgruntled former employee has submitted a proposal to his former employer every year since his employment

[44] *See* JPMorgan Chase & Co., Proxy Statement (Schedule 14A) (Apr. 8, 2024), https://www.sec.gov/ix?doc=/Archives/edgar/data/0000019617/000001961724000273/jpm-20240406.htm.

[45] *See* The Coca-Cola Co., Proxy Statement (Schedule 14A) (Mar. 10. 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/21344/000130817923000117/ko4104401-def14a.htm.

[46] *See* The Coca-Cola Co., Proxy Statement (Schedule 14A) (Mar. 18, 2024), https://www.sec.gov/ix?doc=/Archives/edgar/data/21344/000155837024003468/ko-20240501xdef14a.htm.

[47] Id.

terminated, using the annual meeting as a platform to air his personal grievance with the company.

Another tactic of shareholder proponents and representatives that raises questions as to their true intentions is the practice of submitting proposals to a company every year even after the company has taken action to implement the prior year's proposal. For example, a number of companies have issued reports on various topics as requested in shareholder proposals, only to receive another proposal from the same proponent or representative the following year requesting slightly different information on the same topic. Companies that receive a proposal from John Chevedden can be all but certain that, even if they implement that proposal as requested, they will receive another proposal from him raising a different issue the following year.

The Impact of Rule 14a-8

Rule 14a-8 is highly consequential, impacting many U.S. public companies with significant and long-term effects. In particular, some widely adopted corporate governance practices have come about as a result of Rule 14a-8 shareholder proposals. Among the most successful shareholder proposal campaigns over the past several decades were proposals asking companies to adopt a majority vote standard applicable to the election of directors when there is not a proxy contest (whereas previously a plurality vote standard applied assuring re-election in uncontested meetings), proposals requesting the elimination of outside director retirement plans (which were viewed as entrenching directors and undermining board succession and refreshment planning), and proposals requesting an advisory vote on executive compensation (which was thereafter mandated by Congress under the Dodd-Frank Wall Street Reform and Consumer Protection Act). In addition, while one can debate whether this is a favorable or adverse impact, hedge fund activism as it exists in our markets today has been greatly facilitated by Rule 14a-8. The elimination of staggered boards of directors, the elimination of poison pill rights plans, the adoption of proxy access bylaws, and the ability of shareholders to call special meetings of shareholders have come about largely through Rule 14a-8 shareholder proposals requesting that boards eliminate constructs viewed as entrenching and insulating board of directors from being accountable to shareholders.

It is difficult to identify positive impacts to companies and their shareholders, if any, from environmental and social shareholder proposals. In my experience, to the extent that these topics are relevant to a particular company, the company is already addressing the issue customer relations, employee recruitment and retention, regulatory, or other similar considerations. Public companies are very aware of the political, economic, social, and regulatory environments in which they operate, and they have many resources for assessing what is relevant to those audiences when determining how best to protect and enhance shareholder value.

Rule 14a-8 Should Be Revised to Minimize Vague and Shifting Interpretations That Arise under the Current Rule

In the absence of a clear Congressional mandate on Rule 14a-8, the Rule is subject to vague and shifting interpretations, making it difficult to rely on even well-established precedents. The often unpredictable outcome of the Rule 14a-8 no-action request process increases the cost and burden of the Rule 14a-8 process to both companies and shareholder proponents, and is one of the reasons that the Rule needs to be reformed.

The ordinary business exclusion under Rule 14a-8(i)(7) has been in flux for decades. In 1976, the SEC considered revisions to the "ordinary business" exclusion, hoping to fashion more workable language distinguishing between "mundane" business matters and "important" ones.[48] In lieu of amending the text of Rule 14a-8(i)(7)'s ordinary business exclusion, the SEC stated that going forward it would interpret the provision so as not to allow exclusion of proposals "which have significant policy, economic or other implications inherent in them."[49] In 1997, the SEC referred to this interpretation as precluding exclusion of proposals addressing "significant social policy" issues.[50] Over the years, the SEC and the SEC Staff would classify various topics as potentially implicating significant policy issues, such as issues arising from manufacturing tobacco related products,[51] plant closings,[52] transitioning to renewable energy,[53] operations involving manufacture of guns,[54] animal cruelty or testing,[55] net neutrality,[56] and health care reform.[57]

Over the past ten years, the frequency and degree of the SEC Staff's interpretive changes under Rule 14a-8 have increased dramatically. In 2015, in response to a letter from the Council of Institutional Investors criticizing the SEC Staff's concurrence that companies could exclude proxy access shareholder proposals under Rule 14a-8(i)(9) when companies were proposing for shareholder approval alternative terms for proxy access, SEC Chair Mary Jo White instructed the SEC Staff to review its interpretation of the Rule 14a-8(i)(9) "conflicting proposal" standard, and the SEC Staff refused to respond to 47 pending no-action requests on that ground. Then, in late

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[48] Release No. 34-39093 at 7 (Sept. 18, 1997).

[49] Release No. 34-12999 (Nov. 22, 1976) (stating, in part, "proposals of that nature [relating to the economic and safety considerations of a nuclear power plant], as well as others that have major implications, will in the future be considered beyond the realm of an issuer's ordinary business operations").

[50] Release Nos. 34-39093, at n.72 (Sept. 18, 1997).

[51] *See* Philip Morris Cos., SEC No-Action Request (2/22/1990).

[52] *See* Pacific Telesis Grp., SEC No-Action Request (2/2/1989).

[53] *See* Exxon Mobil Co., SEC No-Action Request (3/23/2000).

[54] *See* Sturm, Ruger & Co., Inc., SEC No-Action Request (3/05/2001).

[55] *See* DeVry Inc., SEC No-Action Request (9/25/2009), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2009/peta092509-14a8.pdf.

[56] *See* Sprint Nextel Co., SEC No-Action Request (2/10/2012), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/thenathancummings021012-14a8.pdf.

[57] *See* United Technologies Corp., SEC No-Action Request (1/31/2008), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/thenathancummings021012-14a8.pdf.

2015, the SEC Staff announced that it was reversing decades of precedents under Rule 14a-8(i)(9),[58] largely eliminating that provision as a basis for excluding shareholder proposals. Whereas in the 2014 proxy season approximately 11% of all no-action requests in which the SEC Staff concurred with exclusion of a proposal were based on Rule 14a-8(i)(9), in the 2016 proxy season there was only one successful no-action request based on that provision.

During the same period, the SEC Staff also largely abandoned the Rule 14a-8(i)(3) standard for excluding proposals containing materially false and misleading or vague and indefinite statements. In early 2015, the SEC Staff literally reversed course on how it interpreted this ground for exclusion. Specifically, in December 2014 the SEC Staff concurred that language in a proposal that included a proposed standard for qualifying as an independent director was vague and indefinite, and that the proposal therefore could be excluded under Rule 14a-8(i)(3). Nevertheless, approximately two months later, the SEC Staff declined to concur with exclusion of a proposal with identical language, stating, "[a]lthough the staff has previously agreed that there is some basis for your view, upon further reflection, we are unable to conclude that the proposal, taken as a whole, is so vague or indefinite that it is rendered materially misleading."[59] As a result, whereas Rule 14a-8(i)(3) arguments served as the basis for 18% of all successful no-action requests in the 2014 proxy season, in 2015 only three proposals were excluded on that ground (representing 2% of all successful no-action requests) and in 2016 only one proposal was excluded as being materially false and misleading or vague and indefinite (representing less than 1% of all successful no-action requests).

In 2017, the SEC Staff indicated that it would rely on a company's board of directors to determine whether a proposal failed to raise significant policy issues that would preclude exclusion under the relevance standard of Rule 14a-8(i)(5) or the ordinary business standard of Rule 14a-8(i)(7), although in practice few no-action requests satisfied the SEC Staff's standard for exclusion.[60]

In 2021, Staff Legal Bulletin 14L ("SLB 14L") rescinded three prior Staff Legal Bulletins and dramatically abandoned the SEC Staff's traditional approach to assessing significant policy

[58] The change was announced in Staff Legal Bulletin 14H (Oct. 22, 2015), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14h-cf.

[59] *See*, *e.g.*, Abbott Laboratories, SEC No-Action Request (Feb. 26, 2015), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kennethsteiner022615-14a8.pdf; The Boeing Co., SEC No-Action Request (Feb. 26, 2015, *recon. denied* Mar. 4, 2015), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/johncheveddenboeingrecon030415-14a8.pdf.

[60] During the 2018 proxy season, 29 no-action requests included a board analysis, but the SEC Staff only concurred with exclusion and referenced the board's analysis of the significance of the proposal to the company's business in one instance. *See* Gibson Dunn Client Alert, *Shareholder Proposal Developments During the 2018 Proxy Season*, (Jul. 12, 2018), https://www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf.

issues under Rule 14a-8(i)(7)'s ordinary business standard.[61] We summarized the impact of SLB 14L in our 2022 client alert on shareholder proposal developments, stating:

> The change of administration at the SEC and the issuance of SLB 14L appear to have served as an open season call for shareholder proponents: the number of proposals submitted surged, the percentage of proposals that shareholders were willing to withdraw as a result of negotiations dropped, and the number of proposals excluded through the no-action process plummeted. At the same time, recent amendments to Rule 14a-8 had only a very minor impact on shareholder submissions. As a result, shareholders were presented with more proposals on a wider range of topics with which they disagreed, with overall levels of voting support dropping notably.[62]

Specifically, in 2022 the number of proposals submitted to companies increased by 6% from 2021 to 888 – the highest number of shareholder proposal submissions to date, with the number of environmental proposals up 54% compared to 2021 and the number of proposals addressing social topics up 9%, constituting the largest category of proposals submitted in 2022. Notably, the overall success rate for excluding proposals through no-action requests plummeted to 38%, a drastic decline from success rates of 71% in 2021 and 70% in 2020.[63] The 38% success rate was significantly below even the previous lowest exclusion rate in recent times, which occurred in the 2012 proxy season when the success rate dipped to 66%.[64] Success rates in 2022 declined on every basis for exclusion, with the most drastic decline in success rates for procedural (56% in 2022, down from 84% in 2021), substantial implementation under Rule 14a-8(i)(10) (13% in 2022, compared with 55% in 2021), and ordinary business grounds under Rule 14a-8(i)(7) (24% in 2022, compared with 65% in 2021).[65]

Staff Legal Bulletin 14M, issued in February of this year, in turn rescinded SLB 14L and sought to re-establish the standards long ago announced by the SEC for applying the relevance standard of Rule 14a-8(i)(5) and the ordinary business standard of Rule 14a-8(i)(7). However, even the SEC Staff's interpretive position under those provisions during the 2025 proxy season denied exclusion of proposals that are prescriptive and seek to second-guess or interfere with management of companies' business to a degree that was unheard of one or two decades ago. Moreover, absent reform of Rule 14a-8, the Rule will continue to be subject to shifting interpretations that can negatively impact public companies and shareholder value.

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[61] Gibson Dunn Client Alert, *The Pendulum Swings (Far): SEC Staff Issues New Guidance on Shareholder Proposals* (Nov. 5, 2021), https://www.gibsondunn.com/the-pendulum-swings-far-sec-staff-issues-new-guidance-on-shareholder-proposals/.

[62] Gibson Dunn Client Alert, *Shareholder Proposal Developments During The 2022 Proxy Season* (Jul. 11, 2022), https://www.gibsondunn.com/wp-content/uploads/2022/07/shareholder-proposal-developments-during-the-2022-proxy-season.pdf.

[63] Id.

[64] Id.

[65] Id.

Rule 14a-8 Should Be Revised to Clarify Its Interaction with State Corporate Law

Any reform of Rule 14a-8 should clarify the extent to which the Rule is intended to supplement state corporate law and companies' charter documents, and to what extent (if any) it supplants state corporate law and company charter documents.

When the predecessor to Rule 14a-8 was first adopted, the Rule was designed to supplement shareholders' state corporate law rights by providing access to a company's proxy statement for a proposal that a shareholder otherwise would be entitled to introduce at a company's annual meeting under state law.[66] However, as noted above, the Rule soon took on a life of its own through the addition of eligibility and procedural requirements and the 13 substantive bases for exclusion of proposals. These provisions emerged in part due to the lack of clarity among states' corporate laws on what types of proposals are proper matters for shareholder action,[67] as well as to address abuse of the Rule.[68]

Now, it is clear that Rule 14a-8 to some extent supplants state corporate law, but the extent to which it does so is unclear. For example, under most state corporate laws and most companies' charter documents, only shareholders of record (those who appear as the registered owners of securities on the list of shareholders maintained by the company or by its transfer agent) are entitled to submit and present shareholder proposals; the beneficial owners of shares are required to work through the shareholder of record if they want to present a shareholder proposal. Rule 14a-8 varies from that and allows a beneficial owner to submit and present a shareholder proposal subject to substantiating its ownership through the bank, brokerage firm, or other intermediary that holds its shares. Conversely, most state corporate laws and company charter documents do not place ownership thresholds or holding period requirements on shareholders' ability to submit shareholder proposals,[69] and do not limit the number of proposals that a

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[66] *Hearings Before the Committee on Interstate and Foreign Commerce on H.R. 1493, H.R. 1821 and H.R. 2019*, 78th Cong. 172 (1943) (statement of Ganson Purcell, Chairman, Securities and Exchange Commission); *see also* 87 Fed. Reg. 45052, 45053 (July 27, 2022) ("The rule is intended to facilitate shareholders' right under state law to present their own proposals at a company's meeting of shareholders and the ability of all shareholders to consider and vote on such proposals.").

[67] As stated by the court in *Medical Committee for Human Rights. v. SEC*, "[T]he paucity of applicable state law giving content to the concept of 'proper subject' led the [SEC] to seek guidance from precedent existing in jurisdictions which had a highly developed commercial and corporate law and to develop its own 'common law' relating to proper subjects for shareholder action."), 432 F.2d 659, 677 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972).

[68] *See, for example,* Exchange Act Rel. No. 4185, *13 FR 6680* (Nov. 5, 1948), adopting a number of procedural requirements and substantive exclusions because "[t]he Commission has found that in a few cases security holders have abused this privilege by using the rule to achieve personal ends which are not necessarily in the common interest of the issuer's security holders generally. In order to prevent such abuse of the rule, but without unduly restricting the privilege which it grants to security holders, the amendment places reasonable limitations upon the submission of such proposals."

[69] *But see* Section 21.373 of the Texas Business Organizations Code, authorizing Texas corporations to impose ownership and procedural conditions on shareholders' ability to submit shareholder proposals, discussed in Gibson Dunn Client Alert, *The Comprehensive Reference Guide for Directors and Officers: 2025 Amendments to the Texas*

shareholder may present, whereas Rule 14a-8 does. While many well-informed observers strongly believe that Rule 14a-8's ownership and procedural requirements do not pre-empt state law, to my knowledge there is no definitive law on the point. In *SEC v. Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947), the court suggested otherwise, stating that a bylaw provision could not be used to circumvent the predecessor of Rule 14a-8. As well, the text of Rule 14a-8(i)(1) states only that a shareholder proposal must be "*a proper subject* for action by shareholders under the laws of the jurisdiction of the company's organization" (emphasis supplied), but the Rule does not address one way or the other eligibility and procedural requirements under state corporate law or company charter documents.

In fact, Rule 14a-8 and its predecessors have so dominated the landscape for shareholder proposals for so long, there is uncertainty as to what proposals are "proper" subjects for shareholder action under state corporate law, particularly in the context of non-binding "precatory" shareholder proposals.[70] Resolving whether Rule 14a-8 creates a federal law standard authorizing precatory proposals,[71] or defers to state corporate law is critical, since most shareholder proposals submitted under Rule 14a-8 are precatory proposals.

Reform, Not Repeal, of Rule 14a-8 May Be Best

Issuance of Staff Legal Bulletin 14M was an important step to rein in some of the shareholder proposals that have been submitted to companies in recent years, but in my opinion, it did not go far enough. In talking with public companies about how the shareholder proposal process could be improved, a surprising number have expressed a preference for reform, but not repeal, of Rule 14a-8. The concerns with repeal of Rule 14a-8 arise both from the possibility that it will not eliminate the uncertainty, complications, and variability of the shareholder proposal process and from acknowledgement that, when properly constrained, Rule 14a-8 can operate in the interests of investors by serving as an efficient means for raising significant corporate governance and corporate policy questions.

First, as discussed above, state corporate law on shareholder proposals is not well developed. Companies would be dependent on local courts exploring unfamiliar issues or on state legislation for guidance on whether particular shareholder proposals are "proper" under state law. As well, it is uncertain whether companies that wish to allow for some shareholder proposals through provisions in their charters and bylaws (commonly referred to as "private ordering") could replicate standards such as those that exist under Rule 14a-8. In particular, while it might generally be accepted that companies could adopt eligibility and procedural conditions on shareholders' ability to submit state law shareholder proposals, it is uncertain whether companies

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Corporate Statute (Jul. 7, 2025), https://www.gibsondunn.com/the-comprehensive-reference-guide-for-directors-and-officers-2025-amendments-to-the-texas-corporate-statute/.

[70] Kyle A. Pinder, *The Non-Binding Bind: Reframing Precatory Stockholder Proposals under Delaware Law*, *forthcoming in* 15 Mich. Business & Entrepreneurial L. Rev., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5418534

[71] For example, Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the so-called "Say on Pay" provision, mandates non-binding advisory votes on executive compensation.

could enforce substantive exclusions such as those that exist under the various prongs of Rule 14a-8(i).[72] Again, the issues would likely rely on courts or state legislation for resolution. Of course, Rule 14a-8 shareholder proposals currently may be addressed through litigation, but most companies and shareholders prefer to rely on no-action requests submitted to the SEC, which are less expensive and typically more quickly resolved than litigation. Also, under a state law- and company-specific shareholder proposal regime, shareholders would be faced with differing standards across companies.

Second, there are also practical concerns on how the proxy solicitation process would operate if a company were to receive non-Rule 14a-8 shareholder proposals from several different proponents. In this regard, it is important to note that an alternative to Rule 14a-8 already exists. Most public companies' bylaws provide a means for shareholders to submit proposals to be voted on at the company's annual meeting, provided that the proposal is a "proper" matter to be transacted at the meeting and the shareholder satisfies "advance notice" requirements set forth in the bylaws.[73] These proposals are commonly referred to as "floor proposals," to distinguish them from proposals submitted under Rule 14a-8.

Under current SEC rules, if a shareholder submits a floor proposal to a company and notifies the company that the shareholder intends to solicit proxy voting authority from shareholders owning sufficient shares to approve its proposal (generally, holders of 50% of the company's shares), the company may vote proxies it receives on the floor proposal only if the company includes the proposal as a separate voting item in its proxy statement and on its proxy card. Typically, this floor proposal process is utilized by hedge fund or other activist shareholders who are conducting a traditional proxy contest at a company. However, the floor proposal process was recently used by the AFL-CIO and United Mine Workers of America to present five precatory proposals at a company's annual meeting. Faced with the possibility of numerous floor proposals from a number of shareholder proponents, each filing and distributing their own proxy statements and proxy cards, the Rule 14a-8 shareholder proposal process, properly constrained, does not look so bad.

Observations on Ways to Reform Rule 14a-8 and Enhance Proxy Advisory Firm Transparency

Rule 14a-8 has been a useful means for shareholders to raise and share their views on corporate governance and significant business policy issues, but the Rule as currently administered is problematic in a number of ways: a single shareholder owning a relatively small amount of stock can initiate a costly and disruptive process; shareholders can be presented with proposals covering the same topic over multiple years; a single shareholder proponent can hound a company with a different proposal each year; existing interpretations of the substantive

[72] *See* Pinder, *supra* n. 107, at Part IV, discussing drawbacks of bylaw provisions attempting to establish substantive conditions for shareholder proposals.

[73] *See, e.g.*, Section 211(b) of the Delaware General Corporation Law ("DGCL"), stating that "[a]ny other proper business may be transacted at the annual meeting."

exclusions under Rule 14a-8 allow for proposals that are overly prescriptive or otherwise designed to second-guess management, instead of informing investors on how management is addressing important business issues; and the existing substantive exclusions use vague terms that are subject to differing interpretations.

To address these concerns, I support reform of Rule 14a-8 to:

- Significantly raise the ownership thresholds;
- Increase the resubmission thresholds for proposals covering similar topics, and consider applying similar thresholds for serial proponents;
- Eliminate the "significant policy" exception under Rule 14a-8(i)(7) and focus on significance to the company's business;
- Revive the former relevance standard to allow for exclusion of any proposal that primarily advances a general economic, political, environmental, social, or similar interest; and
- Confirm that Rule 14a-8 supplements, but does not supplant, state corporate law.

As well, proxy advisory firms can serve a supportive role in helping investors analyze an overwhelming number of shareholder proposals. But the firms face conflicts of interest since an increase in shareholder proposals means more business for them, and it is not clear that they evaluate the company-specific economic relevance of proposals or evaluate in practical terms the costs and benefits of issuing a report or taking other actions requested in a proposal. Since proxy advisory firms clearly and directly impact investors' proxy voting decisions and the voting outcomes on shareholder proposals at U.S. public companies, Congress and the SEC should adopt and implement common-sense regulation of proxy advisory firms to protect the integrity of the U.S. proxy system and capital markets.

On a closing note, I'd like to take the opportunity to commend the SEC Staff on its administration of Rule 14a-8. The SEC Staff currently devotes significant resources every year to the Rule 14a-8 shareholder proposal process. In some respects, their task does not differ significantly from other SEC Staff review processes that assess whether companies and market participants are complying with the SEC's rules. Reform of Rule 14a-8 could significantly lighten the administrative burden of the shareholder proposal process on the SEC Staff, freeing them to pursue equally important regulatory responsibilities.

Although I believe that more proposals should be excludable from companies' proxy statements than has been the case in recent years, I do not view that as being the fault of the SEC's Staff, but instead attribute it to the lack of clarity around the policy objectives of Rule 14a-8. That lack of clarity is something that Congress can, and I hope soon does, rectify. Doing so will serve the interests of all shareholders, as opposed to those of special interest groups, and will help to maintain the business focus and promote the success of U.S. public companies.

Thank you again for inviting me to testify, and I look forward to answering your questions.