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CORPORATE GOVERNANCE, SHAREHOLDER PROPOSALS, AND ENGAGEMENT BETWEEN MANAGERS AND OWNERS

J. ROBERT BROWN, JR.[1]

I. OVERVIEW

In the corporate governance area, few regulations have greater importance than Rule 14a-8.[2] Put in place in 1942,[3] the provision requires companies to include in their proxy statements proposals properly submitted by shareholders.[4] Phrased in precatory language,[5] proposals typically advise rather than command.[6] Rule 14a-8, therefore, provides a cost effective mechanism for obtaining the collective views of shareholders on designated matters.[7]

The rule did not always play such a central role in the governance process. For the first four decades following adoption, proposals failed to receive significant support.[8] Through 1981, only two were approved

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1. Lawrence W. Treece Professor of Corporate Governance, Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law; Member, Standing Advisory Group, PCAOB.

2. *See* 17 C.F.R. 240.14a-8 (2016).

3. *See* Exchange Act Release No. 3347 (Dec. 18, 1942).

4. The Rule limits shareholders to a single proposal per company. Rule 14a-8(c), 17 C.F.R. 240.14a-8(c); *see also* Renee Himes, *Limiting the Limited Number of Shareholder Proposals Under Rule 14a-8*, 94 DENV L. REV. ONLINE 360 (2017).

5. See Division of Corporation Finance, *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors*, n.20 (2003), https://www.sec.gov/news/studies/proxyrpt.htm ("[M]ost proposals are precatory in nature."). *See also* Letter to The Honorable Gary D. Cohn Director, National Economic Council The White House 1600 Pennsylvania Ave. Washington DC 20500 from
The Council of Institutional Investors, The Interfaith Center on Corporate Responsibility, The Investor Network on Climate Risk, US SIF: The Forum for Sustainable and Responsible Investment, The Principles for Responsible Investment, March 15, 2017, http://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_15_17%20-%20Letter%20to%20Gary%20Cohn%20-%2014a-8%20Shareholder%20Proposal%20Process.pdf ("And it is important to understand that virtually all resolutions are advisory (not requiring mandatory company action).") [hereinafter *Shareholder Letter*].

6. Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L. J. 262, 273 (2016) ("Importantly, most shareholder proposals--and virtually all social and environmental proposals--are precatory, which means that they are recommendations and are not bindingon management.").

7. Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 708 (2016) ("From the proponent's prospective, the chief advantage of the Shareholder Proposal Rule is that it is inexpensive. The proponent need not pay any of the printing and mailing costs (all of which must be paid by the corporation) or otherwise comply with the expensive panoply of regulatory requirements.").

8. Campaign GM represented perhaps the earliest and most protracted effort by shareholders to use the shareholder proposal rule to influence the social policies of a public company. *See* Donald

by a majority of the votes cast.[9] Unsurprisingly, therefore, management often viewed the provision as a soapbox used by "special interest" investors to air issues of little importance to most shareholders.[10]

As institutional investors became more active and various regulatory restrictions were lifted, however, Rule 14a-8 assumed a more central role in the governance debate. By the 1990s, governance proposals began to receive substantial support, with some obtaining a majority of the votes cast.[11] Initiatives seeking rescission of poison pills or elimination of staggered boards proved popular.[12]

E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Project GM*, 69 MICH. L. REV. 419 (1971). On proposal called for the formation of a shareholder committee to make recommendations on the "role in modern society and its prospects for and possible means of achieving a proper balance between the interests of shareholders, employees, consumers, and the general public." *Id*. at 424. Despite the efforts of the proposing shareholders, the proposals received less than 3% of the total vote. *See Id*. at 430 ("The proposal for the shareholder committee received 6,361,299 votes, representing 2.73 per cent of the votes cast . . . The proposal to amend the bylaws was supported by 5,691,130 shares, or 2.44 per cent of the votes cast"). This was consistent with percentages obtained on social responsibility proposals during this period. *See* Securities Act Release No. 5627 (Oct. 14, 1975) ("we note that certain social shareholder proposals that appear to have social implications have received an average of from 2 to 3% of the vote in recent years and that corporations have apparently not received a significant number of social inquiries from their shareholders.").

9. Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA L. REV. 425, 426 (1984) ("According to the SEC staff, in the entire history of the rule only two proposals which were not supported by management have ever been approved by shareholders.").

10. *See* Marilyn B. Cane, *The Revised SEC Shareholder Proxy Proposal System: Attitudes, Results and Perspectives*, 11 J. CORP. L. 57, 70 (1985) ("Several respondents [to a questionnaire sent to Fortune 500 companies] wrote that they felt that the process was 'abused' as a soapbox for political or social issues.").

11. For purposes of this article, the term "majority" refers to the majority of the votes cast on the proposal, excluding abstentions and broker-non votes. Under the laws of some states, a matter constitutes an "act of stockholders" only where receiving a majority of the shares "entitled to vote". *See* DGCL §216(2) ("In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders."). Delaware has interpreted the language to include abstentions, effectively transforming them into a "no" vote. *See Licht, PE v. Storage Tech. Corp*., No. Civ.A. 524-N, 2005 WL 1252355 (Del Ch. May 13, 2005) ("If a shareholder is at a shareholders' meeting and abstains, the shares owned by that shareholder are fairly characterized as both present and entitled to vote. That the shareholder may voluntarily decide not to vote those shares either affirmatively or negatively, i.e., to abstain, does not alter the fact that the shares are present at the meeting and are entitled to vote, thereby constituting "voting power present."). The counting technique is, however, a default rule that can be changed. Moreover, other states require a majority of the "votes cast." In those instance, an abstention is not included in the numerator or the denominator. *See Bank of N.Y. Co. v. Irving Bank Corp*., 531 N.Y.S.2d 730 (N.Y. Sup. Ct. 1988). In general, the percentages do not take broker non-votes into account. *See Berlin v. Emerald Partners*, 552 A.2d 482 (Del. 1988). *See also* Proxy Statement, Exxon-Mobil, April 13, 2017, at 3, https://www.sec.gov/Archives/edgar/data/34088/000119312517122538/d182248ddef14a.htm ("Abstentions count for quorum purposes, but not for voting."). In applying the appropriate standard to shareholder proposals, the precatory nature matters. As requests or recommendations, they are not "acts" of shareholders but are instead a mechanism for providing their collective views. In those circumstances, "votes cast" rather than an "act of stockholders" represents a more appropriate standard. The use of "majority" in this article will, therefore, exclude abstentions, permitting a consistent standard throughout. The position aligns with the approach taken by the Commission with respect to the calculation of percentages for purposes of the resubmission of a proposal. *See* Exchange Act Release No. 39093 (Sept. 18, 1997) ("Finally paragraph (c)(12) prescribes a 'votes cast' standard for determining whether a proposal received sufficient voting support in previous years to bar its omission in the current year. Under this standard, which has been characterized as the 'most favorable to

Support also grew for proposals addressing topics of social responsibility. For the first sixty years of the rule's history, none obtained a majority of the votes cast, although some did receive significant support.[13] That changed in 2002 when a proposal at Cracker Barrel received the requisite majority.[14] Thereafter, the percentages for these initiatives increased, with nine receiving a majority of the votes cast in 2016.[15]

The rule, therefore, has emerged as an important component of the engagement process between owners and managers. Proposals provide companies with unique insight into the collective views of shareholders. Moreover, with repeat submissions, support for proposals can be assessed over time, allowing managers to better understand the evolution in shareholder attitudes.[16] Proposals also result in increased communications between long-term shareholders and directors, an important development in an era of activist investors.[17]

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shareholder proponents,' abstentions and broker non-votes are excluded from the denominator comprised of the total number of votes cast 'For' and 'Against'" a given proposal."). Of course, given the signaling role of shareholder proposals, the convention hardly matters. Boards will presumably make their own determination as to the degree and importance of support for a proposal irrespective of the counting conventions.

12. *See* discussion in *infra* Section III.

13. A proposal on board diversity in 1998 received more than 35% of the votes cast. *See* Quarterly Report on Form 10-Q, Cypress Semiconductor, August 13, 1998, at 20, https://www.sec.gov/Archives/edgar/data/791915/0000791915-98-000019.txt (proposal to "approve the shareholder's proposal regarding composition of the Board of Directors" (For: 14,035,150; Against: 25,295,711; Abstain: 3,970,144)).

14. See Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing In Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1258, 1341 (2004) ("In an historic first, a social issue opposed by management won a proxy contest (that is, majority shareholder approval) in November 2002."). *See also* Quarterly Report on Form 10-Q, Cracker Barrel, Dec. 6, 2002 (For: 18,220,892; Against: 13,124,683; Abstain: 1,131,460).

15. *See infra* notes 90-99. Majority in this context excludes abstentions and broker non-votes. *See supra* note 10.

16. A proposal submitted at one public company calling for a sustainability report received 33.1% of the votes cast in in 2014 and 39.2% in 2015. Current Report on Form 8-K, Emerson Electric, Inc., Feb. 3, 2015, https://www.sec.gov/Archives/edgar/data/32604/000003260415000013/votingresultsandpurviscomp.htm (For:158,110,178; Against:257,174,579; Abstain:88,360,272); Current Report on Form 8-K, Emerson Electric, Inc., Feb. 4, 2014 https://www.sec.gov/Archives/edgar/data/32604/000003260414000012/kendleelection2014annualme.htm (For: 158,979,432; Against: 245,711,927; Abstain: 82,193,002). The following year, a proposal requesting that the company "issue a report describing [its] present policies, performance and improvement targets related to key environmental, social and governance (ESG) risks and opportunities, including greenhouse gas (GHG) emissions reduction goals" obtained 47% of the votes cast. *See* Current Report on Form 8-K, Emerson Electric, Inc., Feb. 2, 2016, https://www.sec.gov/Archives/edgar/data/32604/000003260416000064/a2016votingresults8-kbody.htm (For: 202,680,968; Against: 225,877,120; Abstain: 33,668,953). In 2015, the Company "published a corporate sustainability report, providing investors with insight into the company's approach to the environment, corporate governance, supply chain management and other sustainability issues." *See Update: Emerson Electric Issues Sustainability Report*, Wespath Investment Management, Dec. 15, 2016, http://www.wespath.com/update-emerson-electric-issues-sustainability-report/.

17. *See infra* note 114-117.

Despite the role of the rule in the engagement process, calls have arisen for additional restrictions that would effectively eliminate use for most shareholders.[18] Characterizing the provision as "dominated by a limited number of individuals" who have pursued "special interests" that "have no rational relationship to the creation of shareholder value,"[19] critics have argued for, among other things, a dramatic increase in the ownership thresholds and in the applicable holding period.[20] Similarly, asserting that proposals contain "general social issues" that "rarely garner meaningful shareholder support,"[21] they have sought changes designed to limit these types of submissions.[22]

These descriptions do not accurately characterize the state of the shareholder proposal process. Moreover, the calls for additional restrictions cannot be explained as a consequence of an increase in the use of the rule. The number of proposals submitted in recent years is commensurate with earlier periods.[23] Nor is the opposition explainable by the

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18. *See* Adam Kanzer**,** Managing Director at Domini Impact Investments LLC**,** *The Business Roundtable's Unreasonable Proposal*, Responsible Investor.com, April 13, 2017, https://www.responsible-investor.com/home/article/adam_kanzer_an_unreasonable_proposal/ (noting that Business Roundtable proposal "[i]f fully implemented, it would eliminate virtually all proposals.").

19. *Modernizing the Shareholder Proposal Process*, Business Roundtable, Oct. 31, 2016, http://businessroundtable.org/resources/responsible-shareholder-engagement-long-term-value-creation ("Only three shareholders and their families were responsible for nearly 22 percent of all nonmanagement shareholder proposals submitted to Fortune 250 companies in 2016.") [hereinafter *Business Roundtable Proposal*].

20. For example, legislation has called for an increase in the ownership threshold necessary to use the rule to 1% of the outstanding voting shares. *See* Section 844(b)(2), Shareholder Proposals, The Financial CHOICE Act of 2017, HR 10, 115th Cong., 1st Sess. (2017), https://www.congress.gov/115/bills/hr10/BILLS-115hr10ih.pdf ("require the shareholder to hold 1 percent of the issuer's securities entitled to be voted on the proposal, or such greater percentage as determined by the Commission"). The shares must be held for at least three years. Id. Submission of a proposal would therefore require ownership at levels prohibitive for most investors. *See* Kanzer, *supra* note 17 (noting that had a similar proposal by the Business Roundtable been in place, investors would have needed to have an investment of $455 million). *See also* Benjamin Hulac, *Financial regulation bill could end most climate resolutions*, EYE NEWS REPORTER, April 19, 2017, https://www.eenews.net/climatewire/2017/04/19/stories/1060053261("Stockholders would need more than $7 billion worth of shares to submit a proposal to Apple").

21. *Business Roundtable Proposal*, *supra* note 18 ("In addition, these proposals rarely garner meaningful shareholder support, with support for such proposals hovering around 20 percent of shares cast in both 2015 and 2016.").

22. *Business Roundtable Proposal*, *supra* note 18 ("No clear definition of 'ordinary business' exists when a company *see*ks no-action relief under the 'ordinary business' exclusion. . . . Absent a clear definition and in light of shifting approaches to the exclusion, the SEC staff is granted wide discretion in determining whether to issue no-action relief. As a result, a number of dubious proposals are allowed each year. Again, expanded review and oversight procedures, developed with input from issuers and investors, should be implemented to prevent whimsical changes in direction.").

23. Shareholders submitted 916 proposals in 2016 (defined as from Oct. 1, 2015 through June 1, 2016), down from 943 the year before. Elizabeth Ising, Ronald O. Mueller, & Lori Zyskowski, *Shareholder Proposal Developments During the 2016 Proxy Season*, GIBSON DUNN, June 28, 2016, at 12 http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf [hereinafter *Gibson Dunn 2016 Update*]. This is similar to the number submitted in earlier periods. *See* Exchange Act Release No. 39093 (Sept. 18, 1997) ("Between 300 and 400 companies typically receive a total of about 900 shareholder proposals each year."). In 1982, shareholders submitted 972 proposals. *See* Commissioner James C. Treadway, Jr., *Sharehold-*

costs associated with proposals. The actual cost of distribution has, in an era of electronic distribution of proxy statements and other technology enabled changes, likely gone down.[24] The expenses associated with the no-action process are readily controllable and, in any event, the number of requests has declined from earlier periods.[25]

What has changed, however, has been an increase in shareholder support for proposals.[26] While proposals are advisory, they can and do affect the decision making process inside the boardroom.[27] Some favoring significant restrictions on the use of the rule would, presumably, prefer to avoid this type of influence by limiting the right of shareholders to collectively speak on relevant issues.

In addition to conflicting with a board's fiduciary responsibilities,[28] the approach presents the risk of unintended consequences.[29] Denying access to Rule 14a-8 will not lessen interest in the relevant issues but will interfere with the engagement process between owners and managers and force shareholders to pursue other avenues of influence, whether litigation, public campaigns, or broad based regulatory reform.[30]

Rule 14a-8 could use some updating, as the student articles published in this edition of the law review forcefully demonstrate.[31] Most of

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er Proposal Rule, Remarks to Edison Electric Institute Seminar on Current SEC Developments, Washington, D.C., June 23, 1983, at 1, https://www.sec.gov/news/speech/1983/062383treadway.pdf.

24. *See* discussion at *infra* notes 126-127.

25. In 2016, companies submitted 245 no-action requests (down from 315 in 2015). *Gibson Dunn 2016 Update*, *supra* note 22. In 1983, companies filed 495 requests. *See* Memorandum to John Huber and Linda Quinn from Bill Morley, Re: Shareholder Proposals, Nov. 16, 1983, at 2, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_1116_StatisticalShareholder.pdf ("noting 414 contested proposals in 1983, with 328 letters issued by the Division and 495 contested proposals in 1982, with 315 letters issued by the Division).

26. *See* discussion at *infra* Section III.

27. Haan, *supra* note 5, at 273 (noting that "there is significant pressure on management to implement winning proposals.").

28. Remaining unaware of important information has been viewed as "ostrich" like behavior that can be inconsistent with a board's fiduciary responsibilities. *See Pfeiffer v. Toll*, 989 A.2d 683, 693 (Del. Ch.2010) (given the board's obligation to "direct and oversee the business and affairs of the corporation", court declined to provide directors with "an ostrich-like immunity" with respect to knowledge of "core information.").

29. *See* discussion at *infra* Section IVB.

30. *See infra* note 152-154.

31. The students at the University of Denver Sturm College of Rule have undertaken an ambitious project of writing thorough and short articles on all important aspects of Rule 14a-8. This issue is the second of three and includes seven student articles. The articles in this issue address the exclusions for personal grievances (Rule 14a-8(i)(4)) and for the absence of power/authority (Rule 14a-8(i)(6)). In addition, the issue includes articles on the evidence needed to establish shareholder eligibility (Rule 14a-8(b)), the number of proposals that can be submitted to a single company (Rule 14a-8(c)), the time period for submitting proposals to the company (Rule 14a-8(e), and disclosure of the identity of the proponent (Rule 14a-8(l)). For the first issue, *see The Shareholder Proposals Rule and the SEC*, http://www.denverlawreview.org/the-shareholder-proposal-rule/. In that issue, the articles addressed the exclusions for violations of the law (Rule 14a-8(i)(2)), relevance (Rule 14a-8(i)(5)), ordinary business (Rule 14a-8(i)(7)), director elections (Rule 14a-8(i)(8)), conflicting proposals (Rule 14a-8(i)(9)), substantially implemented (Rule 14a-8(i)(10)), and duplicative proposals (Rule 14a-8(i)(11)). Other articles address statements of opposition (Rule 14a-8(m)), "good cause"

the needed revisions can be implemented through interpretive changes issued by the staff of the Division of Corporation Finance at the Securities and Exchange Commission (staff) and do not require amendments to the rule. The interpretations would allow the rule to function more effectively and better reflect the role of shareholder proposals in the corporate governance debate. Efforts to significantly reduce the number of proposals would have the opposite effect.

II. AN EVOLUTIONARY TALE

The Commission adopted the initial version of Rule 14a-8 in 1942.[32] The agency did so in a period when shareholders were less organized and more likely to object to corporate practices through the exercise of the "Wall Street Rule."[33] Proposals during this period almost never received significant support. Through the end of 1981, only two obtained majority approval,[34] one accidentally.[35]

During these early periods, criticisms of the rule frequently surfaced. Some focused on "abuse" of the provision by shareholders.[36] Others characterized the rule as a "soapbox" that facilitated the airing of issues or grievances by "special interest" shareholders.[37] Objections also arose from the more generalized concern about the role of shareholders

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for missing a deadline (Rule 14a-8(j)), and the appeal process following the issuance of a no-action letter. A third issue is anticipated in 2018.

32. *See* Exchange Act Release No. 3347 (Dec. 18, 1942) (originally designated as X-14a-7).

33. *See* Gregory R. Andre, *Tender Offers for Corporate Control: A Critical Analysis and Proposals for Reform*, 12 DEL. J. CORP. L. 865, 867 (1987) ("The ultimate destiny of today's publicly held corporation is substantially controlled by management rather than by shareholders. Shareholders of such corporations are largely passive investors who follow the 'Wall Street Rule' whereby they either support incumbent management or sell their stock if dissatisfied.").

34. *See supra* note 8.

35. See Bevis Longstreth, Commissioner, U.S. Sec. & Exch. Commission, *The SEC and Shareholder Proposals: Simplification in Regulation*, Address Before the National Association of Manufacturers (Dec. 11, 1981), https://www.sec.gov/news/speech/1981/121181longstreth.pdf ("Indeed, the Commission's staff can remember only two instances where proposals received a majority vote without management's endorsement: one, an effort to open end a closed end fund, and the other, a case in which management failed to obtain discretionary authority on its proxies and thus could not vote in opposition. The latter result was overwhelmingly reversed the next year.").

36. *See* Exchange Act Release No. 4185 (Nov. 5, 1948) ("The 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."). *See also* Remarks of Barbara S. Thomas, Commissioner, Sec. & Exch. Commission, *Amending the Shareholder Proposal Rule: A New Approach*, Conference of the Corporate Transfer Agents Association NewYork, New York, April 6, 1983, https://www.sec.gov/news/speech/1983/040683thomas.pdf ("The shareholder resolutions submitted for inclusion in proxy materials all too often may represent self-indulgent attempts to highlight issues of individual significance with little or no real connection to the business of the corporation.").

37. Exchange Act Release No. 39093 (Sept. 18, 1997) (one purpose of the rule to streamline administration "whereby companies are permitted to exclude proposals furthering . . . special interests.").

in the governance process and their "active use" of the proxy machinery.[38]

Although some sought repeal of the rule,[39] the Commission mostly accommodated these criticisms through the imposition of significant additional limitations and restrictions, transforming a lithe provision of 215 words into a behemoth more than ten times as long.[40] Significant restrictions were added in 1948,[41] 1954,[42] and 1983,[43] and often coincided with spikes in the use of the rule.[44] The restrictions at least sometimes resulted in a short term, albeit temporary, reduction in the number of proposals.[45]

By the 1980s, however, the relationship between shareholders and directors had evolved. With ownership in the market dominated by institutional investors, the Wall Street Rule often proved an inadequate mechanism for expressing shareholder dissatisfaction. Whether index

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38. Exchange Act Release No. 20091 (Aug. 16, 1983) **(**Dissent by Commissioner Longstreth) **("**My dissent from adoption of the proposed amendments rests upon a belief that these amendments, in the aggregate, tilt significantly and unnecessarily against shareholders seeking access to the proxy machinery. The tilt, in my opinion, goes well beyond that which is necessary to deal with recognized abuses. I do not believe the active use of the proxy machinery by shareholders is, of itself, an abuse; therefore, I do not favor changes the effect of which will be to reduce that usage by responsible shareholders.").

39. *See* Lewis D. Gilbert, *The Proxy Proposal Rule of the Securities and Exchange Commission*, 33 U. DET. L.J. 191, 193 (1955-1956) ("The report [by a committee of the American Society of Corporate Secretaries] concluded by demanding that Rule X-14A-8, the shareholders' Bill of Rights, be completely abolished."). Academics also called for abolition, viewing the costs as outweighing the benefits. *See* Liebeler, *supra* note 8, at 426 ("propositions advanced under the proposal mechanism appear to be of little relevance or interest to other stockholders who must bear the costs. Since the shareholder proposal rule appears to create a new free-rider problem rather than reduce an existing one, it is hard to see how the rule's benefits could outweigh its costs.").

40. J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. L. REV. ONLINE 151, 151-52 (2016).

41. Exchange Act Release No. 4185 (Nov. 5, 1948).

42. Exchange Act Release No. 4979 (Jan. 6, 1954). For a discussion of the proposals, see David C. Bayne, et al, *Proxy Regulation and the Rule-Making Process: The 1954 Amendments*, 40 VA. L. REV. 387 (1954).

43. Exchange Act Release No. 20091 (Aug. 16, 1983). *See also* Leila N. Sadat-Keeling, Comment, *The 1983 Amendments to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy*, 59 TUL. L. REV. 161, 196 (1984) ("the amendments represent a serious restriction on shareholder participation in corporate governance and a retreat from the goal of management accountability.").

44. Brown, *supra* note 39, at 154, 157, 160. *See also* Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 42 (1997) (characterizing amendments through the 1980s as primarily designed "to narrow the scope of eligible shareholder proposals.").

45. Virginia J. Harnisch, *Rule 14a-8 After Reagan: Does It Protect Social Responsibility Shareholder Proposals?*, 6 J.L. & POL. 415, 438 (1990)("Forty-two percent fewer proposals were recorded in 1983-84 than in 1982-83."); *see also* Frank D. Emerson, *Congressional Investigation of Proxy Regulation: A Case Study of Committee Exploratory Methods and Techniques*, 2 VILL. L. REV. 1 (1956) ("Concerning shareholder proposals, the SEC's schedules show that the number of shareholders whose proposals were carried in management proxies statements in both 1954 and 1955, thirty-one and thirty six, respectively, in absolute terms was lower than the thirty-nine for 1953, the last year before the 1954 amendments to the shareholder proposal rule became effective.").

funds or institutions committed to a specified cross section of the market, simply selling shares of large public companies was no longer realistic.[46]

Those concerned with corporate practices increasingly sought direct engagement with management.[47] Regulatory changes facilitated this approach. The Commission, over the objections of "[c]orporate commenters,"[48] removed unnecessary restrictions on the ability of shareholders to communicate over proxy matters.[49] A number of subject matter restrictions imposed under Rule 14a-8 were also lifted, facilitating a broader class of proposals.[50]

Some reforms sought to encourage institutional involvement in the proxy process. Emphasizing that investment advisers had a fiduciary obligation to vote portfolio shares,[51] the Commission in 2003 adopted rules governing the disclosure of voting policies and voting results by

46. Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269, 282 n. 43 (2003) ("Despite the possibility of exit, institutions may choose not to exit for at least two reasons. First, because of the size of their holdings, some institutional investors cannot exist without substantial cost. . . . Second, some institutions structure their holdings so as to maintain a broad-based portfolio (such as an index fund) and therefore lack the ability to exit. . .").

47. *See* Choi & Fisch, *supra* note 45, at 282 n. 43 ("for these institutions, improving present investments through shareholder activism provides the most cost-effective way to increase their return.").

48. *See* Exchange Act Release No. 31326 (1992) ("Corporate commenters also argued that disclosure of communications among shareholders is necessary to allow management 'a role to play' in rebutting any misstatements or mischaracterizations, to the benefit of shareholders as a whole in ensuring that proxies are executed on the basis of 'correct' information.").

49. *See* Rule 14a-2(b)(1), 17 C.F.R. 240.14a-2(b)(1).

50. This was true, for example, with respect to executive compensation proposals. *See Compare Transamerica Corporation*, 1990 WL 285806 (Jan. 10, 1990) ("The Division's existing position regarding proposals dealing with compensation arrangements is that such matters relate to the conduct of a registrant's ordinary business operations and may be excluded pursuant to rule 14a-8(c)(7)"). *See also Int'l Bus. Mach. Corp*., 1992 WL 29999 (Feb. 13, 1992) ("in view of the widespread public debate concerning executive . . . compensation policies and practices, and the increasing recognition that these issues raise significant policy issues, it is the Division [of Corporate Finance's] view that proposals relating to senior executive compensation no longer can be considered matters relating to a registrant's ordinary business.").

51. Exchange Act Release No. 47304 (Jan. 31, 2003) ("The investment adviser to a mutual fund is a fiduciary that owes the fund a duty of 'utmost good faith, and full and fair disclosure.' This fiduciary duty extends to all functions undertaken on the fund's behalf, including the voting of proxies relating to the fund's portfolio securities. An investment adviser voting proxies on behalf of a fund, therefore, must do so in a manner consistent with the best interests of the fund and its shareholders.").

mutual funds.[52] Described as a "fundamental right,"[53] voting results were required to be disclosed on an annual basis.[54]

Other developments facilitated organization. The advent of electronic communication reduced costs[55] and promoted interaction among owners and managers.[56] A class of intermediaries also arose with the capacity to provide sophisticated advisory services on voting decisions.[57] The existence of the advice allowed institutional investors to reduce the time spent on routine matters and focus instead on the unusual or controversial.[58]

Finally, the advent of "just say no"[59] and "say on pay"[60] proposals influenced engagement between owners and managers. While mostly

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52. *See* Exchange Act Release No. 47304 (Jan. 31, 2003) (adopting final rules requiring to disclose the policies and procedures used "to determine how to vote proxies relating to portfolio securities" and "its record of how it voted proxies relating to portfolio securities"). Voting records must be filed annually on a Form N-PX. *See* Rule 30b1-4, 17 C.F.R. 270.30b1-4.

53. Exchange Act Release No. 47304 (Jan. 31, 2003) ("We believe, however, that the time has now arrived for the Commission to require mutual funds to disclose their proxy voting policies and procedures, and their actual voting records. Investors in mutual funds have a fundamental right to know how the fund casts proxy votes on shareholders' behalf.").

54. Using the data in a Form N-PX to ascertain voting decisions is cumbersome and difficult. The SEC's Investor Advisory Committee has recommended that the agency address some of these concerns by requiring the filing of the Form using a structured data format. *See* Recommendation 3, Data Tagging, IAC Recommendation, July 23, 2003, https://www.sec.gov/spotlight/investor-advisory-committee-2012/data-tagging-resolution-72513.pdf. The change would not be difficult to implement. *See* Jeremy Liles, *Enhancing SEC Disclosure with Interactive Data*, 91 DENV. U. L. REV. Online 121, 147 (2015) ("Because of its simple structure and low filer impact, Form N-PX is highly amenable to a simple conversion to straight XML, with or without a fill-in form.").

55. *Corporate Director's Guidebook – 6th Edition*, 66 BUS. LAW. 975, 1040 (2011) ("The removal of regulatory barriers to communication and coordination among shareholders and the ease of communication in the internet age have aided shareholders who seek to engage in advocacy, persuasion, and other forms of activism.").

56. Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 846 ("Outside of the annual meeting and disclosure documents, technology has greatly enhanced a corporation's ability to communicate with shareholders.").

57. For discussions of these firms and their potential influence, *see* James Cotter, Alan Palmiter, Randall Thomas, *ISS Recommendations and Mutual Fund Voting on Proxy Proposals*, 55 VILL. L. REV. 1 (2010).

58. For a discussion of how this works in practice, along with the complexities of reliance on these firms for execution of voting decisions, *see In re Appraisal of Dell Inc.*, 143 A.3d 20 (Del. Ch. 2016).

59. The practice involves the targeting of directors for a negative vote. The idea is generally attributed to Professor Grundfest at Stanford Law School. *See* Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 865 (1993) ("Although directors of these corporations typically stand unopposed for reelection, shareholders can express their lack of confidence in management's performance by marking their proxy cards to withhold authority for the reelection of these corporate boards."). Only a modest number of directors fail each year to receive significant support. *See* Proxy Pulse, *2016 Proxy Season Review, Broadridge & PWC*, at 2 ("22,560 directors were up for election during the 2016 proxy season. . . . 382 individual directors at 173 different companies failed to receive majority shareholder support. 1,304 directors failed to garner at least 70% support") [hereinafter *Proxy Pulse 2016*].

60. *See* Rule 14a-21, 17 C.F.R. 240.14a-21. Say on pay first appeared in a broad fashion in the American Recovery and Reinvestment Act of 2009 and was applicable to certain TARP recipients. *See* Rule 14a-20, 17 C.F.R. 240.14a-20. *See also* Exchange Act Release No. 61335 (Jan. 12, 2010). The requirement became applicable to public companies in general when Congress included the requirement in Dodd-Frank. *See* Section 951 of the Wall Street Reform and Consumer Protec-

symbolic gestures,[61] they provided companies with regular insight into the collective views of shareholders, acclimating directors to the value of this type of information.[62] Moreover, with advisory votes on compensation a mostly annual event, "say on pay" facilitated the development of regular communications between the two groups.[63]

III. THE CONSEQUENCES OF COLLECTIVE VIEWPOINTS

In conjunction with these developments, shareholder proposals emerged as a critical component in the communication process. Proposals developed into a signaling device for management.[64] To the extent receiving significant support,[65] management understood that the topic required serious attention and necessitated "outreach."[66]

Proposals also did more than render a static snapshot on the views of shareholders. To the extent repeating during subsequent years, they amounted to a gauge in the evolution in owner support.[67] Changes over

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tion Act, Public Law 111-203 (July 21, 2010) (adding Section 14A to the Exchange Act). The Commission implemented the "say on pay" mandate from Dodd-Frank in 2011. *See* Exchange Act Release No. 63768 (2011).

61. The importance of "just say no" campaigns intersects with the advent of "majority vote" provisions, a consequence of the shareholder proposal process. *See infra* note 79. In these circumstances, a negative vote can be more than symbolic and trigger an obligation for the director to submit a letter of resignation. Once submitted, however, acceptance becomes a discretionary decision for the board that is protected by the business judgment rule. *See City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc*., 1 A. 3d 281 (Del. 2010).

62. Companies are only required to provide an advisory vote on compensation every three years. *See* Rule 14a-21(a), 17 C.F.R. 240.14a-21(a) (noting that advisory vote must be taken "no later than the annual or other meeting of shareholders held in the third calendar year after the immediately preceding vote under this subsection"). Nonetheless, most companies provide an advisory vote on a yearly basis. *See Say on Pay: A Fresh Look*, COUNCIL FOR INSTITUTIONAL INVESTORS, Dec. 2016, http://www.cii.org/files/publications/misc/12_22_16_SOP_Frequency_Report_Formatted.pdf.

63. *See supra* note 61. *See also* Brown, *supra* note 39, 179 ("Companies and shareholders talk to each other more often, a trend perhaps accelerated by 'say on pay' proposals. In addition to the potential for additional dialogue, say on pay has resulted in non-management proposals becoming a routine part of the proxy process. The practice has arguably reduced some of the concerns over the use of Rule 14a-8 to obtain the collective views of shareholders.").

64. In some cases, the rule was used to signal approval of management policies. *See* Proxy Statement, Kellogg, Inc., March 10, 2016, at 65 https://www.sec.gov/Archives/edgar/data/55067/000162828016012545/k2016310def14a.htm (proposal to "applaud Kellogg- via this complimentary resolution- for its decision improve animal welfare in its supply system by switching to cage-free eggs"). The proposal received almost unanimous support. *See infra* note 95.

65. *See* Exchange Act Release No. 19135 (Oct. 14, 1982) (noting "the increased voting activities of institutional investors with respect to security holder proposals and the greater potential support for such proposals").

66. Fairfax, *supra* note 55, at 856 ("Shareholders' increased influence over corporate affairs has made board-shareholder engagement a corporate governance priority. Even once reluctant and resistant corporate directors and officers are beginning to realize the importance of outreach efforts involving directors and shareholders."). Proposals, therefore, put pressure on management to act. *See supra* note 26. Moreover, proposals were influential at percentages far below a majority of the votes cast. *See infra* notes 100-101.

67. *See supra* note 15; *see also infra* note 149.

time could provide useful information to boards contemplating a response to the matters raised in a proposal.[68]

The use of proposals as a mechanism for obtaining the collective views of shareholders only occurred gradually. With the advent of the takeover waive in the late 1980s, proposals began to regularly receive substantial, even majority, support.[69] Those addressing poison pills proved popular[70] as did submissions opposing staggered boards[71] and supermajority provisions.[72]

Support gradually went beyond opposition. Shareholders sought the adoption of bylaws and policies that would increase their role in the governance process. They routinely backed initiatives seeking a majority vote for directors,[73] the use of written consents,[74] the right to call a spe-

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68. *See supra* note 15. The Commission has run into the same problem. In considering disclosure requirements on social responsibility matters back in the 1970s, the Commission noted the difficulties in determining the evolving nature of, shareholder views. *See* Securities Act Release No. 5627 (Oct. 14, 1975) (noting that the measurement of support for social responsibility initiatives "does not appear to be a matter which could be resolved by any feasible statistical survey. Investors, like other Americans, have a great variety of interests and concerns, which are held with varying degrees of intensity and in accordance with a variety of personal priorities. Moreover, the results of any such survey might rapidly become outdated in light of the shifting and fluctuating nature of public opinion and the focus of popular attention from time to time.").

69. Majority support occurred at least as early as 1988. *See* Jayne W. Barnard, *Shareholder Access to the Proxy Revisited*, 40 CATH. U. L. REV. 37, 92 n. 328 (1990) (proposals calling for rescission of poison pill received majority support in 1988).

70. The proposals remained common through the early part of the new millennium. *See* Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 1999 (2014) ("According to Georgeson, which compiles data on shareholder proposals filed in S&P 1500 firms, poison pill proposals were the most common type of governance proposal filed in the 1987 to 2004 period. These proposals also tend to garner substantial support from shareholders. During the 2000 proxy season, for example, the average poison pill rescission proposal was supported by 55% of the shares voted, with 39% voting against and 6% abstaining.").

71. Andrew R. Brownstein & Igor Kirman, *Can A Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 27 (2004) ("Board declassifica- tion continued to attract the highest levels of support in 2003, with an average level of support of 63 percent and with forty-one proposals receiving majority support out of forty-eight that came to a vote, with even higher levels of support during 2004."). *See also* Client Alert, *Shareholder Developments During the 2014 Proxy Season*, GIBSON DUNN, June 25, 2014, http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-During-2014-Proxy-Season.aspx ("Board declassification, averaging 84.0% of the votes cast [in 2014], compared to 78.7% in 2013") [hereinafter *Gibson Dunn 2014 Update*]; Client Alert, *Shareholder Developments During the 2013 Proxy Season*, GIBSON DUNN, July 9, 2013, http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-2013-Proxy-Season.aspx (noting that board declassification proposals averaged 81.3% in 2012") [hereinafter *Gibson Dunn 2013 Update*].

72. *See Gibson Dunn 2014 Update*, *supra* note 70 ("Elimination of supermajority vote requirements, averaging 69.6% of votes cast, compared to 70.5% in 2013"); *see also Gibson Dunn 2013 Update*, *supra* note 70 (supermajority vote requirements averaged "65.9% in 2012").

73. *Gibson Dunn 2013 Update*, *supra* note 70 ("Adoption of majority voting in director elections, averaging 58.8% of votes cast, compared to 62.5% in 2012.").

74. *Gibson Dunn 2013 Update*, *supra* note 70 ("shareholder proposals to provide shareholders the ability to act by written consent averaged support of 41.4% in 2013, compared to 45.8% in 2012.").

cial meeting,[75] and access to the company's proxy statement for nominees.[76]

Companies benefited from the "valuable feedback" and modified their practices.[77] The implementation of poison pills declined.[78] Staggered board provisions, at least among larger companies, all but disappeared.[79] Majority vote provisions became ubiquitous[80] and, following a showing of popularity at the ballot box, proxy access bylaws underwent rapid implementation.[81]

Support also grew for proposals addressing social policy issues, albeit more slowly. Although some received significant support in the 1990s,[82] the first initiative to obtain majority approval occurred in 2002, with management changing company policies as a result.[83] Thereafter, proposals obtaining a majority of the votes cast remained sporadic but increasingly common.[84] An environmental proposal crossed that thresh-

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75. *Gibson Dunn 2014 Update*, *supra* note 70 ("Shareholder ability to call special meetings, averaging 41.6% of votes cast, compared to 44.5% in 2013.").

76. These provisions routinely receive majority support. *See Proxy Pulse 2016*, *supra* note 58, at 2 ("Of the 69 proxy access shareholder proposals that went to a vote, 60% received majority support."). *See also Id.* at 1 ("Approximately 40% of companies in the S&P 500 have now adopted proxy access by-laws, up from less than 1% in 2014. Further, 60% of proxy access shareholder proposals that went to a vote this season received majority support.").

77. Emily Chasan, *More Companies Bow to Investors With a Social Cause*, WALL ST. JOURNAL, March 31, 2014, https://www.wsj.com/articles/SB10001424052702304157204579471383739569084 ("CF Industries initially objected, saying the reports would be costly to produce and 'an imprudent consumption of our resources.' But it began producing them after the shareholder votes. CF spokesman . . . said the engagement with shareholders has 'resulted in valuable feedback' and contributed to the company's decision making. He wouldn't say how much the reports cost to produce."). *See also infra* note 116.

78. Ryan A. Murr, *How to Avoid Corporate Governance Issues by Establishing an Effective Compliance Program*, ASPATORE, 2008 WL 5689005, at 13 (2008) (describing as a "current trend" the "[r]eduction in the adoption and renewal of poison pills").

79. John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 557 (2016) ("In 2000, 300 of the S&P 500 had staggered boards, but as of the end of 2013, only 60 did.").

80. *See FAQ: Majority Voting for Directors*, COUNCIL OF INSTITUTIONAL INVESTORS, http://www.cii.org/files/issues_and_advocacy/board_accountability/majority_voting_directors/CII%20Majority%20Voting%20FAQ%201-4-17.pdf ("nearly 90 percent of S&P 500 companies use majority voting in some form").

81. *See Proxy Access*, COUNCIL OF INSTITUTIONAL INVESTORS, http://www.cii.org/proxy_access (last visited, April 17, 2017) ("At least 367 companies, including more than half of the S&P 500 index, have amended their bylaws to allow proxy access.").

82. *See supra* note 12.

83. *See* Matthew J. Petrozziello, *Beyond Cracker Barrel: Shareholder Proposals As A Means of Effectuating CSR Policies*, 13 RUTGERS BUS. L. REV. 22, 39 (2016) ("Upon learning the results of the vote, Cracker Barrel's board members "unanimously agreed to add the category of sexual orientation" as requested by the shareholder proposal.").

84. In 2008, another proposal addressing employment practices in the context of sexual orientation received majority support. *See* Quarterly Report on Form 10-Q, HCC Insurance, August 7, 2008, at 36, https://www.sec.gov/Archives/edgar/data/888919/000095012908004325/h59192e10vq.htm ("Shareholders were requested to vote on a shareholder proposal requesting that management implement equal employment opportunity policies regarding sexual orientation. The proposal was rejected by the shareholders, who voted as follows: 48,828,263 shares in favor, 43,717,873 against, 4,354,846 abstained, and 6,416,067 broker non-votes. For the proposal to pass under Delaware law, the shares

old in 2009.[85] Two proposals addressing topics of social responsibility received a majority of the votes in 2010,[86] four in 2011,[87] one in 2012,[88] four in 2013,[89] and five in 2014.[90]

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in favor must exceed 50% of the total shares present at the meeting, in person or by proxy, and entitled to vote (103,317,049, in this case).").

85. The proposal called for the adoption of quantitative goals for reducing greenhouse gas emissions. *See* IDACORP, Inc., Proxy Statement (DEF 14A), at 13 (Apr. 6, 2009), http://www.sec.gov/Archives/edgar/data/1057877/000118811209000880/t64788_def14a.htm. The proposal received 52% of the votes cast. *See* Quarterly Report on Form 10-Q, IDACORP, Inc., August 6, 2009, at 90 https://www.sec.gov/Archives/edgar/data/49648/000105787709000090/esa10q.htm (For: 14,568,648; Against: 13,875,126; Abstain: 4,079,948).

86. *See* Current Report on Form 8-K, Massey Energy Co., May 21, 2010, https://www.sec.gov/Archives/edgar/data/37748/000119312510126329/d8k.htm ("Stockholder proposal regarding greenhouse gas emissions reduction. The stockholder proposal regarding greenhouse gas emissions reduction did not pass, having received 25,136,228 "Votes For," 22,200,363 "Votes Against" and 20,889,446 "Abstentions."). *See also* Current Report on Form 8-K, Layne Christensen Co., June 7, 2010, https://www.sec.gov/Archives/edgar/data/888504/000120677410001414/laynechristensen_8k.htm (stating that the "stockholder proposal regarding the preparation of a sustainability report has been approved by the stockholders." For: 8,705,732; Against: 5,724,527; Abstain: 1,778,379).

87. *See* Current Report on Form 8-K, Ameren Corp., April 21, 2011, https://www.sec.gov/Archives/edgar/data/18654/000119312511105313/d8k.htm (stating that "Ameren shareholders did not approve a shareholder proposal requesting that Ameren's Board of Directors prepare a report on coal combustion waste as described in the definitive proxy statement relating to the Annual Meeting." For: 74,950,082; Against: 67,241,677; Abstentions: 18,856,006). *See also* Current Report on Form 8-K, KBR, Inc., 2011, https://www.sec.gov/Archives/edgar/data/1357615/000135761511000047/form8k.htm ("A stockholder proposal to amend the Company's equal employment opportunity policy to explicitly prohibit discrimination based on sexual orientation and gender identification or expression and to substantially implement the policy…." For: 67,906,113; Against: 42,241,257). A proposal also received majority support at Tesoro. *See* Current Report on Form 8-K, Tesoro Corporation, May 6, 2011, https://www.sec.gov/Archives/edgar/data/50104/000005010411000046/form8-k.htm ("Stockholders did not approve the stockholder proposal regarding a safety report." Received For: 35,950,299; Against: 30,267,051; Abstentions: 38,504,963). Finally, a proposal at Layne Christianson received over 90% where the board recommended adoption. *See* Current Report on Form 8-K, Layne Christensen Co., June 14, 2011, https://www.sec.gov/Archives/edgar/data/888504/000115752311003631/a6758154.htm ("Stockholder proposal regarding the preparation of a sustainability report." Received For: 14,873,784; Against: 1,147,321; Abstains: 1,611,235). Management recommended approval of the proposal. *See* Proxy Statement, Layne Christensen Co., May 10, 2011, at 33, https://www.sec.gov/Archives/edgar/data/888504/000115752311002976/a6710913.htm.

88. *See* Current Report on Form 8-K, Wellcare Health Plans, May 23, 2012, https://www.sec.gov/Archives/edgar/data/1279363/000127936312000028/form8k.htm ("The stockholder proposal regarding a political contributions and expenditures report was defeated by the following vote." For: 16,504,536; Against: 14,836,716; Abstentions: 5,714,120).

89. Three proposals received majority support at a single company. *See* Current Report on Form 8-K, CF Industries Holdings, May 16, 2013 ("Stockholder proposal regarding issuance of a report on political use of corporate assets…." For: 25,079,125; Against: 12,943,718); Current Report on Form 8-K, CF Industries Holdings, May 16, 2013 ("Stockholder proposal regarding adoption of a policy on board diversity…." For: 18,955,837; Against: 18,434,077); Current Report on Form 8-K, CF Industries Holdings, May 16, 2013, https://www.sec.gov/Archives/edgar/data/1324404/000110465913042420/a13-12240_18k.htm ("Stockholder proposal regarding issuance of a sustainability report…." For: 25,019,015; Against: 12,308,953). *See also* Current Report on Form 8-K, ATK Orbital, July 31, 2013, https://www.sec.gov/Archives/edgar/data/866121/000110465913058230/a13-17594_18k.htm ("Stockholder Proposal Regarding Disclosure of Corporate Lobbying Activities"; For: 15,062,933; Against: 8,187,259; Abstain: 3,660,708).

By the end of the proxy season in 2016, the number had jumped to nine.[91] Those receiving a majority of the votes cast included proposals addressing gender pay equity at eBay;[92] board diversity at Joy Global[93] and FleetCor Technologies;[94] changes to an employment opportunity policy designed to prevent discrimination on the basis of sexual orientation and gender identity at J.B. Hunt Transport Services, Inc.;[95] animal welfare at Kellogg;[96] and disclosure of sustainability efforts at

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90. *See* Heidi Welsh, *Mid-Year Review: Corporate Political Activity Proposals in the 2014 Proxy Season*, SUSTAINABILITY INVESTMENTS INSTITUTE, August 28, 2014, https://si2news.files.wordpress.com/201; 4/08/si2-2014-proxy-season-mid-year-review-corporate-political-activity-excerpt.pdf ("There were five majority votes in 2014. . . . This brings the total number of management-opposed shareholder resolutions earning majority votes to 15 in the last five years, a figure inconceivable in the early days of shareholder activism."). *See also* Current Report on Form 8-K, H&R Block, Sept. 12, 2014, https://www.sec.gov/Archives/edgar/data/12659/000160529714000009/form8-k9x12x14.htm ("The shareholder proposal concerning political contributions was not approved"; For: 75,880,439; Against: 73,985,538; Abstain: 58,445,900); Current Report on Form 8-K, Smith & Wesson Holding Corp., Sept. 26, 2014, at 3, https://www.sec.gov/Archives/edgar/data/1092796/000119312514354852/d794739d8k.htm ("Our stockholders approved a stockholder proposal regarding political contributions"; For: 13,282,345; Against: 10,530,781; Abstain: 2,923,762); Current Report on Form 8-K, SLM Corp., June 26, 2014, https://www.sec.gov/Archives/edgar/data/1032033/000119312514251370/d751297d8k.htm ("Stockholder Proposal Regarding Lobbying Disclosure"; For: 158,217,684; Against: 111,943,167; Abstain: 78,264,195); Current Report on Form 10-K, Dean Foods, May 20, 2014, https://www.sec.gov/Archives/edgar/data/931336/000119312514206650/d729533d8k.htm ("A stockholder proposal asking the Board to adopt a policy requiring annual reporting of the Company's political activities"; For: 30,524,328; Against: 28,406,836; Abstain: 14,889,722); Valero Energy, May 5, 2014, https://www.sec.gov/Archives/edgar/data/1035002/000119312514182502/d723421d8k.htm ("Vote on a stockholder proposal entitled, 'Corporate Lobbying'"; For: 169,813,727; Against: 159,275,258; Abstain: 52,937,354).

91. As used in this article, "majority" does not include abstentions. *See supra* note 10. At least one proposal received majority support in 2015. *See* Current Report on Form 8-K, Nabors, June 8, 2015, https://www.sec.gov/Archives/edgar/data/1163739/000110465915043986/a15-13702_18k.htm ("*Shareholder Proposal Regarding Sustainability Reporting*"; For: 118,642,361; Against: 111,668,920; Abstain: 37,324,074).

92. Current Report on Form 8-K, eBay Inc., April 27, 2016, https://www.sec.gov/Archives/edgar/data/1065088/000106508816000300/form8-k2016annualmeeting.htm ("Stockholder Proposal Regarding Gender Pay Equity"; For: 417,093,396; Against: 397,086,399; Abstain: 120,530,190).

93. Current Report on Form 8-K, Joy Global, March 8, 2016, https://www.sec.gov/Archives/edgar/data/801898/000080189816000155/a8-kshareholdervotingmarch.htm ("Shareholders were asked to consider a shareholder proposal relating to board diversity"; For: 35,670,611; Against: 32,474,121; Abstain: 5,947,809).

94. The proposal was not opposed by management. *See* Current Report, Form 8-K, FleetCor Technologies, June 10, 2016, https://www.sec.gov/Archives/edgar/data/1175454/000129993316002618/htm_53673.htm ("Stockholder proposal regarding board diversity and reporting." For: 46,480,010; Against: 17,704,530; Abstain: 11,751,945).

95. Current Report on Form 8-K, JB Hunt Transport Services, April 25, 2016, https://www.sec.gov/Archives/edgar/data/728535/000143774916029938/jbht20160425_8k.htm ("proposal to amend the Company's equal employment opportunity policy to explicitly prohibit discrimination based on sexual orientation, gender identity or gender expression and to take substantial action to implement the policy." For: 50,751,937; Against: 42,021,922; Abstain: 3,816,387).

96. The board recommended that shareholders vote in favor of the resolution, which they did. *See* Current Report on Form 8-K, Kellogg Co., May 4, 2016, https://www.sec.gov/Archives/edgar/data/55067/000162828016015507/k-2016538k.htm ("Shareowner proposal to recognize Kellogg's efforts regarding animal welfare"; For: 302,141,341; Against: 5,581,676; Abstain: 7,445,656).

CLARCOR,[97] methane emissions at WPX,[98] and political contributions at Fluor[99] and NiSource.[100]

Support and influence, however, did not rest on the need for majority approval. Any significant percentage had the potential to send a signal to companies that could result in changes. Thus, a shareholder proposal at Exxon-Mobil called for the appointment of a climate change expert to the board of directors. Although the initiative received only about twenty percent of the vote in 2015 and 2016,[101] Exxon in 2017 appointed such an individual to the board.[102]

The approximately ninety environmentally related matters submitted to a vote in 2016 averaged twenty-one percent of the votes cast,[103] the highest percentage over the prior decade[104] and more than double the percentages of the late 1990s.[105] Proposals seeking sustainability reports

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97. Current Report, Form 8-K, CLARCOR Inc., March 29, 2016, https://www.sec.gov/Archives/edgar/data/20740/000002074016000134/a20168kannualmeetingresults.htm (proposal "regarding environmental sustainability reporting"; For: 23,676,553; Against: 15,298,848; Abstain: 4,462,664).

F. OOTNOTE 98 MISSING

99. *See* Current Report, Form 8-K, Fluor Corp., May 10, 2016, https://www.sec.gov/Archives/edgar/data/1124198/000110465916119599/a16-10940_18k.htm (Stockholder Proposal (Disclosure of Political Contributions): For: 55,498,062; Against: 34,188,115; Abstain: 16,047,912).

100. Current Report on Form 8-K, NiSource Inc., May 12, 2016, https://www.sec.gov/Archives/edgar/data/1111711/000111171116000066/a8-kheader5122016.htm ("Stockholder Proposal Regarding Reports on Political Contributions"; For: 110,413,627; Against: 109,203,512; Abstentions:40,526,458).

101. *See* Current Report on Form 8-K, Exxon-Mobil, May 31, 2016, at 3, https://www.sec.gov/Archives/edgar/data/34088/000003408816000075/r8k052516.htm (proposal seeking "Climate Expert on Board"; For: 511,885,966 (20.9%); Against: 1,936,261,955 (79.1%); Abstain: 203,189,426). *See also* Current Report on Form 8-K, Exxon-Mobil, June 1, 2015, https://www.sec.gov/Archives/edgar/data/34088/000003408815000027/r8k060115.htm (proposal seeking "Climate Expert on Board"; For: 513,095,754 (21%); Against: 1,932,262,742 (79%); Abstain: 193,919,159).

102. In 2017, Exxon-Mobil has added a climate change expert to the board. *See* Proxy Statement, Exxon-Mobil, April 13, 2017, at 14, 20, https://www.sec.gov/Archives/edgar/data/34088/000119312517122538/d182248ddef14a.htm.

103. Yafit Cohn, *Climate Change, Sustainability and Other Environmental Proposals*, SIMPSON, THACHER & BARTLETT, Sept 6, 2016, https://corpgov.law.harvard.edu/2016/09/06/climate-change-sustainability-and-other-environmental-proposals/ ("As of June 30, 2016, 90 environment-related proposals had been submitted to a vote at Russell 3000 companies this year . . . shareholder proposals submitted to a vote at Russell 3000 companies received average shareholder support of 21.9%.").

104. *See also* Scott Hirst, *Social Responsibility Resolutions*, forthcoming, JOURNAL OF CORPORATION LAW (2017), last revised, Oct. 10, 2016, at 9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773367 (noting that in 2014, proposals addressing political contribution disclosure averaged 26% (with 12% abstaining), sexual orientation anti-bias issues, 35% (with 6% abstaining), and sustainability reports, 25% (with 13% abstaining)). Other categories have performed equally well. *See Gibson Dunn 2013 Report*, *supra* note 70 ("Political contributions and lobbying proposals again were frequent shareholder proposal topics, with shareholders submitting 115 such proposals for 2013 shareholder meetings to date, compared to 116 proposals for 2012 meetings. . . . ISS reported that these proposals received average approval of 29.0%, an increase of 7.3 percentage points over2012.").

105. Social policy proposals according to data from IRRC routinely averaged less than 10% of the vote. *See US Proxy Issue Proposals*, Investor Responsibility Research Center, March 5, 1998 (noting that 10 proposals addressing Ceres principles received on average 8.6%; 13 proposals ad-

did the best.[106] As environmental proposals received increasing support, they were seen as "moving further into the mainstream. . . "[107]

At the same time, the ascending amount of support arguably understated the overall degree of shareholder acceptance of these types of proposals. Initiatives that received substantial support often resulted in an agreement with the company and therefore did not repeat in the following year.[108] Had these proposals remained in the mix and gone to a vote, overall support would likely have been higher.[109]

The growing levels of approval also took place in an environment where some of the largest shareholders routinely withheld support. Representing the largest category of shareholders,[110] mutual funds typically assigned voting rights to investment advisers.[111] Although a number of funds regularly supported social responsibility proposals, some of the largest did not.[112]

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dressing political contributions/ties averaged 6.1%). The percentage represents a seven-fold increase since the 1970s. *See supra* note 7.

106. Cohn, *supra* note 102 (of the 14 environmental proposals calling for a sustainability Report, the average shareholder support was 29.46%).

107. *Four takeaways from proxy season 2016*, EY CENTER FOR BOARD MATTERS, June 2016, http://www.ey.com/Publication/vwLUAssets/EY-four-takeaways-from-proxy-season-2016/$FILE/EY-four-takeaways-from-proxy-season-2016.pdf.

108. In 2015, a proposal at EOG Resources calling for "a report that reviews its policies, actions, and plans to enhance and further develop measurement, disclosure, mitigation, and reduction targets for methane emissions resulting from all operations under its financial or operational control" received 31.5% of the shares voted on the matter. Quarterly Report on Form 10-Q, EOG Resources, May 4, 2015, at 32, https://www.sec.gov/Archives/edgar/data/821189/000082118915000023/a2015033110-q.htm (For: 115,690,900; Against: 250,950,698; Shares Abstaining: 84,271,216). In January 2016, the company agreed on increased disclosure. *See Shareholder Advocacy Highlights*, Trillium Asset Management, 2016, at 1, http://www.trilliuminvest.com/wp-content/uploads/2016/07/Q2-2016-Shareholder-Advocacy-Highlights.pdf ("In January, we reached an agreement with EOG Resources whereby the company committed to publicly disclose its methane-specific fugitive emissions associated with EOG's operated wells for 2015 relative to EOG's total company production of oil and gas for 2015."). Thus, despite the support for the initiative, no methane emissions proposal was submitted to the company. *See* Proxy Statement, EOG Resources, March 17, 2016, https://www.sec.gov/Archives/edgar/data/821189/000119312516508576/d98464ddef14a.htm#toc98464_40.

109. *See* Thomas Miner, *2010 Saw Unprecedented Investor Approval for Social Shareholder Resolutions*, SUSTAINABLE BRANDS, September 19, 2010, http://www.sustainablebrands.com/news_and_views/articles/2010-saw-unprecedented-investor-approval-social-shareholder-resolutions ("Proposals that receive high levels of support are the most amenable to negotiated withdrawal agreements between activists and companies. Nearly three-quarters of the 45 resolutions filed on equal opportunity and board diversity were withdrawn, as were just less than two-thirds of the 41 requests for reports and oversight on sustainability.").

110. Stephen Choi, Jill Fisch & Marcel Kahan, *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 37 (2013) ("Mutual funds constitute the largest group of institutional investors, holding approximately 29% of the equity of U.S. public companies, and their ownership percentage is growing.").

111. *See* Choi, et al, *supra* note 109, at 41 ("mutual funds outsource their investment decisions to an investment advisor.").

112. *See* Lewis Braham, *Vanguard's Climate-Change Dismissal*, BARRON'S, August 6, 2016, http://www.barrons.com/articles/vanguards-climate-change-dismissal-1470459744 ("According to proxy-tracking firm Fund Votes, Vanguard didn't vote in favor of a single climate-related sharehold-

As with governance proposals, social responsibility matters have generated results. In 2015, eighty-one percent of the largest companies issued corporate responsibility or sustainability reports.[113] Much of what is known with respect to political contributions has been a result of the shareholder proposal process.[114]

IV. CALLS FOR CHANGES TO RULE 14A-8

Communication and engagement between owners and management has grown. As a report by E&Y noted:

> Company-investor engagement on governance topics — and disclosure of these efforts in the proxy statement — also continues to grow. While executive compensation remains a primary engagement driver, companies disclosed a variety of other topics that were part of those conversations, including proxy access, strategy, performance, board composition, board leadership, board assessments, director tenure, sustainability practices, risk oversight and capital allocation.[115]

Moreover, involvement in the communication process has not been limited to shareholders. Participation by directors has also increased.[116]

Engagement with management is a broad based concept that can and should take on a variety of forms.[117] Proposals represent one critical,

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er proposal in 2015."). *See also* Hirst, *supra* note 103, at 12-13. Practices in this area, however, appear to be evolving. Vanguard has indicated a possible shift in approach. *See Environmental and social proposals*, Vanguard's proxy voting guidelines, VANGUARD, https://about.vanguard.com/vanguard-proxy-voting/voting-guidelines/ ("The funds will evaluate each proposal on its merits and may support those where we believe there is a logically demonstrable linkage between the specific proposal and long-term shareholder value of the company.") (last visited April 21, 2017). The prior policy was more deferential towards the views of the company. Supplement to the Statement of Additional Information, VANGUARD FUNDS, 2016, at B-49, https://personal.vanguard.com/pub/Pdf/sai040.pdf (Vanguard "generally believes that these are 'ordinary business matters' that are primarily the responsibility of management and should be evaluated and approved solely by the corporation's board of directors. Often, proposals may address concerns with which the Board philosophically agrees, but absent a compelling economic impact on shareholder value (e.g., proposals to require expensing of stock options), the funds will typically abstain from voting on these proposals.").

113. Jessica Lyons, *81% of S&P Companies Publish Sustainability Reports in 2015*, ENVIRONMENTAL LEADER, June 30, 2016, https://www.environmentalleader.com/2016/06/81-of-sp-500-companies-published-sustainability-reports-in-2015/.

114. *See* Haan, *supra* note 5, at 265-66 ("Today, much of what is publicly known about how large, publicly held companies spend money to influence federal, state, and local elections and ballot proposals comes from disclosures that conform to privately negotiated standards.").

115. *Four takeaways*, *supra* note 106.

116. *Four takeaways*, *supra* note 106 ("And directors are getting involved: among the 287 S&P 500 companies that disclosed engagement this year, 24% disclosed that board members were involved (most often the lead director or compensation committee chair), up from 18% last year.").

117. *See* Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuk-Stine Debate*, 12 NYU J. OF LAW & BUS. 385 (2016). *See also* Proxy Statement, ConcoPhillips,April 3, 2017, at 5, https://www.sec.gov/Archives/edgar/data/1163165/000104746917002284/a2230814zdef14a.htm ("In an effort to continuously improve ConocoPhillips' governance processes and communications, the Committee on Directors' Affairs adopted Board and Shareholder Communication and Engagement Guidelines in 2015. . . . Management provides regular reports to the Board and its committees regarding the key themes and results of their communications with the Company's stockholders,

yet essential, component of the process. They provide a unique and cost effective source of information on the collective views of shareholders. In the context of engagement, shareholders can speak as a representative of a broader base of owners and management can consider the level of support in fashioning an appropriate response.[118]

A. The "Impetus" for Change

Rule 14a-8 has been characterized as "ripe for reform"[119] and in need of "modernization."[120] Efforts to rewrite the rule and add substantial additional restrictions are not, however, designed to modernize but to reduce the role of owners in the governance process.[121]

The impetus for the proposed restrictions cannot be traced to a significant change in the use of the rule. During the 2016 proxy season, shareholders filed 916 proposals, a decline from the year before.[122] The

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including typical investor concerns and questions, emerging issues and pertinent corporate governance matters. Since the Company's last annual meeting, we actively reached out to our top 50 investors and an engagement team consisting of management and subject-matter experts on governance, compensation, and environmental and social issues, conducted in-depth discussions with a significant number of large stockholders. . . . ConocoPhillips gained valuable feedback during these discussions, and this feedback was shared with the Board and its relevant committees.").

118. *See Shareholder Advocacy Highlights*, Trillium Asset Management, 2016, at 1 http://www.trilliuminvest.com/wp-content/uploads/2016/07/Q2-2016-Shareholder-Advocacy-Highlights.pdf ("We were pleased to successfully withdraw our renewable energy shareholder proposal at Amgen following a March commitment from the company to include greater disclosure of current and future renewable energy projects in its Environmental Sustainability Report. . . . Also in March, we were able to successfully withdraw our renewable energy shareholder proposal at Akamai Technologies following a company commitment to source renewable energy for 50% of its network operations by 2020."). *See also* Haan, *supra* note 5, at 265-66 (noting the common nature of privately negotiated agreements arising from shareholder proposals involving political spending disclosure).

119. *SEC Rule 14a-8: Ripe for Reform*, James R. Copeland Senior Fellow and Director, Legal Policy, MANHATTAN INSTITUTE FOR POLICY RESEARCH, Statement to the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, Hearing on Corporate Governance: Fostering a System that Promotes Capital Formation and Maximizes Shareholder Value, September 21, 2016, at 3, https://www.manhattan-institute.org/sites/default/files/T-JC-0916.pdf [hereinafter *The SEC's process is ripe for reform*].

120. *Business Roundtable Proposal*, *supra* note 18.

121. Efforts to reduce shareholder participation in the governance process are not limited to efforts to change the terms of Rule 14a-8. The issuance of non-voting shares when a company goes public can have the same effect. Such companies have no obligation to distribute proxy or information statements. *See* Form S-1/A, Snap Inc., Feb. 27, 2017, at 40, https://www.sec.gov/Archives/edgar/data/1564408/000119312517045870/d270216ds1a.htm ("Since our Class A common stock will be our only class of stock registered under Section 12 of the Exchange Act and that class is non-voting, we will not be required to file proxy statements or information statements under Section 14 of the Exchange Act, unless a vote of the Class A common stock is required by applicable law."). Shareholders, therefore, will be entirely denied the right to vote on proposals, provide an advisory vote on compensation, and engage in "just say no" campaigns with respect to directors. *See Id.* at 6 ("we will not be subject to the 'say-on-pay' and 'say-on-frequency' provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act. As a result, our stockholders will not have an opportunity to provide a non-binding vote on the compensation of our executive officers. Moreover, holders of our Class A common stock will be unable to bring matters before our annual meeting of stockholders or nominate directors at such meeting, nor will they be able to submit stockholder proposals under Rule 14a-8 of the Exchange Act.").

122. *See supra* note 22.

number was neither a record[123] nor, in historical context, unusual.[124] Moreover, total submissions bear little or no relationship with the number of proposals actually submitted to shareholders for a vote. By one estimate, for example, forty percent of the 474 public interest proposals in 2015 were withdrawn.[125]

Similarly, the impetus for additional restrictions does not appear to be driven by changes in the cost of the shareholder proposal process. The actual costs of adding a proposal to the proxy statement are likely nominal. With companies already having to draft and circulate the proxy materials to shareholders, an additional proposal adds at most a modest amount of volume.[126] Moreover, these expenses have likely been reduced substantially through the advent of electronic dissemination of proxy materials.[127]

To the extent "costs" also include the expenses associated with seeking exclusion of a proposal,[128] such amounts are a consequence of

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123. *See supra* note 22.

124. Davis Polk, *Excluding Shareholder Proposals: Lessons From the 2009 Proxy Season*, GENERAL COUNSEL UPDATE, July 7, 2009, https://www.davispolk.com/sites/default/files/files/Publication/5d627f2c-3794-456f-8096-01628c698869/Preview/PublicationAttachment/9a2619e5-d032-43f9-b5c5-018f0a542410/070709_GC_Update.html ("According to RiskMetrics Group (RMG) as of March, 1,126 shareholder proposals were submitted to 481 companies in the 2009 season, addressing governance, compensation and social and environmental issues.").

125. Haan, *supra* note 5, at 266 ("Investors submitted more shareholder proposals on social and environmental subjects in 2015 than in any previous year: 474 in total, according to Institutional Shareholder Services (ISS). Forty percent of these were withdrawn before they went to a shareholder vote, suggesting that, in a single year, nearly 200 were negotiated to a private agreement."). *See also* Heidi Welsh, *2016 Proxy Mid-Season Review*, SUSTAINABILITY INVESTMENTS INSTITUTE, Sept. 9, 2016, https://corpgov.law.harvard.edu/2016/09/09/2016-proxy-mid-season-review/ (noting that shareholders submitted 431 environmental and social policy resolutions, with 239 going to a vote).

126. Much of the additional volume probably comes from the statement of opposition included by management. *See* Rule 14a-8(m)(1), 17 C.F.R. 240.14a-8(m)(1). Proposals are subject to a limit of 500 words. *See* Rule 14a-8(d), 17 C.F.R. 240.14a-8(d). Opposition statements are not subject to any limit in length and can, therefore, take up significantly greater space in a proxy statement.

127. *See* Rule 14a-16, 17 C.F.R. 240.14a-16. Similarly, the Commission has permitted "householding" which reduces the number of proxy statements that must be distributed to each address. *See* Exchange Act Release No. 43487 (Oct. 27, 2000) (permitting delivery of proxy statement to multiple security holders "who share an address" assuming certain conditions were met). This includes the "note of availability" when materials are posted on the Internet. *See* Exchange Act Release No. 55146 (Jan. 22, 2007) ("Consistent with the proposal, the final rules permit an issuer to 'household' the Notice pursuant to Rule 14a-3(e). Accordingly, an issuer could send a single copy of the Notice to one or more shareholders residing at the same address if the issuer satisfies all of the Rule 14a-3(e) conditions."). Thus, the reliance on "cost" information from 1998 does not take this into account. *See* Copeland, *supra* note 118, at 19 ("Submission of shareholder proposals is not cost-free to the company and to other shareholders; a 1998 analysis by the SEC determined that it cost the average company $37,000 to decide whether to place a shareholder proposal on the ballot and another $50,000 in costs to print, distribute, and tabulate the proposal; aside from printing and distributing, such costs have doubtless risen over time.").

128. *See Business Roundtable Proposal*, *supra* note 18 ("It is also costing companies tens of millions of dollars and countless hours of management time through the cost of negotiating with proponents, seeking SEC no-action relief to exclude proposals from proxy statements, preparing opposition statements and other activities that are diverting from creating long-term shareholder value.").

management, not shareholder, behavior.[129] Companies can avoid them by including the proposal in the proxy statement. Indeed, with the number of no-action requests down from earlier decades, companies seem increasingly comfortable with this approach.[130]

Neither the volume of proposals nor the costs are sufficient to explain current attitudes towards Rule 14a-8. What has changed in recent years, however, has been the increased support for shareholder proposals. Governance initiatives routinely obtain majority support.[131] And while critics have asserted that proposals addressing social responsibility topics fail "to garner broad shareholder support,"[132] these submissions average a fifth of the total votes cast and increasingly receive support from a majority of the votes cast.[133]

The concern with success can be seen from the nature of the proposed changes. Most are indiscriminate in their impact and would apply to proposals that routinely receive substantial support from shareholders. Calls for extreme increases in the eligibility standards, for example, would substantially reduce the participation of all investors and all types of proposals.[134] Reducing participation by retail investors would have a more focused effect.[135] In addition to limiting the role of individuals in

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129. *See Letter from Ann Yerger, Executive Director, Council of Institutional Investors*, WALL ST. JOURNAL, April 1, 2014, https://www.wsj.com/articles/SB10001424052702304886904579473441821446148 (describing costs as "self-inflicted" and noting that "[t]oo many companies choose to spend tens of thousands of dollars—shareholders' money—in legal fees in an effort to keep these proposals from coming to vote. Some companies even up the ante by going straight to court to block shareholder proposals, bypassing the Securities and Exchange Commission's well-established, less costly process for reviewing these submissions.").

130. *See supra* note 24.

131. *See supra* Section III.

132. *See* Copeland, *supra* note 118, at 13 ("In contrast to some shareholder-proposal activism related to corporate governance, shareholder proposals related to social or policy concerns have consistently failed to garner broad shareholder support.").

133. *See supra* note 102.

134. *See Business Roundtable Proposal*, *supra* note 18 ("For proposals related to topics other than director elections, a truly reasonable standard could be to use a sliding scale based on the market capitalization of the company, with a required ownership percentage of 0.15 percent for proposals submitted to the largest companies and up to 1 percent for proposals submitted to smaller companies. Additionally, if a proposal were submitted by a group or by a proponent acting by proxy, the ownership percentage sliding scale could be increased to up to 3 percent."). The requirements in the Financial Choice Act are even more severe. *See supra* note 19. In addition to an extreme increase in the ownership threshold, the Financial Choice Act would require a three year holding period, an increase from the 12-month period currently in place. *See* Rule 14a-8(b), 17 C.F.R. 240.14a-8(b) (requiring shares to be held "continuously" for "at least one year by the date" the proposal was submitted).

135. *See Business Roundtable Proposal*, *supra* note 18 ("the current shareholder proposal process is dominated by a limited number of individuals who file common proposals across a wide range of companies but own only a nominal amount of shares in the companies they target. These investors are pursuing special interests — many of which have no rational relationship to the creation of shareholder value and conflict with what an investor may view as material to making an investment decision."). *See also* Copeland, *supra* note 118, at 8 ("All told, Mr. Chevedden and four individual gadfly investors and their family members sponsored 29% of all shareholder proposals from 2006–15"). The prohibition on the submission of a proposal by a "proxy" in the Financial Choice Act is likewise aimed at reducing the use of the rule by individuals. *See* Section 844(c)

the governance debate,[136] the approach would result in the omission of proposal most commonly supported by shareholders.[137]

Expanding the exclusions likewise would have an indiscriminate effect. Critics have called for the reversal of the staff bulletin[138] addressing the *Whole Foods* no-action letter.[139] Doing so would turn back the clock and allow management to strategically submit proposals on the same subject matter in order to block shareholder initiatives.[140] Had that interpretation remained in place, shareholders would have been denied the right to vote on many, if not most, of the shareholder access proposals.[141]

Increasing the barriers to the use of the rule would deprive management of insight into the views of shareholders. This result may not always be accidental. According to one study, companies seeking to

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of the Financial Choice Act, *supra* note 19. *See also Business Roundtable Report*, *supra* note 18 ("These proponents are able to submit such a large number of proposals in part because they have been able to pursue their agendas even at companies where they have no relationship and own no shares by acting as a 'proxy' for a shareholder of the company."). The provision, however, was drafted in an extraordinarily broad fashion and has the potential to interfere with the shareholder proposal process. The language extends to a proxy, agent, or representative "acting on behalf of a shareholders." That would arguably, for example, apply to proposals submitted by counsel retained by the shareholder.

136. Threshold increases seek to equate the importance of a proposal with the amount of ownership. No such relationship exists, however. *See* Kanzer, *supra* note 17 ("The quality of one's ideas is not correlated with the size of one's investment. Several of the so-called 'gadflies' that the BRT would like to swat away have been responsible for transforming the field of corporate governance, one irritating but highly successful proposal after another.").

137. Individuals almost entirely limit their submissions to governance proposals popular with shareholders. *See* Haan, *supra* note 5, at 280 ("Most shareholder proposals on political spending have been submitted by institutional investors."). For the percentages of support received by proposals submitted by individuals during the 2016 proxy season, see Annex A, *2016 Proxy Season*, SULLIVAN & CROMWELL, July 11, 2016, https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2016_Proxy_Season_Review.pdf.

138. *See* Shareholder Proposals, Staff Legal Bulletin 14H (CF), Oct. 22, 2015, https://www.sec.gov/interps/legal/cfslb14h.htm (noting that similar shareholder access proposals would not be subject to exclusion under subsection (i)(9); "This is because both proposals generally seek a similar objective, to give shareholders the ability to include their nominees for director alongside management's nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals.").

139. *Whole Foods*, 2014 WL 5426272 (Dec. 1, 2014), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf.

140. *Business Roundtable Proposal*, *supra* note 18 ("In 2015, the SEC staff issued a Staff Legal Bulletin (SLB) that revised its approach to the conflicting proposal exclusion, materially departing from decades of guidance. . . . The SEC's new interpretation dramatically limits public companies' ability to exclude a shareholder proposal that conflicts with a company proposal unless 'a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal….' This new standard risks confusing shareholders while intruding upon the fiduciary duties of directors. . . . [T]he SEC should reinstate the prior interpretation of the conflicting proposal exclusion.").

141. Following the staff's initial ruling in *Whole Foods*, 25 companies submitted no-action requests seeking exclusion of a shareholder access proposal on the same grounds. *See* Letter from Michael Garland, Assistant Comptroller, Corporate Governance and Responsible Investment, City of NY, Office of the Comptroller, to Mr. Keith F. Higgins, Director, Division of Corporation Finance, SEC, June 17, 2015, at 6, https://www.sec.gov/comments/i9review/i9review-7.pdf ("Following Whole Foods, twenty-five additional companies (seventeen of which were responding to NYC Systems-sponsored proposals) quickly submitted requests for no-action relief under the Rule.").

exclude proposals "are larger, have worse performance, and have less institutional shareholders".[142] Nor were their efforts focused on proposals particularly lacking in support. Proposals not successfully excluded often received support from a "significant proportion of shareholders"[143] at levels "broader" that those for uncontested proposals.[144] The evidence, therefore, was "consistent with managers often seeking to exclude proposals that represent the interests of their shareholders."[145]

B. The Rule of Unintended Consequences

The proposed changes are also likely to generate a number of unintended consequences. For example, one set would substantially increase the percentage of support needed to resubmit a proposal in future years.[146] The rule currently sets the highest resubmission threshold at ten percent, a significant but not prohibitive percentage.[147] Some have, however, suggested that the number be tripled.[148]

The change would unquestionably prevent resubmissions but would not necessarily result in a reduction in the number of proposals.[149] Shareholders could avoid the high thresholds by changing the subject matter when submitting a proposal to the same company. A climate change proposal that did not receive the required thirty percent could be transformed into a proposal seeking disclosure of political contributions.

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142. Eugene Soltes, Suraj Srinivasan & Rajesh Vijayaraghavan, *What Else do Shareholders Want? Shareholder Proposals Contested by Firm Management*, April 2016, at 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771114 ("Firms that are larger, have worse performance, and have less institutional shareholders are more likely to contest proposals they receive.").

143. Soltes, et al, *supra* note 141, at 3 ("Our evidence supports the idea that managers often seek to exclude proposals that are not necessarily frivolous and are supported by a significant proportion of shareholders.").

144. Soltes, et al, *supra* note 141, at 4 ("proposals contested by management that eventually make their way to the proxy often gain broader shareholder support at a level comparable to non-contested proposals.").

145. Soltes, et al, *supra* note 141, at 5 ("Overall, our evidence is consistent with managers often seeking to exclude proposals that represent the interests of their shareholders.").

146. Petition for Rulemaking Regarding Resubmissions of Shareholder Proposals Failing to Elicit Meaningful Shareholder Support, *In re Exclusion of Resubmitted Shareholder Proposals, 17 C.F.R. §240.14a-8(i)(12)*, Petition 4-675 (April 9, 2014), at 25, http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/04/Combine.pdf?x48633 (calling for the Commission to "formulate an amendment to the Resubmission Rule that would significantly increase the voting thresholds and additionally require that a shareholder proposal must gain the support of a progressively and meaningfully higher proportion of shareholder support each year").

147. Rule 14a-8(i)(12), 17 C.F.R. 240.14a-8(i)(12).

148. *See Business Roundtable Proposal*, *supra* note 18 ("At the very least, however, the thresholds should be updated to implement the increases proposed by the SEC in 1997: 6 percent on the first submission, 15 percent on the second and 30 percent on the third."). *See also* Financial Choice Act, *supra* note 19, at Section 844 ("in paragraph (iii), adjust the 10 percent threshold to 30 percent").

149. Thus, past data has been used to assess the impact of a significant increase in the resubmission threshold. *See* Copeland, *supra* note 118, at 23 ("Were the SEC to adopt a 33% threshold as an intermediate (or even ultimate) floor for multiple shareholder-proposal resubmissions . . . 215 of the 608 resubmitted proposals would have been ineligible for resubmission").

The shift in topic, however, would negatively affect the communication process. By vastly reducing the number of resubmissions, companies would be deprived of information on the evolution in shareholder thinking. These views can and do change over time.[150] Directors, therefore, could find themselves making decisions on the basis of stale and inaccurate information, potentially damaging the relationship between owners and managers.[151]

Perhaps the most significant unintended consequence, however, will be the need for shareholders to find alternative avenues of influence and the attendant uncertainty and cost that could result. Rule 14a-8 provides a well understood mechanism for addressing issues that arise between owners and managers. Moreover, in the case of disputes, Commission officials serve as "informal arbiters" through the no-action letter process.[152] Many of the current set of changes would render this process, and the role of the Commission, irrelevant.

To the extent that access to the rule is foreclosed for most investors, shareholders will have an incentive to find alternative avenues for influencing managerial decision making. These could involve public campaigns, particularly "just say no" initiatives.[153] Shareholders may be more willing to consider litigation over the accuracy of the disclosure[154]

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150. Shareholders have increasingly supported proposals at Nike that call for disclosure of political contributions. The first appeared in 2012 and obtained about 22% of the votes cast. *See* Current Report on Form 8-K, Nike, Inc., Sept. 26, 2012, https://www.sec.gov/Archives/edgar/data/320187/000032018712000146/f8k120920am.htm ("Shareholder Proposal Regarding Political Contributions Disclosure"; For: 74,954,681; Against: 259,813,960; Abstain: 30,163,359). The following year, the percentage dropped to 18.2%. *See* Current Report on Form 8-K, Nike, Inc., Sept. 19, 2013, https://www.sec.gov/Archives/edgar/data/320187/000032018713000152/a8k.htm (For: 120,222,175; Against: 537,083,295; Abstain: 56,943,963). Although no such proposal was included in 2014, the submission received 27% in 2015. *See* Current Report on Form 8-K, Nike, Inc., Sept. 17, 2015, https://www.sec.gov/Archives/edgar/data/320187/000032018715000186/a8-k_2015amvote.htm (For: 175,268,809; Against: 469,638,047; Abstain: 61,260,411). Had the threshold proposed in the Financial Choice Act or the Business Roundtable Report been in place, the proposal could not have been included in the proxy statement in 2016. *See supra* note 19. The proposal was included, however, and received approximately 31% of the vote. *See* Current Report on Form 8-K, Nike, Inc., Sept. 22, 2016, https://www.sec.gov/Archives/edgar/data/320187/000032018716000383/a8-kaxamendedannualvote.htm ("Shareholder Proposal Regarding Political Contributions Disclosure"; For: 357,615,603; Against: 895,904,015; Abstain: 94,021,536).

151. *See supra* notes 15 & 149.

152. Eliminating this role has generally been opposed. *See* Exchange Act Release No. 40018 (May 21, 1998) ("Some of the proposals we are not adopting share a common theme: to reduce the Commission's and its staff's role in the process and to provide shareholders and companies with a greater opportunity to decide for themselves which proposals are sufficiently important and relevant to the company's business to justify inclusion in its proxy materials. However, a number of commenters resisted the idea of significantly decreasing the role of the Commission and its staff as informal arbiters through the administration of the no-action letter process.").

153. *See supra* note 58. *See also* Schwartz, *supra* note 7, at 502 ("Campaign GM won few votes from universities, but it probably achieved its most significant victory on the campuses by virtue of the attention students gave to the problems it raised.").

154. *See Silberstein v. Aetna, Inc*., No. 13–cv–8759, 2014 WL 1424058 (SD NY March 26, 2015) (allegations by plaintiff that company "filed proxy statements with material misrepresenta-

or seek additional information through demands to inspect corporate documents.[155] Companies will confront greater uncertainty in their interaction with shareholders in an environment that may ultimately prove far more costly than the existing regulatory regime under Rule 14a-8.

Limitations on the use of Rule 14a-8 will also interfere with efforts to implement reform through private ordering. Without an understanding of the collective views of shareholders, efforts to induce changes in the governance structure, or to increase the disclosure of social policy matters, will likely be less effective. With the opportunity for private ordering reduced, pressure will increase for broad regulatory reform.[156] Changes may be implemented by the Commission. They also may come from legislative changes. Sarbanes Oxley[157] and Dodd Frank[158] demonstrate that, under the right circumstances, Congress can intervene forcefully into the governance process, whether through substantive provisions or mandatory disclosure.

V. UPDATING RULE 14A-8

Critics understate the value of Rule 14a-8 in the engagement process. They discount the importance of obtaining the views of shareholders on relevant issues. They minimize the role of owners in providing a useful source of ideas and perspectives that can benefit directors.[159] Board meetings can be busy affairs.[160] Proposals provide another mecha-

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tions and omissions in their descriptions of the company's political contribution disclosure practices in response to proposed shareholder resolutions in 2012 and 2013" and seeking to have votes on resolutions voided).

155. *See Louisiana Municipal Police Employee Retirement System v. The Hershey Co.*, C.A. No. 7996-ML, 2013 WL 1776668 (Del. Ch. March 18, 2014) (allowing inspection of documents relating to the use of child labor in the cocoa supply chain).

156. Calls for mandatory disclosure of this type of information have arisen. *See* Comment Letters, *Concept Release on Business and Financial Disclosure Required by Regulation S-K*, Securities Act Release No. 10064 (April 3, 2016), https://www.sec.gov/comments/s7-06-16/s70616.htm. A number of the views are summarized in the comment letter filed by the author of this article. *See* Letter from J. Robert Brown, Jr. to Brent Fields, Securities and Exchange Commission, October 3, 2016, https://www.sec.gov/comments/s7-06-16/s70616-374.pdf.

157. *See* Section 301, Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (adding Section 10A(m) to the Exchange Act to require the adoption of listing standards regulating audit committees of exchange traded companies).

158. *See* Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010) (adding Section 14A of the Exchange Act to require an advisory vote on executive compensation).

159. Thus, for example, proposals have long sought improved diversity on the board of directors. *See supra* notes 12, 88, 92 & 93. Increasing diversity provides any number of benefits to the company. *See The CS Gender 3000: Women in Senior Management*, RESEARCH INSTITUTE, CREDIT SUISSE, Sept. 2014, at 3, https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=8128F3C0-99BC-22E6-838E2A5B1E4366DF ("Some of the findings of our initial report are confirmed – greater diversity in boards and management are empirically associated with higher returns on equity, higher price/book valuations and superior stock price performance."). For a discussion of the systemic factors that explain the lack of board diversity, *see* J. Robert Brown, Jr., *The Demythification of the Board of Directors*, 52 AM. BUS. L. J. 131 (2015).

160. The CEO typically has significant influence in setting the agenda. *See* Brown, *Demythification*, *supra* note 158, at 175-176.

nism for bringing an issue to the attention of directors and earning a place on the board's agenda.

Reducing the role of shareholders in the governance process will not lessen the importance of the issue but will interfere with the communication process, force shareholders to seek alternative avenues of influence, and deprive management of information material to the decision making process. Shareholders have opposed these proposed revisions,[161] viewing the rule as "well functioning."[162] Moreover, the changes will affect all issuers, even those that recognize the value of the information provided by shareholders through the use of Rule 14a-8.[163]

Nonetheless, aspects of the rule could stand updating, something that mostly can be accomplished through staff interpretation rather than amendments to the text. As the last proxy season illustrated, the rule does not adequately deal with the use of images and tables in proposals. The City of Philadelphia Public Employees Retirement System submitted a proposal requesting "full disclosure" of General Electric's "lobbying activities and expenditures."[164] The supporting statement contained, according to company, "a page of images, including detailed charts, graphs, equations, and emoji. . . ."[165]

The company sought exclusion of the table.[166] The staff initially declined to allow omission, resulting in a request for Commission re-

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161. *See* Letter from Jeffrey P. Mahoney General Counsel, Council of Institutional Investors, to The Honorable Jeb Hensarling Chairman, & The Honorable Maxine Waters Ranking Member, Committee on Financial Services, United States House of Representatives, Washington, DC, April 24, 2017, http://www.cii.org/files/issues_and_advocacy/correspondence/2017/Apr%2024%20Letter%20Committee%20on%20Financial%20Services_FINAL.pdf ("CII opposes Section 844 of the Act because it would dramatically restrict the ability of shareowners to file proposals on important governance issues."); *Shareholder Letter*, *supra* note 4 ("Resolutions that are not withdrawn can be voted on by all holders of voting stock – giving the board and management input far beyond that the shareholder(s) who initially filed the resolution."). *See also* Paul Hodgson, *In [defense] of the shareholder resolution process (Part 1)*, April 27, 2017, RESPONSIBLE INVESTOR, https://www.responsible-investor.com/home/article/hodgson_on_choice_act/.

162. *See Shareholder Letter*, *supra* note 4 ("The existing shareholder proposal process under 14a-8 is well functioning - it does not need to be repealed or amended. The process does an effective job of facilitating communication between shareholders and companies. It provides shareholders of all types and sizes, from large pension funds to smaller asset managers and individual investors, an opportunity to communicate directly with corporate boards and management on issues of concern to them and to other shareholders.").

163. *See* Kanzer, *supra* note 17 ("The Business Roundtable is a group of prominent CEOs. If I had the privilege to run a global corporation, I'd want as much input as I could get. Nobody can successfully manage the myriad risks a multinational faces without a broad range of inputs. And nobody can legitimately hope to address the myriad risks a company causes without engaging a broad range of stakeholders."). As a result,

164. *See General Electric*, 2016 WL 7370133 (Feb. 3, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/martinharangozo020317-14a8.pdf

165. In fact, the "image" was a single table titled "Debt/Earnings (DE) Study: GE, JNJ, AAPL." General Electric, 2017 WL 821664 (Feb. 23, 2017), at 15, https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/martinharangozorecon022317-14a8.pdf.

166. 2017 WL 821664 (Feb. 23, 2017).

view.[167] The staff declined to permit the appeal but did reverse the earlier position. Without addressing the systemic issues raised by the use of images, the staff found that the challenged material was "irrelevant" and that there was "a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote."[168]

Addressing the issue through the use of an exclusion for false and misleading disclosure was unclear and, in any event, ad hoc. Prior rulings had focused on images in the context of the word limitation on proposals. The staff should provide more thorough guidance on the use of images in a manner that avoids reliance on uncertain interpretations of the antifraud provisions.

Similarly, staff views with respect to the use of hyperlinks in shareholder proposals should be reconsidered. Proposals have been excluded because they lack adequate definitions of terms considered significant.[169] Given the 500 word limitation on proposals and supporting statements,[170] the ability to include fulsome definitions of all technical terms is limited. At the same time, because the staff considers "only the information contained in the proposal and supporting statement," shareholders are not allowed to supply the definitions through links to the relevant terms.[171] Instead, they must include the definition in the proposal. This often forc-

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167. Although noting that requests for Commission review could be presented for "matters of substantial importance and where the issues are novel or highly complex," the staff declined to do so. 2017 WL 821664. *See also* Rule 17 C.F.R. 202.1(d). The response came not from a staff attorney but from an associate director of the Division. *See* 2017 WL 821664 (letter from staff signed by Associate Director, Legal).

168. 2017 WL 821664 ("Although we are unable to concur in your view that the proposal as a whole may be excluded, there appears to be some basis for your view that GE may exclude the Images (as defined in your February 13, 2017 letter) under rule 14a-8(i)(3). In our view, the Images are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote."). The staff relied on the exclusion in (i)(3) of the rule. 17 C.F.R. 240.14a-8(i)(3).

169. *See Chevron, Inc.*, 2013 WL 207026 (March 15, 2013), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/unitarianuniversalistasso031513-14a8.pdf ("we note that the proposal refers to the 'New York Stock Exchange listing standards' for the definition of an 'independent director,' but does not provide information about what this definition means. In our view, this definition is a central aspect of the proposal. . . . In evaluating whether a proposal may be excluded on this basis, we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.").

170. *See* Rule 14a-8(d), 17 C.F.R. 240.14a-8(d).

171. *Staff Legal Bulletin No. 14G*, DIVISION OF CORPORATION FINANCE, SEC, Oct. 16, 2012, https://www.sec.gov/interps/legal/cfslb14g.htm ("If a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would raise concerns under Rule 14a-9 and would be subject to exclusion under Rule 14a-8(i)(3) as vague and indefinite.").

es shareholders to provide a summary that will be unlikely to fully capture the meaning of the term.[172]

The interpretation entails a certain efficiency. While proposals can include hyperlinks, the staff does not for the most part examine the contents of the URL.[173] This reduces the administrative resources used in the review process. Nonetheless, as a practical matter, the approach does not take into account the widespread availability of the Internet and stands in sharp contrast to the Commission's own efforts to encourage the use of links in SEC filings.[174] At least with respect to definitions of important or technical terms, the staff's interpretation should be more flexible in allowing the use of hyperlinks.

The staff should also require increased disclosure where companies omit the identity of the proponent from the proxy statement. As Erin Stutz discusses in her article, *What's in A Name: Rule 14a-8(l) and the Identification of Shareholder Proponents*, issuers need not include the identity and address of the shareholder submitting the proposal. Nor can the proponent compensate by including the information in his or her supporting statement.[175]

Companies that do not disclose the information must agree in the proxy statement to reveal the identity and address upon request.[176] As Ms. Stutz empirically demonstrates, however, issuers are not required to, and as a result, do not always, make the requests easy by providing specific contact information. The staff should, through interpretive guidance, encourage companies to specify the person or persons inside the

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172. The NYSE definition of independent director, the issue in the *Chevron* no-action letter (*see supra* note 168), consists of over 1200 words. *See* NYSE Listing Standard 303A.03, http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_3_2_6&manual=%2Flcm%2Fsections%2Flcm-sections%2F.

173. The staff has left open the possibility of review where the relevant website contains false and misleading information. *See Staff Legal Bulletin 14G*, *supra* note 170 ("To the extent that the company seeks the exclusion of a website reference in a proposal, but not the proposal itself, we will continue to follow the guidance stated in SLB No. 14, which provides that references to website addresses in proposals or supporting statements could be subject to exclusion under Rule 14a-8(i)(3) if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules, including Rule 14a-9.").

174. *See* Exchange Act Release No. 80132 (March 1, 2017) ("Under the final rules, registrants will be required to include a hyperlink to each exhibit identified in the exhibit index, unless the exhibit is filed in paper pursuant to a temporary or continuing hardship exemption under Rules 201 or 202 of Regulation S-T, or pursuant to Rule 311 of Regulation S-T.").

175. Suggestions have been made to increase the required disclosure from proponents. *See Business Roundtable Proposal*, *supra* note 19 ("Amending the rules to require proponents owning less than 5 percent of the company and proponents by proxy to disclose their motivations, goals, economic interests and holding in the company's securities and any similar proposals they have submitted at other companies (as well as the results of those proposals) would allow other shareholders to make a fully informed decision regarding the interests of the proponent of the proposal."). Presumably making this type of disclosure mandatory would likewise require issuers to prove the identity of the proponent in the proxy statement.

176. *See* Rule 14a-8(l), 17 C.F.R. 240.14a-8(l) ("instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral orwritten request.").

company with the relevant information and to disclose a specific mode of contact, whether an email address or a phone/fax number.

Similarly, the debate over an increase to the ownership thresholds has obscured another area that requires administrative reform. The current iteration of the rule makes proof of ownership and the holding period unnecessarily difficult for street name owners. As Sophie Fritz points out in her article, *Proving Shareholder Eligibility under Rule 14a-8(b)*, owners cannot rely on their account statements but must obtain a letter from the broker responsible for the shares.

Obtaining a letter that meets the requirements of the provision is not always easy. Moreover, to the extent changing accounts during the twelve month holding period, the investor may need to obtain two letters. As she concludes:

> The unnecessary complexity has consequences. The ownership thresholds and holding period seek to ensure that investors submitting proposals have "skin in the game." The excessive complexity in demonstrating these requirements, however, all but guarantees that in some instances shareholders meeting these requirements will have their proposal excluded. Moreover, by requiring a letter from the broker, the Commission has imposed an essential obligation on third parties that do not receive compensation for the service and view the matter a "chore."

A simple solution and important "modernization" would be for the staff to allow beneficial owners to use broker statements, at least those "that establish ownership over a twelve month period."

VI. ADDITIONAL STUDENT PAPERS

This issue of the DU Online Law Review includes student articles that contain other proposed reforms. In the piece by Renee Himes, *Limiting the Limited Number of Shareholder Proposals Under Rule 14a-8*, she addresses the restriction in Rule 14a-8 on the number of proposals that may be submitted by a shareholder to a single company. The Commission imposed a limit of two in 1976. Notwithstanding a lack of evidence of abuse, the Rule was amended in 1983 to allow only a single proposal, one of the clearest examples of a change apparently implemented solely to reduce the volume of proposals.

The notion that the limitation would be a straightforward and objective requirement quickly receded. Companies argued that single proposals were really multiple proposals or that proposals submitted by others should be attributed to the proponent. The result, as she notes, has been "uncertainty and an unnecessary waste of resources." By looking to whether a proposal contains "distinct issues," the test implicates a significant number of proposals. She recommends, among other things, that

the staff adopt a broader interpretation of "unifying themes" in order to reduce the application of the "distinct issues" analysis.

Ashely Kincaid Lloyd in her article, *The Untimely Problem of the Timely Submission of Shareholder Proposals*, writes about the arbitrary nature of the shareholder obligation to submit proposals 120 days before the date of distribution of proxy materials from the prior year. The period, which has lengthened over the life of the rule, was justified by "the need for extra time by companies to consider filing with the Commission and the staff to process the requests." As a result, "important topics that develop shortly before the meeting will not be captured in a shareholder proposal." In an era of email and electronic dissemination of proxy materials, the excessively early deadlines are no longer as necessary and should be shortened.

The article by John Ikard, *The Lack of Adequate Time to Address Deficiencies under Rule 14a-8(f)*, examines the response time for deficiency letters issued by companies to shareholders. The fourteen-day period is often inadequate. More importantly, the staff routinely provides a seven-day period to cure upon a finding that the company provided inadequate notice of a deficiency. The approach raises concerns. As Mr. Ikard notes:

> The use of an extension provides no incentive on the part of companies to improve their deficiency notices. Rule 14a-8(f) requires that issuers issue the notice within fourteen days of receipt of the proposal. The staff has effectively declined to enforce the requirement by excusing inadequate notices. The staff instead uses the no-action process to provide beneficial owners with notice of the deficiency and then provides a cure period not otherwise included in the Rule.

He asserts that a better approach would be to "treat inadequate deficiency notices as the failure to conform to the fourteen-day requirement" and amount to a waiver of any deficiency.

In the article by Donovan Gibbons, *Excluding Proposals in the Absence of Corporate Authority*, he discusses the exclusion applicable to proposals where the company lacks "the power or authority to implement" the matter.[177] As with rules that evolve over time in a piece meal fashion, he notes that the exclusion to some degree overlaps with other exclusions. The provision, he observes, "frequently applies to proposals falling within a separate subsection for those violating the law."[178] He recommends that the provision be clarified through a more narrow interpretation and through an increase in the right of shareholders to "cure" concerns raised under the exclusion.

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177. *See* Rule 14a-8(i)(6), 17 C.F.R. 240.14a-8(i)(6).
178. *See* Rule 14a-8(i)(2), 17 C.F.R. 240.14a-8(i)(2).

Jon Wagner, in his article, *Finding the Grievance in the Personal Grievance Exclusion*, would change the personal grievance exclusion. He notes that the exclusion was added in 1948 when the rule contained few grounds for omitting a proposal. As a result, "[t]he instances . . . where proposals addressing grievances also involved a general abuse of the rule have declined."

Given the long list of exclusions currently included in the rule, such a broad based and subjective provision may no longer be necessary. Moreover, to the extent permitting an analysis of subjective motivation, the staff ought not to be placed in the role of fact finder. At most the exclusion should be "narrowly tailor[ed] . . . to apply only to those proposals that objectively evince a grievance or promote a benefit not in common with other shareholders." He suggests language to achieve this result.