ARTICLE

THE FORTUNATE DEMISE OF SEC STAFF LEGAL BULLETIN NO. 14L

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In 2021, the SEC published its now rescinded Staff Legal Bulletin No. 14L ("the 2021 Bulletin"), revising its interpretations of the "ordinary business" and "economic relevance" exclusions under Rule 14a-8. This Article contends that the post-Bulletin landscape has proven undesirable. It empirically shows that environmental and social ("E & S") shareholder proposals—including anti-E&S proposals—surged in response. Between 2022 and 2024 alone, E & S proposals accounted for 40% of all such filings in Russell 3000 companies over the entire 2014-2024 period, generating an estimated $23.3 million in additional processing costs for companies during that three-year window. Despite their volume, these proposals were largely unpopular among shareholders.

The Article argues that rescinding the 2021 Bulletin was a necessary corrective—but not a sufficient safeguard. Although non-binding, SEC Bulletins exert significant influence on market behavior. Decisions about whether to facilitate or constrain the submission of E & S proposals, however, should not rest with the SEC staff's discretion, particularly when such interpretative shifts are achieved through non-binding acts and carry large systemic consequences. Simply rescinding the 2021 Bulletin leaves open the possibility of future reversals, and is, therefore, insufficient to prevent future overuse of Rule 14a-8. To provide more durable protection, this Article proposes giving shareholders greater control over E & S resolutions—either by voting on

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whether such proposals should be solicited, or by allowing companies to adopt anti-E&S bylaw provisions. These mechanisms would preserve shareholder choice while reducing the costs and uncertainty generated by staff-driven interpretative changes.

INTRODUCTION

In law and in policy, not all deaths are to be mourned. Some rules, doctrines or interpretations deserve to end. Some are ill-conceived; others, though well-intentioned, produce unintended distortions. In such cases, their repeal marks not a loss, but a liberation—a fortunate demise. This Article examines such a fortunate demise in the context of shareholder proposals (or resolutions), one of the items that shareholders in corporate America frequently vote on. Shareholder proposals are commonly submitted under Rule 14a-8 of the Securities Exchange Act of 1934 ("Rule 14a-8" or the "Rule"),[1] which requires companies to include qualifying proposals in their proxy materials unless a valid exclusion applies.

Two grounds for exclusion, among the thirteen listed in the Rule, are the ordinary business exclusion (Rule 14a-8(i)(7)) and the economic relevance exclusion (Rule 14a-8(i)(5)). The former allows exclusion of proposals relating to the company's ordinary business operations, unless they raise a significant policy issue. The latter allows exclusion of proposals that are economically insignificant—that is, involving issues below the Rule's financial thresholds—and not significantly related to the company's business.

1. 17 C.F.R. § 240.14a-8 (2025).

Because the Rule is not self-executing, the SEC plays a central role in interpreting it. Over the years, the SEC has issued both formal (mostly via adopting releases) as well as informal (via no-action letters and Staff Legal Bulletins) guidance to clarify specific aspects of the Rule, including how exclusions should be applied, with the ultimate objective of encouraging resolution and preventing litigation.

In 2021, the SEC published its now rescinded Staff Legal Bulletin No. 14L ("the 2021 Bulletin"),[2] amending its interpretations of the ordinary business exclusion and of the economic relevance exclusion. As far as the ordinary business exclusion is concerned, the Bulletin updated the SEC's approach to the "significant policy exception." Prior to the 2021 Bulletin, the SEC staff evaluated whether a proposal raised a significant policy issue using a company-specific approach. The 2021 Bulletin moved away from this approach and instead focused on whether the issues raised by the proposal had a broad societal impact, transcending the ordinary business of the company. The 2021 Bulletin also impacted the SEC's interpretation of the economic relevance exclusion: before 2021, the SEC assessed the proposal's significant relation to the company's business using a company-specific approach; the 2021 Bulletin, however, departed from this approach, stating that even economically insignificant proposals could not be excluded if they raised issues of broad social or ethical concern related to the company's business.

In sum, the 2021 Bulletin narrowed the scope of both exclusions, making it harder for companies to omit shareholder proposals. This Article tests the hypothesis that, by facilitating the submission of shareholder resolutions on environmental and social ("E & S") issues, the 2021 Bulletin contributed to an increase in the number of such resolutions in U.S. public companies. As the 2021 Bulletin was rescinded in February of 2025, this is a timely moment to assess its impact on market participants' behavior, its broader implications and whether its rescission was desirable. Such analyses are relevant not only to inform future SEC stances in the area, but also to examine whether specific policy measures targeted for E & S resolutions are necessary, especially given the

2. *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14l-cf [https://perma.cc/CMV8-FKH6].

rise of not only E & S resolutions but also of proposals attempting to counter E & S initiatives ("anti-ESG" or "anti-E&S" proposals).

This Article argues that the post-2021 landscape has proven largely undesirable. It shows that the submission of large volumes of proposals on E & S issues, including anti-E&S proposals, surged in response to the 2021 Bulletin. The empirical data presented in this Article, however, indicates that the E & S proposals submitted after the publication of the 2021 Bulletin were largely unpopular amongst shareholders. The significant increase in the number of E & S resolutions was associated with a substantial decrease in the average support given by shareholders, signaling that many of the post-2021 proposals were not considered worthy by a significant portion of shareholders. The post-2021 landscape was also characterized by a decline in the number of resolutions that received support from a majority of votes cast, confirming that shareholders found virtually all of them problematic. Overall, it is unlikely that these resolutions have stimulated managerial action.

At the same time, facilitating the submission of E & S resolutions is not without costs. First, it empowers unconventional activists—organizations that, unlike traditional investors, are not seeking an economic return but instead pursue social or political goals through corporate channels. Because these activists lack the traditional financial incentives or the broad range of stewardship tools available to institutional investors, they often rely on the submission of radical shareholder proposals as their primary means of influence. Second, shareholder proposals have the potential of depleting corporate resources (for example, time, money, and managerial attention): such costs increase as the number of frivolous proposals increases. Third, by making it more difficult to exclude E & S proposals, the 2021 Bulletin reduced the likelihood of companies obtaining no-action letters and, consequently, increased the risk of litigation for companies choosing to omit a shareholder proposal without a no-action assurance from the SEC staff. Fourth, many E & S initiatives may be value-destroying. To the extent that managers surrender to such initiatives, facilitating E & S resolutions can eventually lead to the destruction of economic value. To the extent that they do not, the company is still incurring costs for processing the proposals.

Therefore, the recent rescission of the 2021 Bulletin was a necessary corrective—but not a sufficient safeguard. In fact, the analysis also indicates that, despite their non-binding nature, SEC Bulletins exert a significant influence on the behavior of market participants. Decisions about whether to facilitate or constrain the submission of E & S proposals, however, should not rest with SEC staff's discretion, particularly when such interpretative shifts carry large systemic consequences and are achieved through non-binding acts that, unlike rulemaking, are not subject to requirements such as notice and comment. Simply rescinding the 2021 Bulletin leaves open the possibility of future reversals and is, therefore, insufficient to prevent future overuse of Rule 14a-8.

To provide more durable protection, this Article proposes policy measures that, collectively or individually, would severely restrict, regardless of future SEC staff's stances, the ability of shareholders—both those pro-E&S and anti-E&S—to overuse Rule 14a-8. A first option is to shift quantifiable direct costs from the company to the proponent for resolutions that do not reach a minimum percentage of votes cast in favor. A second possibility is to tighten the resubmission exclusion, in order to expand its scope of application and reduce the number of proposals potentially being included in the company's proxy materials. A third, more radical, option is to increase the ownership thresholds necessary to submit a proposal under the Rule. However, if introduced for all precatory resolutions—regardless of whether they deal with E & S or governance matters—such measures would unreasonably constrain shareholders' ability to bring proposals under Rule 14a-8. If, on the other hand, such measures were implemented with regard to E & S resolutions only, they could penalize E & S resolutions over governance-related ones even in companies with more socially responsible shareholders, which may well regard E & S proposals as something to be incentivized, rather than hindered.

To avoid these results, the Article argues that the most appropriate response would be to amend securities law—and, particularly, the Securities Exchange Act of 1934—to allow shareholders more control over E & S resolutions. This objective could be attained through two distinct solutions. Under the first approach, shareholders would be able to decide whether they want the company to solicit E & S resolutions. The second

approach would allow companies to introduce in their bylaws a provision preventing E & S resolutions from being submitted.

This Article is organized as follows. Part II examines the regulatory framework governing shareholder proposals and its evolution in light of the SEC staff's interpretative efforts, particularly those promoted through its Bulletins. This Part also estimates the likely impact of the 2021 Bulletin and, based on such analysis, sets a research hypothesis. Part III tests the research hypothesis against empirical evidence by collecting data on the volume of E & S shareholder proposals submitted in Russell 3000[3] companies before and after the publication of the 2021 Bulletin. Furthermore, it also tests the claim that the 2021 Bulletin unleashed the submission of high-quality E & S proposals. The analysis is conducted by collecting data on the average votes in support received by E & S resolutions before and after 2021, as well as on the number of proposals that received majority support. Part IV discusses the costs associated with facilitating the submission of E & S precatory resolutions. Building on the analyses conducted in the previous Parts, Part V assesses whether rescission of the 2021 Bulletin was desirable. It also discusses the desirability of the current state of affairs—with the SEC staff's informal and non-binding interpretations significantly influencing E & S resolutions submission rates—and explores the policy implications of my study. Part VI concludes.

I. THEORY

A. Shareholder Resolutions

1. The Regulatory Framework: Rule 14a-8

Most shareholder proposals at U.S. companies are put forward based on Rule 14a-8,[4] also known as the "Town Hall

3. The Russell 3000 index measures the performance of the largest 3,000 U.S. companies—selected by market capitalization—and represents roughly 98% of the investable U.S. equity market. Therefore, it provides a comprehensive sample for observing patterns in shareholder proposals. *See* FTSE RUSSELL, INDEX FACTSHEET: RUSSELL 3000 INDEX 1 (2025), https://research.ftserussell.com/Analytics/FactSheets/Home/DownloadSingleIssue?issueName=US3000USD&IsManual=True [https://perma.cc/JST5-PGTM].

4. Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2025).

rule,"[5] first introduced in 1942.[6] Under the Rule, issuers with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and issuers that are registered under the Investment Company Act of 1940 are required to include eligible proposals—those meeting the procedural and eligibility criteria outlined in Rule 14a-8—in their proxy statement for a shareholder meeting.[7] The inclusion in the proxy card is mandatory, unless the company is able to exclude the proposal based on one of the thirteen grounds listed in the Rule.[8]

The main advantage of putting forward a shareholder resolution under Rule 14a-8 is that the proponent will be able to present its proposal to all shareholders without bearing the significant costs—such as, for example, printing and mailing the materials to the other shareholders—that this process would otherwise entail.[9] Indeed, without Rule 14a-8 the only alternative for shareholders intending to implement changes would be to

5. Harwell Wells, "*Corporation Law Is Dead*": *Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 340 (2013).

6. According to one account, it was the actions of one investor—Lewis Gilbert, frustrated by the chairman's dismissal of shareholder questions at a Consolidated Gas Co. meeting in 1932—and his brother that contributed to the SEC's adoption of Rule 14a-8. ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 206 (5th ed. 2011).

7. On the Rule and its evolution see, e.g., J. Robert Brown Jr., *The Evolving Role of Rule 14A-8 in the Corporate Governance Process*, 93 DENV. L. REV. F. 151 (2016); James D. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating A Corporate Public Square*, 3 COLUM. BUS. L. REV. 1147 (2021); Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425 (1984); Virginia J. Harnisch, *Rule 14a-8 After Reagan: Does It Protect Social Responsibility Shareholder Proposals?*, 6 J.L. & POL. 415 (1990); Herbert Alan Gocha, Jr., *The 1980's Amendments to Shareholder Proposal Rule 14a-8: A Final Damper on Dissent?*, 17 U. TOL. L. REV. 411 (1986); Alan Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879 (1994); Frank D. Emerson & Franklin Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807 (1952).

8. *See* Sections I.C.1 and I.C.2 on the ordinary business exclusion and Section I.D. on the economic relevance exclusion.

9. *See* Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 709 (2016) ("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.").

conduct their own (costly) proxy contest.[10] The Rule allows proponents to shift such costs to the company.

To be eligible to submit a proposal under the Rule, shareholders must meet a number of requirements,[11] including specific ownership thresholds. Following the amendments that came into effect in 2020,[12] the Rule now follows a tiered approach. Shareholders today may request the inclusion of a resolution in the company's proxy card if they possess holdings for at least (*i*) $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years; (*ii*) $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or (*iii*) $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year.[13] Importantly, for the purpose of meeting such thresholds, shareholders cannot aggregate their holdings with those of other shareholders.[14]

Rule 14a-8 proposals are typically precatory—that is, they include the proponent's "recommendation or requirement that the company and/or its board of directors take action."[15] Despite their precatory nature, these proposals can still have a significant influence on public corporations,[16] especially if they receive

10. *Id.* at 708–09.

11. *See* 17 C.F.R. § 240.14a-8(b)(1)(ii) (2025) (requiring a written statement of intent to hold a requisite amount of securities); *id.* § 240.14a-8(b)(1)(iii) (requiring a written statement indicating willingness to meet with a company after submission of the shareholder proposal); *id.* § 240.14a-8(b)(1)(iv) (delineating requirements of written documents to be shared with shareholder proposal).

12. *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-89964, 85 Fed. Reg. 70240 (Nov. 4, 2020).

13. *See* 17 C.F.R. § 240.14a-8(b)(1)(i) (2025). The alternative condition of eligibility set forth in paragraph (b)(1)(i)(D) of the Rule expired on January 1, 2023.

14. 17 C.F.R. § 240.14a-8(b)(1)(vi) (2025). Indeed, the SEC believed that allowing aggregation for the purpose of meeting the threshold would undermine the threshold's objective of ensuring that the proponent had sufficient "skin in the game." *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-87458, 84 Fed. Reg. 66458, 66464 (Nov. 5, 2019) (final rule issued at 84 Fed. Reg. 66458 on Dec. 4, 2019).

15. 17 C.F.R. § 240.14a-8(a) (2025).

16. *See, e.g.*, Usha Rodrigues, *The Hidden Logic of Shareholder Democracy* 4 (U. Ga. Sch. of L., Working Paper No. 2024-2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4755251 [https://perma.cc/7V7U-X2FB].

substantial support from the other shareholders. Indeed, although historically shareholders have sided with managers' recommendations to vote against other shareholders' proposals, which has traditionally led to very low rates of support for these resolutions,[17] in more recent times the trend seems to have reversed, with more of them receiving higher rates of support.[18]

2. Shareholder Proposals as an Activist Tactic

Precatory proposals are a key tool through which shareholders express concerns and influence board action.[19] When the Rule was first introduced, U.S. corporations were largely characterized by dispersed ownership, as described in the Berle-Means framework,[20] and proposals were primarily submitted by small groups of individual activists—often regarded as the founders of shareholder activism[21]—known as corporate gadflies,[22] who focused on issues like executive compensation and cumulative voting.[23] In the 1960s, social activists joined this small cohort,[24] using precatory resolutions to promote broader societal

17. Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 BOSTON U. L. REV. 1301, 1309 (2019).

18. *See, e.g.*, GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2018 PROXY SEASON 1 (2018), https://www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf [https://perma.cc/54YL-LNTS]; Fairfax, *supra* note 17, at 320 (explaining that "there has been significant growth in shareholder support for those proposals."); Randall S. Thomas & James F. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FIN. 368 (2007) (reporting higher level of shareholder support for shareholder proposals in the 2002, 2003, and 2004 proxy seasons and, as a consequence of this increased support, higher board responsiveness to the requests called for by the proponents in their resolutions).

19. *See, e.g.*, Rodrigues, *supra* note 16, at 4.

20. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 47–65 (rev. ed. 1967).

21. MONKS & MINOW, *supra* note 6, at 206.

22. Richard Marens, *Inventing Corporate Governance: The Mid-Century Emergence of Shareholder Activism*, 8 J. BUS. & MGMT. 365, 366 (2002).

23. MONKS & MINOW, *supra* note 6, at 206.

24. *See, e.g.*, Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1083 (2015); MONKS & MINOW, *supra* note 6, at 206.

concerns, often disconnected from corporate value creation.[25] At that point, shareholder proposals had gained little traction and most had failed to receive significant shareholder support.[26] Gadflies lacked influence,[27] and until 1970 companies could still exclude proposals "of a general political, social, or economic nature".[28] For decades, the Rule "amounted to little more than nuisance for corporate management and a slight burden on the SEC staff."[29]

The progressive shift of corporate ownership in the hands of institutional investors that began in the 1980s challenged the assumptions of the Berle-Means theory[30] and transformed the shareholder landscape, opening different prospects for Rule 14a–8 resolutions. These investors—now holding larger stakes and better-resourced—began to use Rule 14a-8 more effectively. By the late 1980s, they were submitting proposals on a wide array of issues, such as staggered boards, redemption of poison pills, and supermajority voting rules.[31]

This trend has only accelerated. The growth and increasing sophistication of institutional investors have made shareholder resolutions a mainstream mechanism of stewardship, not limited to gadflies or social activists.[32] Pension funds and other long-term investors now regularly submit proposals as part of their

25. Wells, *supra* note 24, at 1083.

26. Palmiter, *supra* note 7, at 883 ("[a]s of 1981, only two contested shareholder proposals of the thousands submitted had ever won"). *See also* Bainbridge, *supra* note 9, at 709.

27. Wells, *supra* note 24, at 1082.

28. *Id.*, at 1083 (citing JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 269–70 (3d ed. 2003)).

29. Palmiter, *supra* note 7, at 883.

30. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 874 (2013).

31. Palmiter, *supra* note 7, at 883.

32. Bainbridge, *supra* note 9, at 709 ("[p]roponents are no longer just gadflies and social justice warriors but now include major institutional investors such as hedge funds and both union and government pension funds.").

corporate governance strategies.[33] Similarly, activist hedge funds have embraced shareholder resolutions as a key element of their campaigns.[34]

B. Shareholders' Resolutions on Environmental and Social Issues

The submission of shareholder proposals on E & S issues is not a new phenomenon. As discussed,[35] it had already emerged in the 1960s, although such proposals were, at least initially, put forward only rarely and by a limited number of social activists. However, more recent times have marked a significant rise in the number of E & S proposals, which now account for the majority of the total number of shareholder resolutions submitted at U.S. companies.[36]

This growth can be attributable to at least two factors. First, the rise of sustainable investing. For example, according to the US SIF Trends, in 2020 $17.1 trillion worth of US-domiciled assets under management (AUM) was managed using sustainable investing strategies, compared to the $12 trillion at the start of 2018[37] and this trend is set to continue.[38] The commitment to

33. *See, e.g.*, Diane Del Guercio & Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism*, 52 J. FIN. ECON. 293, 294 (1999); Andrew K. Prevost & Ramesh P. Rao, *Of What Value Are Shareholder Proposals Sponsored by Public Pension Funds*, 73 J. BUS. 177 (2000). *See also* Morris Mitler, Sean Collins, & Dorothy Donohue, *Funds and Proxy Voting: Who Submits Shareholder Proposals?* (Nov. 6, 2018), https://www.ici.org/viewpoints/view_18_proxy_proponents [https://perma.cc/5X3C-5SC7] (according to whom in the 2017 proxy season state and local pension funds had filed approximately 21% of the total number of shareholder resolutions).

34. *See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1745 (2008).

35. *Supra* Section I.A.2.

36. Subodh Mishra, *U.S. Shareholder Proposals: A Decade in Motion*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 18, 2024), https://corpgov.law.harvard.edu/2024/11/18/u-s-shareholder-proposals-a-decade-in-motion/ [https://perma.cc/Z62Y-X574].

37. U.S. SIF FOUND., REPORT ON US SUSTAINABLE INVESTING TRENDS 2020 1 (2020), https://www.ussif.org//Files/Trends/2022/Trends%202022%20Executive%20Summary.pdf [https://perma.cc/9GMH-YUB3].

38. *See US Sustainable Investing Trends 2024/2025 – Executive Summary*, U.S. SIF FOUND. (Dec. 17, 2024), https://www.ussif.org/research/trends-reports/us-sustainable-investing-trends-2024-2025-executive-summary [https://perma.cc/BDQ3-J9C5] (explaining that, despite political turmoil and regulatory scrutiny, "73% of survey respondents expect the sustainable investment market to grow significantly in the next 1-2 years, driven by client demand, regulatory evolution, and advances in data analytics.").

sustainable investing often translates into an integration of E & S criteria also in investor advocacy activities.

Second, even investors that are purely focused on corporate profitability and that are not managing their assets based on sustainable strategies might submit E & S resolutions. In fact, far from being the exclusive realm of social justice activists, often disinterested in the financial performance of the company,[39] E & S precatory proposals carry several advantages and can be filed with the objective of improving companies' long-term financial value, based on an enlightened shareholder value paradigm.[40] E & S resolutions might, for example, be helpful in monitoring management on non-financial issues that are material to the company's business,[41] including by improving non-financial risks management[42] as well as transparency on the disclosure of non-financial issues.[43] Long-term investors might also file such resolutions to address what they view as managers' excessive short-termism.[44]

The 2021 Bulletin's reinterpretation of the exclusion grounds under Rules 14a-8(i)(7) and (i)(5) may have further contributed to

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39. *See, e.g.*, *infra* Section III.A.

40. Consistent with this, 77% of the respondents to a survey recently conducted by Georgeson declared to prioritize ESG issues with financial relevance. GEORGESON, GLOBAL INSTITUTIONAL INVESTOR SURVEY 34 (2024), https://www.georgeson.com/us/insights/global-institutional-investor-survey-2024-report (on file with the *Fordham Journal of Corporate & Financial Law*).

41. *See, e.g.*, David Freiberg, Jean Rogers & George Serafeim, *How ESG Issues Become Financially Material to Corporations and Their Investors* (Harv. Bus. Sch., Working Paper No. 20-056, 2019), https://www.hbs.edu/ris/Publication%20Files/20-056_1c21f28a-12c1-4be6-94eb-020f0bc32971.pdf [https://perma.cc/C57F-NUWL].

42. *See, e.g.*, Caroline Flammer, Michael W. Toffe & Kala Viswanathan, *Shareholder Activism and Firms' Voluntary Disclosure of Climate Change Risk*, 42 STRAT. MGMT. J. 1850, 1851–52 (2021).

43. For example, Vanguard is ready to support proposals that "[address] a shortcoming in the company's current disclosure relative to market norms or to widely accepted investor-oriented frameworks . . ." *See* VANGUARD, PROXY VOTING POLICY FOR U.S. PORTFOLIO COMPANIES 11 (2025), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_proxy_voting_policy_2025.pdf [https://perma.cc/KT3V-2TNK].

44. Henk Berkman, Jonathan Jona, Joshua Lodge & Joshua Shemesh, *The Value Impact of Climate and Non-Climate Environmental Shareholder Proposals*, 89 J. CORP. FIN. 1 (2024).

this rise in E & S proposals, potentially pushing their volume beyond optimal levels.

C. The Evolution of Rule 14a-8(i)(7)

As mentioned,[45] inclusion of a shareholder proposal in the company's proxy materials is mandatory under Rule 14a–8, unless the company may omit it under one of the Rule's thirteen grounds of exclusions.[46] One of these is the so called ordinary business exclusion under Rule 14a-8(i)(7). The ordinary business exclusion, however, was affected by the 2021 Bulletin.[47] In this Part, I provide an overview of the regulatory framework on the ordinary business exclusion and then analyze the SEC staff's approach in interpreting it under the 2021 Bulletin.

1. The Ordinary Business Exclusion

The original version of the Rule contained no exclusions: it simply required management to include any proposal submitted with reasonable notice by a qualified shareholder, so long as the proposal was "a proper subject for action by the security holders".[48] The ordinary business exclusion was introduced in 1954[49] to allow exclusion of proposals on matters falling in the directors' competence,[50] thereby preserving state laws' allocation of authority between management and shareholders.[51]

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45. *Supra* Section I.A.1.

46. *See* 17 C.F.R. § 240.14a-8(i)(1)–(13) (2025).

47. *See infra* Section I.C.2.c.

48. *See* Solicitation of Proxies, Exchange Act Release No. 3347, 7 Fed. Reg. 10655, 10656 (Dec. 22, 1942).

49. *See* Solicitation of Proxies, 19 Fed. Reg. 246 (Jan. 14, 1954) ("[u]nder the provisions of the amended Rule X-14A-8(c)(5), management would also be permitted to omit from its proxy material a proposal which is a recommendation or request with respect to the conduct of the ordinary business operations of the issuer.").

50. *See, e.g.*, Palmiter, *supra* note 7, at 892.

51. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, Investment Company Act Release No. IC-22828, 62 Fed. Reg. 50682, 50683 (Sept. 18, 1997) (explaining that "[t]he "ordinary business" exclusion is based in part on state corporate law establishing spheres of authority for the board of directors on one hand, and the company's shareholders on the other."). *See also* Reilly S. Steel, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1558–59 (2016).

Today, Rule 14a-8(i)(7) permits exclusion of proposals dealing "with a matter relating to the company's ordinary business operations".[52] The rationale is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting."[53] SEC guidance applies a two pronged assessment,[54] involving the subject matter of the resolution and the extent to which the proposal seeks to micromanage the company. On the first prong, the SEC has noted that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight."[55] On the second, the proposal should not attempt to go too deeply "into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."[56]

2. The Evolution of the Ordinary Business Exclusion: The Interpretative Role of the SEC

The SEC plays an important role in interpreting Rule 14a-8 and its exceptions, including the ordinary business exclusion. Because the Rule is not self-executing,[57] the SEC has developed mechanisms to provide guidance and reduce litigation.[58]

Interpretations are conveyed both formally and informally. Formal interpretations appear in "adopting releases" issued in connection with Rule amendments.[59] Informal guidance is

52. 17 C.F.R. § 240.14a-8(i)(7) (2025).

53. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, Investment Company Act Release No. IC-23200, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

54. *Id.*; *see also* Renee Jones, Dir. of Div. of Corp. Fin., SEC, The Shareholder Proposal Rule: A Cornerstone of Corporate Democracy (Mar. 8, 2022), https://www.sec.gov/newsroom/speeches-statements/jones-cii-2022-03-08 [https://perma.cc/V4P5-424L].

55. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. at 29108.

56. *Id.* This concern arises in situations where proposals "[involve] intricate detail, or [seek] to impose specific time-frames or methods for implementing complex policies." *Id.*

57. Jones, *supra* note 54.

58. *Id.*

59. Steel, *supra* note 51, at 1555.

provided through informal staff opinions in no-action letters and Staff Legal Bulletins.[60] No-action letters respond to company requests to exclude shareholder proposals under Rule 14a-8(j), which requires companies wishing to omit a shareholder proposal to file reasons justifying exclusion. These requests are addressed to the Division of Corporation Finance. If the Division issues a no-action response, it indicates that the staff will not recommend enforcement—effectively allowing exclusion, though the letters are not legally binding.[61] Staff Legal Bulletins, also non-binding, outline the SEC "staff's views regarding various aspects of the federal securities laws and SEC regulations."[62] These Bulletins serve as a key tool for communicating interpretative positions and shifts in enforcement priorities.

a. The Significant Policy Exception

Proposals addressing ordinary business matters are not, however, subject to exclusion to the extent that they involve a "significant policy" issue. This was not always the case. At one time, the SEC allowed for the exclusion of proposals with "significant policy, economic or other implications."[63] But with the significant social exception, first articulated by the Commission in 1976, the SEC started viewing proposals of this nature as outside the scope of a company's business operations.[64] In other words, proposals that focused on "sufficiently significant social policy issues . . . generally would not be considered to be excludable, because the proposals would transcend the day-to-day

60. On the inefficiencies of such a process, see J. Robert Brown, Jr., *Shareholder Proposals and the Limits of Encrypted Interpretations*, 63 VILL. L. REV. 35 (2018).

61. *See, e.g.*, Statement of Informal Proposals for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 34-12599, Public Utility Holding Company Act Release No. 35-19603, Investment Company Act Release No. IC-9344, 41 Fed. Reg. 29989, 29990 (July 7, 1976).

62. *See Rule 14a-8 Staff Legal Bulletins*, U.S. SEC. & EXCH. COMM'N (Feb. 12, 2025), https://www.sec.gov/rules-regulations/shareholder-proposals/rule14a-8-staff-legal-bulletins [https://perma.cc/WU6Y-6DJM].

63. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-12999, Public Utility Holding Company Act Release No. 35-19771, 41 Fed. Reg. 52994 (Nov. 22, 1976).

64. *Id.*

business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."[65]

b. The SEC Approach Prior to the 2021 Bulletin

Prior to publishing the 2021 Bulletin, to determine whether a policy issue was "significant" (and, hence, could not be excluded), the SEC would take a company-specific approach, looking at whether the issue was relevant for the company. In particular, in its Legal Bulletin No. 14K the SEC explained that, historically, proponents and companies had focused excessively on the general importance of the issues raised by proposals, instead of considering whether such issues went beyond the day-to-day operations of the specific company.[66]

Bulletin 14K clarified that the SEC staff would no longer deem "particular issues or categories of issues as universally 'significant.'"[67] Instead, it adopted a company-specific approach: the same issue could justify exclusion for one company but not for another. Companies seeking to exclude proposals under Rule 14a-8(i)(7) would thus need to explain, in their no-action requests, why

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65. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, Investment Company Act Release No. IC-23200, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

66. *See* SEC Staff Legal Bulletin No. 14K (CF) (Oct. 16, 2019), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/staff-legal-bulletin-14k-shareholder-proposals [https://perma.cc/CAZ9-726N] (explaining that "[i]n the past, proponents and companies have often focused on the overall significance of the policy issue raised by the proposal, instead of whether the proposal raises a policy issue that transcends the particular company's ordinary business operations."). The SEC staff had already adopted a company-specific approach in Legal Bulletin No. 14E, stating that it would focus "on the subject matter to which the risk pertain[ed] or that [gave] rise to the risk" rather than whether the proposal involved risk evaluation. After this shift, proposals addressing significant policy issues were no longer automatically excludable under Rule 14a-8(i)(7) merely because they involved the evaluation of risk. Instead, exclusion turned on the subject matter of the proposal, making non-excludable proposals whose subject matter transcended day-to-day business, raised policy issues so significant that it would be appropriate for a shareholder vote, and that had a sufficient nexus to the company. *See* SEC Staff Legal Bulletin No. 14E (CF) (Oct. 27, 2009), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14e-cf [https://perma.cc/GLP5-SZYY].

67. *See* SEC Staff Legal Bulletin No. 14K (CF), *supra* note 66.

they lacked significance for the company. If they failed to do so, the proposal would not qualify for exclusion.[68]

c. The SEC's Realigned Approach Under the 2021 Bulletin

The 2021 Bulletin significantly changed the interpretation. The SEC recognized that, when determining whether to exclude a shareholder proposal that dealt with a matter relating to the company's ordinary business operations, the SEC placed "an undue emphasis . . . on evaluating the significance of a policy issue to a particular company at the expense of whether the proposal focuse[d] on a significant social policy."[69] According to the agency, this approach produced two costs.[70] First, it forced the SEC staff to engage in factual considerations.[71] Second, using a company-specific approach yielded inconsistent and unpredictable results.[72] In fact, since each proposal was evaluated based on how it impacted a particular company, different companies could receive different decisions for similar issues, depending on their unique circumstances. This inconsistency could partly undermine the effectiveness of the SEC staff's informal guidance, as it did not provide clear and predictable guidelines for companies, directors, and shareholders.

With the 2021 Bulletin, the SEC abandoned its company-specific perspective and restored the significant policy exception

68. *Id.*

69. SEC Staff Legal Bulletin No. 14L (CF), *supra* note 2.

70. *Id.*

71. This is particularly true when considering that, in one of its prior Bulletins, the SEC had explicitly encouraged companies to provide "well-developed discussion[s] of the board's analysis of whether the particular policy issue raised by the proposal is . . . sufficiently significant in relation to the company", as reporting such discussions could "assist the staff in evaluating a company's no-action request." *See* SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017); SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018); SEC Staff Legal Bulletin No. 14K (CF), *supra* note 66.

72. SEC Staff Legal Bulletin No. 14L (CF), *supra* note 2 ("focusing on the significance of a policy issue to a particular company has drawn the [SEC] staff into factual considerations that do not advance the policy objectives behind the ordinary business exception. We have also concluded that such analysis did not yield consistent, predictable results.").

as originally formulated in 1976.[73] Under this realigned approach, the SEC conducted its assessment focusing on the "social policy significance" of the issue raised with the resolution. This evaluation was carried out by examining whether "the proposal raise[d] issues with a broad societal impact, such that they transcend the ordinary business of the company."[74]

D. The Economic Relevance Exception

Alongside changes to the interpretation of the ordinary business exclusion, the 2021 Bulletin also reinterpreted Rule 14a-8(i)(5), the economic relevance exception.[75] Under its current version—the result of amendments proposed in 1982[76] and adopted in 1983[77]—the exception allows exclusion of proposals relating to operations that account (*i*) for less than 5% of the company's total assets at the end of its most recent fiscal year, and (*ii*) for less than 5% of its net earnings and gross sales, provided that the proposal is not otherwise significantly related to the company's business.[78]

Two years after the 1983 amendments, the District Court for the District of Columbia rendered its decision in *Lovenheim v. Iroquois Brands, Ltd.*[79] The Court held that a proposal may not be

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73. *See supra* Section I.C.2.a. The 1976 approach was reaffirmed in 1998. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, Investment Company Act Release No. IC-23200, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

74. SEC Staff Legal Bulletin No. 14L (CF), *supra* note 2.

75. On the exclusion, see Kathryn Kaoudis, *SEC Rule 14A-8(I)(5): Is it Still Relevant?*, 93 DENV. L. REV. F. 251 (2016).

76. *See* Proposed Amendments to Rule 14a-8, Exchange Act Release No. 34-19135, Public Utility Holding Company Act Release No. 35-22666, Investment Company Act Release No. IC-12734, 47 Fed. Reg. 47420, 47428 (Oct. 26, 1982).

77. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-20091, 48 Fed. Reg. 38218 (Aug. 23, 1983); *see, e.g.*, Leila Sadat-Keeling, *The 1983 Amendments to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy?*, 59 TUL. L. REV. 161, 183–84 (1984).

78. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, 48 Fed. Reg. at 38223.

79. 618 F. Supp. 554 (D.D.C. 1985). The case raised the issue of a shareholder resolution relating to the ethical implications of force-feeding geese to produce *pâté de foie gras*, which the company exported. The company sought to exclude the proposal

excluded under Rule 14a-8(i)(5) solely due to its economic insignificance if it raises important ethical or social concerns significantly related to the company's business. This led the SEC to adopt a narrow interpretation of Rule 14a-8(i)(5), rarely granting no-action relief on this basis.[80]

This changed in 2017 with Legal Bulletin No. 14I in which, just as for the ordinary business exclusion, the SEC adopted a company-specific approach,[81] hence expanding the scope of the economic relevance exception. However, the 2021 Bulletin reversed course, signaling a return to *Lovenheim*'s reasoning, and reaffirming that proposals raising "issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5)."[82] This once again narrowed the exception's scope, reducing companies' ability to exclude proposals under Rule 14a-8(i)(5).

E. Reactions to the 2021 Bulletin

The 2021 Bulletin was met with mixed reactions from policy-makers, academics, legal practitioners, institutional investors, and nonprofits.

Many welcomed the change. Former SEC Chair Gary Gensler praised it for increasing clarity and restoring consistency with the SEC's original approach.[83] Support also came from the

based on the economic relevance exception, arguing that *pâté de foie gras* sales represented none of the company's net earnings (as the company had registered loss for such sales) and only .05% of the company's assets. The plaintiff—the shareholder-proponent—filed a motion for a preliminary injunction to prevent the company from excluding the proposal from its proxy materials.

80. SEC Staff Legal Bulletin No. 14I (CF), *supra* note 71.

81. *Id.*

82. SEC Staff Legal Bulletin No. 14L (CF), *supra* note 2.

83. *See* Gary Gensler, Chairman, Sec. & Exch. Comm'n, Securities and Exchange Commission, Chair Gary Gensler's Statement Regarding Shareholder Proposals: Staff Legal Bulletin No. 14L (Nov. 3, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-statement-shareholder-proposals-14l [https://perma.cc/UQV8-LM2E] ("[t]oday's bulletin will provide greater clarity to companies and shareholders on these matters, so they can better understand when exclusions may or may not apply. The updated staff legal bulletin, which replaces three previously issued bulletins, is consistent with the Commission's original intention.").

Shareholder Rights Group and As You Sow.[84] The former emphasized the 2021 Bulletin's potential to benefit all investors, not only those focused on ESG factors. It also explained that the revised SEC approach corrected the distortion caused by the rescinded Bulletins, which, in the Group's opinion, had overturned the SEC's adopted rules.[85] The latter explained that the SEC's former approach, as detailed in its pre-2021 Bulletins, hindered shareholder rights, on the one hand, by "severely limit[ing] meaningful shareholder proposals" and, on the other hand, by significantly broadening the ordinary business exclusion to an extent that it "allowed the exclusion of shareholder proposals containing almost any specific request, timelines, or action."[86] Some scholars also approved of the change, noting that the SEC's prior interpretation made it difficult to submit proposals referencing, for example, frameworks like the United Nations' Guiding Principles on Business and Human Rights.[87]

Critics questioned the Bulletin's rationale and effects, which remained—according to SEC Commissioners Peirce and Roisman—unclear.[88] Others argued that expanding shareholder

84. The Shareholder Rights Group is an association of investors that promotes and defends shareholder advocacy, and particularly the right of shareholders to engage with public companies on governance, corporate accountability and long-term value creation. For more information on As You Sow, see *infra* Section III.A.1.

85. Sanford Lewis, *SEC Resets the Shareholder Proposal Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 23, 2021), https://corpgov.law.harvard.edu/2021/12/23/sec-resets-the-shareholder-proposal-process/ [https://perma.cc/T7NS-HXYD].

86. Press Release, As You Sow, SEC Takes Action to Restore Shareholder Rights (Nov. 3, 2021), https://www.asyousow.org/press-releases/2021/11/3/sec-takes-action-restore-shareholder-rights [https://perma.cc/R5EW-A3Y3] ("[Bulletins 14 I, J and K] severely limited meaningful shareholder proposals, including vastly expanding the prohibition on micromanagement in a way that allowed exclusion of shareholder proposals containing almost any specific request, timelines, or action.").

87. *See* Kishanthi Parella, *Investors as International Law Intermediaries: Using Shareholder Proposals to Enforce Human Rights*, 45 SEATTLE U. L. REV. 41, 87 (2021).

88. *See* Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n & Elad L. Roisman, Comm'r, Sec. & Exch. Comm'n, Statement on Shareholder Proposals: Staff Legal Bulletin No. 14L (Nov. 3, 2021), https://www.sec.gov/newsroom/speeches-statements/peirce-roisman-statement-shareholder-proposals-staff-legal-bulletin-14l [https://perma.cc/784X-4PJW].

access to the Rule to raise E & S concerns risked politicizing shareholder meetings[89] and distorting corporations' purpose.[90]

A further concern was the Bulletin's impact on proposal volume.[91] E & S submissions have already increased over the past decade.[92] This trend could accelerate following the Bulletin's narrower reading of the ordinary business exclusion, making it

89. Press Release, U.S. Chamber of Com., Statement on the SEC's Revised Guidance for Shareholder Proposals (Nov. 3, 2021), https://www.uschamber.com/finance/corporate-governance/statement-on-the-secs-revised-guidance-for-shareholder-proposals [https://perma.cc/63XP-MGYS] (stating that "[w]ith today's unprecedented announcement, the SEC has sided with a small minority of activists over the vast majority of American investors. By repealing longstanding guidance about treatment of shareholders proposals, the SEC has stated its preference to turn board rooms and shareholder meetings into political debate societies on issues the SEC admits have no nexus to the actual business of the company.").

90. *See* Lindsay Frost, *New No-Action Rules to 'Embolden' Investors on ESG Proposals*, AGENDA WK. (Nov. 29, 2021), https://www.agendaweek.com/c/3411334/434874/action_rules_embolden_investors_proposals [https://perma.cc/S6MM-9VGV] (reporting Howard A. Fischer's comment that "[t]he Bulletin drastically alters how the role of public corporations is conceived [and] represents a dramatic shift from the idea that the driving force animating corporate decision-making is increasing shareholder value, to the notion that corporations are, in effect, public citizens that have to incorporate into their actions considerations of their social impact.").

91. *See, e.g.*, HOUSE COMM. ON FIN. SERVS., THE FAILURE OF ESG: AN EXAMINATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS IN THE AMERICAN BOARDROOM AND NEEDED REFORMS 11 (Aug. 1, 2024), https://financialservices.house.gov/uploadedfiles/hfsc_esg_working_group_staff_report.pdf [https://perma.cc/VK2K-KVAM] ("[a]s ESG shareholder proposals become harder to exclude under Chair Gensler's leadership, activist stakeholders are emboldened to offer a greater number of unreasonable ESG-related shareholder proposals."). *See also* Shaun J. Mathew, *How Companies Should Approach Shareholder Proposals This Proxy Season*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 3, 2023), https://corpgov.law.harvard.edu/2023/01/03/how-companies-should-approach-shareholder-proposals-this-proxy-season/ [https://perma.cc/PJC3-FTBU] ("Following the shift in approach, the ordinary business exception became largely unavailable for proposals that focus on ordinary business matters yet mention a social or environmental issue."); Era Anagnosti, Maia Gez, & Scott Levi, *SEC's New Approach to No-Action Requests for Shareholder ESG Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 4, 2021), https://corpgov.law.harvard.edu/2021/12/04/secs-new-approach-to-no-action-requests-for-shareholder-esg-proposals/ [https://perma.cc/E89Q-DLZR] ("In sum, while perhaps reducing some of the potential work for companies when making Rule 14a-8(i)(5) and (i)(7) exclusion arguments, SLB 14L also severely limits the availability of these grounds to companies. Although the success of such arguments in most cases was never a certainty, the new guidance will make it much harder for companies to argue exclusion under these grounds.").

92. *Supra* Section I.B.

harder to exclude a shareholder resolution anytime it raises issues with broad societal impact, regardless of their materiality to the company.[93] In the SEC's terms: "proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company [would] no longer be viewed as excludable under Rule 14a-8(i)(7)."[94] Consider a proposal requesting the disclosure of greenhouse gas (GHG) emissions submitted to two companies: a cloud-based software firm and an oil and gas company. Under the SEC's pre-2021 guidance, only the latter would likely have been required to include the proposal, given its material relevance to that industry. The former could have excluded it under the ordinary business exception. After the 2021 Bulletin, however, both companies would likely be required to include the proposal, as climate disclosure is now viewed as a matter of significant social policy. At an aggregate level, this change effectively increases the number of non-excludable E & S proposals.

F. The 2025 Bulletin and the Rescission of the 2021 Bulletin

On February 12, 2025, the SEC issued Staff Legal Bulletin No. 14M (the "2025 Bulletin"),[95] which rescinded the 2021 Bulletin. By marking a return to the pre-2021 approach for both the ordinary business and the economic relevance exclusions, the SEC expanded their scope again. As far as the 2025 Bulletin is concerned, the SEC staff explains that it will now return to taking a company-specific approach when evaluating the significance of the issue raised by a given resolution. As a result, similarly to the SEC approach under Legal Bulletin No. 14K, "a policy issue that is significant to one company may not be significant to another".[96]

The 2025 Bulletin marks a return to a company-specific approach also for the economic relevance exclusion. In particular, the SEC announced its intention to abandon its

93. *Supra* Section I.C.2.c.

94. SEC Staff Legal Bulletin No. 14L (CF), *supra* note 2.

95. *See* SEC Staff Legal Bulletin No. 14M (CF) (Feb. 12, 2025), https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf [https://perma.cc/A3E7-7QRE].

96. *Id.*

Lovenheim-like[97] approach: as a result, the SEC now evaluates whether a given issue is not "otherwise significantly related to the company"—and, thus, the proposal potentially excludable—based on the company's specific circumstances, which it will assess in light of the "'total mix' of information about the issuer."[98] Accordingly, although shareholders may continue to raise social or ethical issues, such issues would now have to be tied "to a significant effect on the company's business."[99] Importantly, the 2025 Bulletin clarifies that the mere prospect of reputational or economic disadvantage will not, by itself, be sufficient to demonstrate a nexus between the proposal and the company's business.

G. Research Hypothesis, Methodology, and Contributions to the Literature

As the 2021 Bulletin was rescinded only recently, it is now a good moment to assess its impact and broader implications. Understanding its effects is critical not only to evaluate whether its recent rescission was warranted but also to inform future SEC stances and the need for policy measures for E & S resolutions.

The central hypothesis is that the 2021 Bulletin facilitated the submission of shareholder proposals on E & S matters, contributing to a measurable increase in their volume at U.S. public companies. With three years of post-Bulletin data now available, it is possible to assess this impact empirically. To test the hypothesis and evaluate whether the 2021 Bulletin's approach was appropriate, I collected and analyzed data on E & S proposals in U.S. companies.[100] I also consider whether the SEC's recent decision to rescind it in 2025 was warranted, and what broader policy implications may follow.[101]

Prior scholarship has largely focused on voting behavior around E & S proposals.[102] More recent studies have examined

97. *Supra* Section I.D.

98. *SEC Staff Legal Bulletin No. 14M*, *supra* note 95.

99. *Id.*

100. *See infra* Section II. For details on the methodology *see infra* Section II.A.

101. *See infra* Section IV.

102. *See, e.g.*, Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 218, 218 (2018); *see, e.g.*, Caleb N. Griffin, *Environmental & Social Voting at Index Funds*, 44 DEL. J. CORP. L. 167 (2020).

trends in proposal prescriptiveness,[103] explored the growing prevalence of resolutions on E & S matters,[104] or suggested possible links between the 2021 Bulletin and the rise in E & S resolutions[105] (or other trends).[106]

This Article makes three contributions to the academic and policy debates on Rule 14a-8 E & S resolutions. First, it shows that the 2021 Bulletin unleashed the submission a significant number of E & S proposals that were largely unpopular amongst shareholders. As a result, its rescission was desirable. Second, building on this evidence, it argues that informal interpretations of Rule 14a-8 provided by the SEC staff significantly affect the behavior of market participants. As a consequence, it questions the validity of a model where important decisions—such as whether to facilitate or hinder E & S resolutions—are taken through informal, nonbinding tools such as Bulletins. Third, building on this analysis, it explains that mere rescission of the 2021 Bulletin is not sufficient to prevent future overuse of Rule 14a-8, as the SEC staff might well amend again its interpretation. Therefore, it advocates for the adoption of policy measures that would severely restrict, regardless of future SEC staff's stances, shareholders' ability to overuse Rule 14a-8.

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103. *See* Cydney Posner, *More Prescriptive Proposals, Less Support for 2022 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 22, 2022), https://corpgov.law.harvard.edu/2022/08/22/more-prescriptive-proposals-less-support-for-2022-proxy-season [https://perma.cc/N3DN-S49G]; *see also* Kenneth Khoo & Roberto Tallarita, *Expanding Shareholder Voice: The Impact of SEC Guidance on Environmental and Social Proposalsi*, J.L. & ECON. (forthcoming 2025-2026), https://papers.ssrn.com/sol3/abstract_id=4913660 [https://perma.cc/5QMC-RS4A].

104. *See, e.g.*, INSTITUTIONAL S'HOLDER SERVS., 2023 UNITED STATES PROXY SEASON REVIEW: ENVIRONMENTAL & SOCIAL ISSUES (2023); Ronald O. Mueller, Elizabeth A. Ising & Thomas J. Kim, *Shareholder Proposal Developments During the 2023 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 23, 2023), https://corpgov.law.harvard.edu/2023/08/03/shareholder-proposal-developments-during-the-2023-proxy-season/ [https://perma.cc/GBK2-HM8Y].

105. *See* Mishra, *supra* note 36 (explaining that "[t]he overall surge in submitted proposals observed in 2022 was likely the direct result of the November 2021 SEC Staff Legal Bulletin.").

106. *See* Mueller et al., *supra* note 104 (linking the significant drops in withdrawal rates of all—and not just E & S—shareholder proposals to the 2021 Bulletin).

II. EVIDENCE

This Part tests the research hypothesis against empirical evidence. In particular, I collect data to assess whether the publication of the 2021 Bulletin is correlated with (*i*) an increase in the number of shareholder resolutions on E & S matters; and, if so, (*ii*) a decrease in the quality of such proposals, as represented by shareholders support for these proposals and number of such resolutions that received a majority of votes in support.

A. Methodology and Data Source

A good representation of the potential effects of the 2021 Bulletin is the number of E & S resolutions submitted in U.S. companies. It is hard to prove causation, as fluctuations in the number of such resolutions might be due to multiple exogenous factors, such as investors' preferences, civil society's attention to such issues, or the degree to which public corporations lag behind on non-financial issues. An additional hurdle comes from the fact that, as mentioned,[107] E & S resolutions have been representing—even before the 2021 Bulletin—a non-negligible proportion of the overall number of shareholder proposals for many years now. However, if this Article's research hypothesis is correct, an empirical investigation would, at least, reveal some degree of correlation between the publication of the 2021 Bulletin and the number of E & S resolutions. Signals such as, for example, abnormal increases in the number of such resolutions after 2021 might be telling.

To conduct my analysis, I collected data on E & S shareholder resolutions submitted in Russell 3000 companies between January 1, 2014, and January 1, 2025. I collected the data utilizing FactSet's Universal Screening[108] and only selected proposals fulfilling the following criteria: (*i*) submitted in the relevant timeframe; (*ii*) submitted in Russell 3000 companies; (*iii*) brought by shareholders; and (*iv*) labeled as dealing with E & S issues.

107. *See supra* Section I.B.

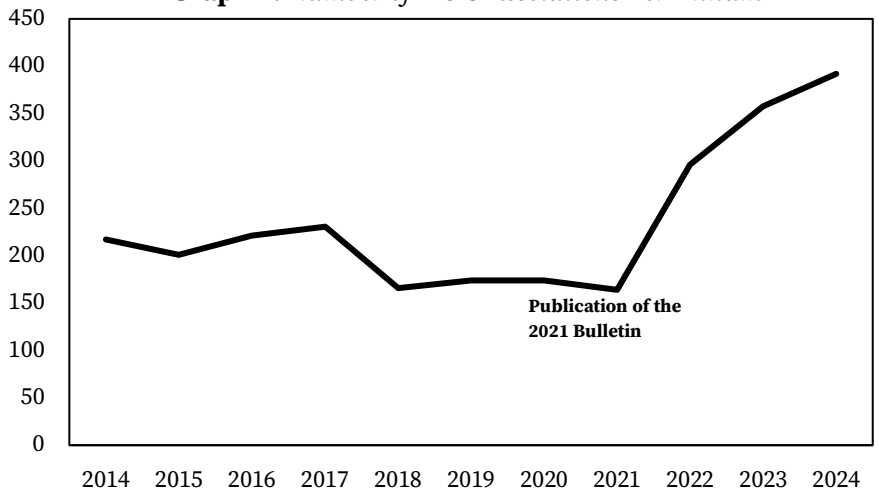
108. The analyses conducted *infra* in Section II.C. (support rates for E & S resolutions) and in Section II.D. (proposals that received a majority of votes cast in favor) also rely on data from FactSet.

I did not filter out the sample so-called anti-E&S (or "anti-ESG") proposals,[109] which are submitted to counter E & S initiatives. An increase in E & S proposals might have also triggered a rise in anti-ESG proposals and a decline in pro-E&S initiatives might reduce the number of anti-E&S proposals. If the 2021 Bulletin facilitated the submission of more E & S proposals, it might have indirectly enabled in anti-ESG proposals—tough these remain a small share of the total.[110] Including them allows for a more complete assessment of the 2021 Bulletin's overall impact.

B. The Rise of Shareholders' Proposals on E & S Issues

The research yielded a total of 2,594 proposals. Graph 1 below reports the distribution of these proposals over the period examined.

Graph 1. *Number of E & S Resolutions Per Annum*



In 2014, shareholders submitted 217 proposals on E & S issues. Despite small fluctuations, the submission rate remained steady until 2017, when shareholders submitted a total of 231

109. These proposals have been on the rise in recent years. *See* Mishra, *supra* note 36 (reporting that, in 2024, shareholders submitted 108 anti-ESG proposals).

110. *See* Mishra, *supra* note 36 (noting that anti-ESG proposals represented approximately "11% of all requests in the year through June 2024").

resolutions. The number of E & S resolutions, however, started declining in 2018 (166 proposals, marking a 28% decline compared to 2017). The figure remained steady until 2021, with 174 E & S resolutions submitted in 2019, 174 in 2020, and 164 in 2021.

However, the trend changed significantly in 2022, following the SEC's 2021 Bulletin. Indeed, the Bulletin was published in November 2021, so any effects that it might have produced would be only observable starting in 2022. In 2022, shareholders in Russell 3000 companies submitted 296 E & S resolutions, representing an 80% growth compared to 2021. This trend continued over the next two years, with 2023 marking a 21% increase over the previous year (358 E & S proposals submitted), and 2024 a 9.5% increase over 2023 (392 E & S proposals).

As can be observed, despite E & S resolutions being on the decline between 2017 and 2018, and then substantially steady between 2018 and 2021, the publication of the Bulletin marked a significant shift. The growth after the 2021 Bulletin was remarkable: the total number of E & S resolutions more than doubled over just three years, between 2021 and 2024, growing by 139%. Collectively, the E & S proposals submitted after the 2021 Bulletin account for 40% of all such filings in Russell 3000 companies over the entire 2014-2024 period.

C. The Decline in the Rates of Support

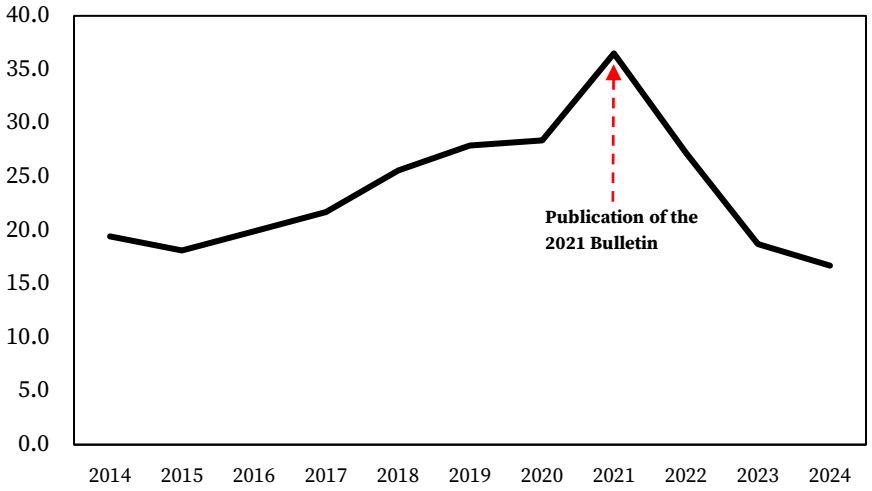
The remarkable growth experienced by E & S resolutions, by itself, only tells part of the story. Indeed, it might be the case that the 2021 Bulletin unleashed the submission of high-quality E & S proposals that, prior to the policy shift, were being omitted from companies' proxy materials based on the ordinary business or the economic relevance exclusions. In other words, the fact that E & S proposals surged after the 2021 Bulletin is not inherently negative if the additional proposals are of high quality. If that were the case, the policy shift would be desirable, as it would result in more high-quality E & S proposals for shareholders to vote on.

Deciding whether a proposal is worthy or not is an inherently subjective exercise. One good proxy for the quality of a shareholder proposal, however, is what shareholders think about it, as evidenced by their voting behavior. If many shareholders believe that a proposal is good, this will translate into higher percentages of support for the proposal. Additionally, higher

shareholder support for a resolution makes it more likely that the proposal will stimulate managerial action. In fact, although precatory resolutions are not binding, typically, the higher the percentage of support, the more influential the proposal.[111] Higher shareholder support is, therefore, a good indicator of both the extent to which shareholders consider a given resolution worthy and of the likelihood that managers will follow up on the proposal.

To assess whether the post-2021 growth was driven by a significant increase in the number of proposals that shareholders considered worthy of support, I collected data on shareholders' voting behavior on all the proposals that shareholders voted on out of the 2,594.[112] To account exclusively for the behavior of those who actively participated in the voting process, I consider solely the average level of support for the E & S proposals voted each year as percentage of the votes cast. Graph 2 below reports the results.

Graph 2. *Average Level of Support for Proposals (% of Votes Cast Net of Proposals Not Voted On)*



111. *See* Thomas & Cotter, *supra* note 18, at 371 (observing that "[i]f only a minority of the shareholders vote to support a proposal, corporate directors may well decide that they do not need to pay it much attention.").

112. I excluded 99 proposals that were not voted on and three proposals (one in 2020, two in 2023) that FactSet labeled as with "Pending/Results Never Disclosed."

Shareholder support for resolutions on E & S matters experienced a steady growth between 2015 and 2020, with an increase of approximately 57% over five years, or an average annual growth rate of roughly 11.4%. Between 2020 and 2021 the percentage of support registered a remarkable 28.5% increase, peaking in 2021, when E & S resolutions received, on average, support by 36.5% of the votes cast. All in all, between 2014 and 2021, the average support grew by 88.1%, representing an average annual growth of 12.59%.

Support for E & S resolutions, however, began declining after 2021, plummeting to 18.7% in 2023 and further declining to 16.7% in 2024, its lowest point since 2014. Hence, following the publication of the 2021 Bulletin, the average support for E & S resolutions declined by approximately 54%, for an average annual decline of 18%.

This decline might be due to several reasons. For instance, a recent study[113] finds that it might be largely driven by an increase in the number of proposals using a prescriptive language. Regardless of the reasons, what matters for the purpose of this study is that—at least from the shareholders' perspective—there were good reasons to question the desirability of most post-Bulletin E & S resolutions. Such proposals were generally unpopular with a majority of voting shareholders—suggesting that they were, at least as framed, problematic—and, as a result, are unlikely to have stimulated managerial initiative.

D. The Decline in the Number of Proposals Approved

The analysis conducted in Section II.C. on shareholders' voting behavior might not fully capture developments after 2021. Although the average level of support declined following the publication of the Bulletin, it is possible that an equal or greater number of E & S resolutions still received majority shareholder support in the post-2021 proxy seasons compared to earlier periods. In such a scenario, the declining rates of support would not be particularly concerning: the Bulletin might have certainly

113. *See* Khoo & Tallarita, *supra* note 103, at 31 (finding that "prescriptive proposals are less favored by voters, receiving approximately 3.75% to 5.38% less support compared to their non-prescriptive counterparts" and that "[t]his gap grew substantially after the 2021 Guidance, with support dropping by approximately 6.60% to 8.50%.").

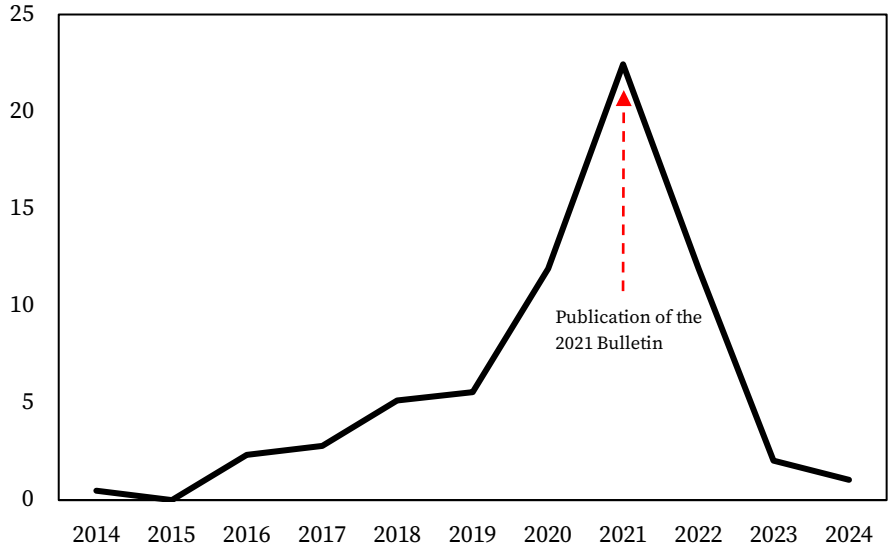
unleashed the submission of more unworthy resolutions, but the final outcome—the number of proposals approved—would either remain substantially unchanged or even improve (if more E & S resolutions were approved). To be sure, it is rare for precatory proposals to receive a majority of votes cast.[114] However, significant fluctuations over the years in the number of E & S proposals that received support from a majority of votes cast can further shed light on the analysis.

To conduct the analysis, I calculated the Shareholder Proposals Approval Rate ("SPAR"), which represents the number of E & S proposals that were approved (*i.e.*, received a majority of votes cast in support) over the total number of net E & S resolutions.[115] Graph 3 below reports the results.

114. *See, e.g.*, John M. Bizjak & Christopher J. Marquette, *Are Shareholder Proposals All Bark and No Bite? Evidence from Shareholder Resolutions to Rescind Poison Pills*, 33 J. FIN. & QUANTITATIVE ANALYSIS 499, 512 (1998) (highlighting that "shareholder proposals do not usually receive a majority of votes"); *see also* GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2024 PROXY SEASON 8 (2024) (explaining that "[a]s of June 1, 2024, 39 proposals (4% of the proposals submitted and 8% of the proposals voted on) received majority support, as compared with 25 proposals (or less than 3% of the proposals submitted and 5% of the proposals voted on) that had received majority support as of June 1, 2023."); *see also U.S. Shareholder Proposals Jump to a New Record in 2023*, INSTITUTIONAL S'HOLDER SERVS. (2023), https://www.iss-corporate.com/library/us-shareholder-proposals-jump-to-a-new-record-in-2023/ [https://perma.cc/3R2R-TTL5] ("To date in 2023, . . . just 8.3% [of shareholder proposals] received majority support . . ."); Hirst, *supra* note 102, at 240 (observing that "many resolutions receive aggregate support substantially less than a majority of votes cast . . ."); Matteo Tonello, *Shareholder Voting Trends (2018-2022)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 5, 2022), https://corpgov.law.harvard.edu/2022/11/05/shareholder-voting-trends-2018-2022/ [https://perma.cc/QFS9-A29A] (reporting that "[i]n 2022, 11.4 percent of proposals in this thematic category received majority support.").

115. "Net resolutions" indicates the number of E & S proposals that shareholders voted on. As for the analysis in Section II.C., I calculated it by subtracting from the total number of E & S proposals submitted every year (*i*) the 99 proposals that were not voted on; and (*ii*) the three proposals that FactSet labeled as with "Pending/Results Never Disclosed." *See supra* note 112.

Graph 3. *Ratio of Proposals Passed to Total Number of E&S Resolutions (Over Total Number Net of Those Not Voted On)*



Consistent with the trend characterizing the average level of support analyzed in Section II.D., as well as with the research hypothesis, the SPAR was on the rise starting in 2015 and grew by a remarkable 307% between 2019 and 2021, representing an annual average growth of 153%. In 2021, the SPAR reached its peak, with 22.4% of the E & S resolutions voted on receiving majority support. As in the case of the average level of support, however, this trend significantly reversed following the publication of the 2021 Bulletin, with the SPAR decreasing to 11.2% in 2022, to 2% in 2023 and plummeting to 1% in 2024. This represented a 95% decrease over just three years.

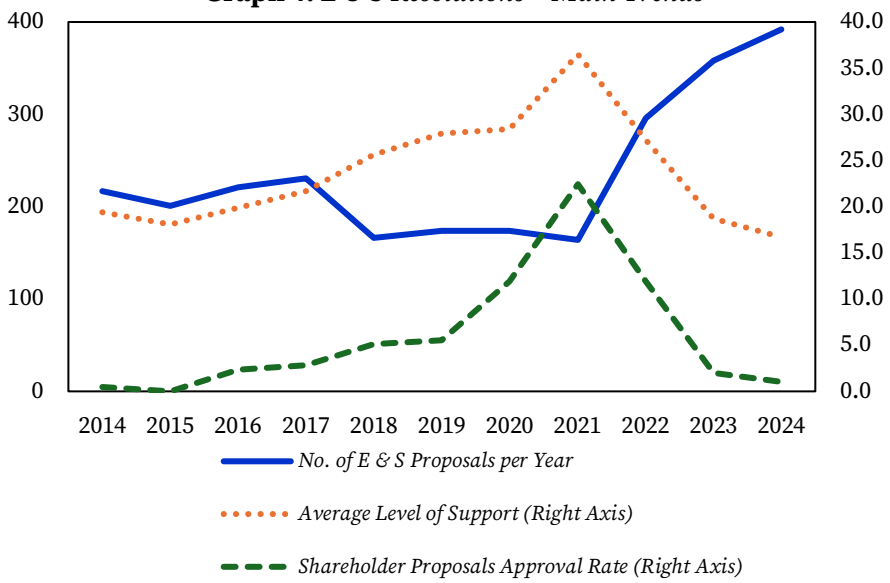
This analysis confirms that the post-2021 proposals were not particularly popular amongst shareholders and contributed to a substantial decrease in the number of resolutions that were approved, confirming that shareholders found the vast majority of them problematic.

E. What the Analysis Indicates

Graph 4 below groups the results of the empirical analyses above to compare the trends on the number of E & S proposals

(blue line), the average support as a percentage of the votes cast (orange line), and the SPAR (green line).

Graph 4. *E & S Resolutions – Main Trends*



The change in the SEC staff stances on the ordinary business and on the economic relevance exclusions, as detailed in the 2021 Bulletin, correlates with an abnormal increase in the number of E & S resolutions submitted in Russell 3000 companies. As the significant rise in such numbers can be observed after the publication of the 2021 Bulletin, it is very likely that, consistent with the research hypothesis, the growth was primarily driven by the expansion of the scope of application of Rule 14a-8(i)(5) and (7) achieved with the 2021 Bulletin. Additionally, the post-2021 rise came after a decline in the number of E & S resolutions submitted between 2017 and 2018, and a three-year period (between 2018 and 2021) in which the number had remained steady, making it more likely that the abrupt post-2021 boost was caused by the publication of the Bulletin.

This increase does not seem to have stimulated the submission of high-quality E & S resolutions, whether the quality of proposals is proxied by the average support levels or by the number of resolutions approved. As shown in Graph 4 above, the publication of the Bulletin and the subsequent increase in the

number of E & S resolutions submitted are correlated with a decline in both levels of average support and number of resolutions passed. Both proxies were on the rise between 2018 and 2021—that is, when the number of E & S resolutions was essentially steady—indicating a higher popularity of these resolutions amongst shareholders. This makes it more likely that the post-2021 declines are not only correlated, but also in a causal relationship with the publication of the Bulletin and the associated surge in E & S resolutions.

III. COSTS

A. Empowering Unconventional Activists

In this Part I discuss the main costs—effective or potential—associated with facilitating the submission of E & S proposals: empowering unconventional activists, depleting corporate resources, increasing risks of litigation, and destroying economic value.

1. Unconventional Activists: Objectives, Approach, Business Model

The 2021 Bulletin may have contributed to empowering unconventional activists—organizations that, unlike traditional investors, are not seeking an economic return for their contributors or members. These organizations have long used Rule 14a-8 to advance social objectives, and the SEC's revised interpretation arguably provided them with more leeway to do so.[116] Two prominent examples are Follow This and As You Sow.

Follow This is an Amsterdam-based non-profit association that seeks to combat climate change[117] by pressuring major oil companies to reduce their contribution to GHG.[118] It becomes a

116. For a discussion on how the Bulletin further empowered organizations such as Follow This, see Exxon Mobil Corp. v. Arjuna Capital, LLC, et al., 735 F. Supp. 3d 709, 716–17 (N.D. Tex. 2024).

117. *See How It Works*, FOLLOW THIS, https://www.follow-this.org/how-it-works/ [https://perma.cc/TJ6Q-FTRZ] (last visited February 15, 2025).

118. *See* FOLLOW THIS, ARTICLES OF ASSOCIATION 1 (2024), https://www.follow-this.org/wp-content/uploads/2024/10/Follow-This-English-office-translation-articles-of-association-2024-Signed.pdf [https://perma.cc/5MK2-QXR5].

shareholder in oil and gas companies such as BP, Chevron, Exxon, Shell, and Total Energies[119]—ensuring to always maintain sufficient stakes so as to have the right, based on the applicable law, to file a shareholder proposal[120]—for the express purpose of submitting shareholder resolutions, voting and influencing corporate climate policies.[121]

To fund its activities, Follow This collects donations from environmentally-minded donors and explicitly eschews financial returns. Previously, it offered so-called "green shares", whereby individuals could fund the purchase of shares in oil companies, which the nonprofit would then vote on in alignment with its mission.[122] Consistent with its objectives, Follow This explained that the organization "buy[s] shares in order to work on [its] mission to stop climate change, not to make a financial profit" and that "Follow This should not function as an investment broker for [its] members, and [it is] not here to make a profit for [its] members."[123] While green shares have been discontinued—as Follow This now owns sufficient shares to file climate resolutions[124]—the organization continues to rely on donations

119. *See FAQ*, FOLLOW THIS, https://www.follow-this.org/faq/ [https://perma.cc/K5DX-PG4Q] (last visited February 15, 2025).

120. *Id.*

121. *Id.*; *see also Our Story*, FOLLOW THIS, https://www.follow-this.org/our-story/ [https://perma.cc/94F8-T26Z] (explaining the organization's history and strategies) (last visited February 15, 2025).

122. As the option of purchasing green shares is not offered anymore (see *infra* in the text), the relevant section in Follow This' FAQs has since been removed. However, it may be recovered through web archiving services, such as the Internet Archive's Wayback Machine. *See FAQ*, FOLLOW THIS, https://web.archive.org/web/20231202082750/https://www.follow-this.org/faq/ [https://perma.cc/4ZMD-6EBM] (explaining that if an investor decides to buy a share through Follow This "[the] share will be . . . held in the investment account of Follow This on your behalf . . . [but it] . . . can be reclaimed (sold) at any time" and that "[Follow This] will vote at the shareholder meeting on the Follow This climate resolution on your behalf") (select "What Happens When I Buy a Share Through Follow This*?*") (last visited Nov. 5, 2025).

123. *See FAQ*, *supra* note 122 (select "Can I buy more than one share?").

124. *See FAQ*, *supra* note 119 ("Follow This no longer offers the option to buy a "green share" in oil and gas companies because we own sufficient shares in all relevant oil companies to file our climate resolutions. The best way to support our work is to become a member or to donate . . .") (select "Can I still buy a share in Big Oil through Follow This?").

and memberships that serve its advocacy goal, rather than investment purposes.[125]

As You Sow, based in California and founded in 1992, pursues a similar mission, focusing on E & S corporate responsibility.[126] It engages in shareholder advocacy through dialogue with companies and the submission of resolutions.[127] As You Sow is organized as a nonprofit under section 501(c)3 of the Internal Revenue Code and funds its advocacy through donations, including cash and stock gifts.[128]

2. The 2021 Bulletin and Unconventional Activists

Unconventional activists differ significantly from both traditional shareholders and ESG-oriented investors. While ESG investors may push for non-financial initiatives, their ultimate goal typically remains financial—improving long-term performance and reducing risk.[129] In contrast, unconventional activists do not pursue any economic return, either for themselves or for their donors.

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125. A close look at Follow This' financial statements reveals that, for 2023, the association primarily funded itself mostly through donations by The Sunrise Project and Laudes Foundation, which accounted for approximately 83% of the total benefits. Members' contributions, on the other hand, only accounted for 13.3%, whereas sponsorship contributions accounted for the remaining 3.4%. *See* FOLLOW THIS, STATEMENT OF ACTIVITIES FOR THE YEAR 2023, https://www.follow-this.org/wp-content/uploads/2024/09/Jaarrekening-2023-definitief.pdf [https://perma.cc/2P6U-6FU9].

126. *About Us*, AS YOU SOW, https://www.asyousow.org/about-us [https://perma.cc/X9U7-YNBX] (last visited Feb. 15, 2025).

127. *Shareholder Advocacy*, AS YOU SOW, https://www.asyousow.org/shareholder-advocacy [https://perma.cc/Q66X-A8X4] (last visited Feb. 15, 2025).

128. *Giving to As You Sow*, AS YOU SOW, https://www.asyousow.org/more-ways-to-give [https://perma.cc/B3JZ-XN6B] (last visited Feb. 15, 2025).

129. *See, e.g.*, Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHI. BUS. L. REV. 417, 423 (2022) (observing that "[w]hile traditional activism focuses on short-term profit and total shareholder return, the rise of ESG has brought with it a new set of activists concerned with ESG-related issues" and that "[m]odern activism includes dual-purpose activists who combine shareholder-return and ESG arguments . . ."); *see also* Kai H.E. Liekefett, Holly J. Gregory & Leonard Wood, *Shareholder Activism and ESG: What Comes Next, and How to Prepare*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 29, 2021), https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare/ [https://perma.cc/2GLQ-6BK4] (discussing possible reasons for integrating ESG factors in shareholder activism).

This distinction has two important consequences. First, many of the proposals submitted by unconventional activists are entirely decoupled from concerns about corporate value.[130] Second, and most importantly, their stewardship tools are significantly constrained by their objectives. While most investors can engage in a broad range of tactics—such as private engagements, proxy fights, submitting resolutions, voting, or divesting[131]—unconventional activists face practical and strategic limitations. They are not necessarily powerful enough to conduct private engagements or have the resources to initiate costly proxy fights. Voting on directors' elections or on other shareholders' resolutions might not help them accomplish their specific objectives.[132] Since their objectives are non-financial, they cannot take the "Wall Street Walk" without undermining their core purpose.[133] As a result, these activists need to rely heavily on submitting shareholder proposals as their primary tool for exerting influence.[134]

Furthermore, because they do not intend to exit and are unconcerned with profit, they may be less sensitive to the economic costs or market consequences of their proposals. By narrowing the scope of the ordinary business and economic relevance exceptions and reducing the need for company-specific

130. *See also* Exxon Mobil Corp. v. Arjuna Capital, LLC, et al., 735 F. Supp. 3d 709, 717 (N.D. Tex. 2024) (observing that "[f]or the past several years, [Arjuna Capital, LLC and Follow This] have submitted proposals for consideration by the shareholders of Plaintiff Exxon-Mobil Corporation. While they argue these proposals create shareholder value, that's really beside the point: both Defendants are primarily driven by the fight against anthropogenic climate change.").

131. On some of the tactics deployed by activists, see Maria Castanón Moats, Paul DeNicola & Leah Malone, *The Director's Guide to Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jun. 11, 2021), https://corpgov.law.harvard.edu/2021/06/11/the-directors-guide-to-shareholder-activism/ [https://perma.cc/A9RH-ZR7K]).

132. This is not only because their stakes are limited, but also because other shareholders' resolutions might not be specifically drafted in a way that is consistent with the unconventional activist's objectives and voting on directors' elections might not directly translate into the desired specific outcome.

133. In this sense, their position is similar to that of index funds, though for different reasons. On index funds and their inability to exit the company, see Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2047 (2019).

134. *See supra* Section III.A.1.

significance, the 2021 Bulletin empowered these groups in a way that may not have been anticipated. In particular, by discarding its pre-2021 approach, the SEC opened the door to more extreme or broadly framed resolutions—ones that may bear little connection to the company's actual operations or shareholder value. Such empowerment carries the risk of incentivizing radical initiatives—promoted by a subset of small shareholders that, as discussed, can afford to be insensitive to the company's economic performance—at the expense of the other shareholders, including retail investors, and of the company itself.[135]

B. Depleting Corporate Resources: Time, Money, Managerial Attention

The significant rise in E & S resolutions triggered by the 2021 Bulletin entails considerable costs, especially given their general unpopularity among shareholders.[136] Rule 14a-8 allows proponents to shift to the company the full costs of processing their proposal:[137] these costs are both time-consuming and financial. Fending off proposals the board does not believe to be in the best interest of shareholders entails significant attention, especially if a company receives a large volume of proposals: the company will have to engage in negotiations with multiple proponents and submit numerous no-action letters to the SEC. Additionally, many companies report that, when presented with a shareholder resolution "various internal groups, including legal, investor relations, executive officers and the board of directors and its committees spend considerable amounts of time evaluating and addressing [it]."[138] This, in turn, translates into managerial distraction, with their time and attention diverted from their core tasks.[139]

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135. *See infra* Sections III.B–D.

136. *See supra* Sections II.C–D.

137. *See supra* Section I.A.1.

138. *See* Letter from the Bus. Roundtable to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 4 (Feb. 3, 2020), https://www.sec.gov/comments/s7-23-19/s72319-6742491-207776.pdf [https://perma.cc/R8V7-V9NV].

139. *See also* Liebeler, *supra* note 7, at 454 (observing that "[t]he direct costs [also] include . . . the alternative use of resources, such as the time that management, legal advisors, etc., must devote to shareholder proposals.").

Financial costs, while difficult to quantify precisely—and despite some disagreement[140]—appear to be often substantial. The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness, for example, reports that its members consider an average cost spanning $87,000 to $150,000 to process each resolution as "a fair estimate for a typical proposal", with some even exceeding that range.[141] Business Roundtable companies estimate costs anywhere between $50,000 and $100,000 (or even more per proposal),[142] and the Society for Corporate Governance survey found that 41% of the respondents spend "between $10,000 to more than $200,000."[143] Using a conservative estimate of $50,000 per proposal, which accounts also for lower cost cases, it may be estimated that, following the increase in E & S proposals after the 2021 Bulletin, companies likely incurred $23.3 million in additional direct costs between 2022 and 2024.[144]

This calculation, however, ignores indirect costs, such as the risk that proposals pressure companies into economically suboptimal decisions.[145] This is particularly relevant for E & S

140. For example, CalPERS reports that "[d]uring no-action fights, many proposals are disposed of fairly quickly and easily by referencing the appropriate exclusion" and "[c]ompanies actually pay less than $20,000 in marginal costs for the work product displayed on the SEC website." *See* Letter from CalPERS to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 18 (Feb. 3, 2020), https://www.sec.gov/comments/s7-23-19/s72319-6744100-207900.pdf [https://perma.cc/9NGX-5LAS].

141. *See* Letter from Ctr. for Cap. Mkts. Competitiveness to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 6 (Jan. 31, 2020), https://www.sec.gov/comments/s7-23-19/s72319-6730870-207447.pdf [https://perma.cc/YRV4-VJQA].

142. *See* Letter from the Bus. Roundtable to Vanessa Countryman, *supra* note 138, at n.3.

143. *See* Letter from the Soc'y for Corp. Governance to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 2 (Feb. 3, 2020), https://www.sec.gov/comments/s7-23-19/s72319-6743699-207856.pdf [https://perma.cc/ZAJ2-WYAG].

144. The estimate is derived utilizing the data included in my empirical research *supra* in Section II.B. I calculated the average number of shareholder proposals submitted annually from 2014 to 2021 (193.5), and subtracted this baseline from the actual number of proposals in 2022, 2023, and 2024. The resulting total of 465.5 additional proposals was multiplied by an estimated cost of $50,000 per proposal, yielding an aggregate cost of $23.3 million.

145. See *infra* Section III.D.

resolutions with goals that may conflict with long-term value creation.[146]

C. Increased Litigation

Although this Article does not collect litigation data, it is worth noting that the 2021 Bulletin may have increased legal uncertainty. As the room for excluding a proposal narrows, the risk of litigation increases. Under Rule 14a-8(j) companies seeking to exclude a proposal must request a no-action letter from the SEC's Division of Corporation Finance.[147] These letters reflect the staff's informal, non-binding views,[148] and the final decision on the exclusion rests with the courts.[149] Therefore, if the SEC staff decides not to recommend enforcement, and a company excludes a proposal, the proponent (or other shareholders) may still challenge the company's decision in court.[150] Still, when a company receives a favorable no-action letter, it is less likely that the shareholder will pursue litigation, since the SEC position—while not binding—may hold at least some degree of persuasive weight with courts.

The 2021 Bulletin weakened this filtering effect. By making exclusion of E & S proposals harder, it reduced the chances of favorable no-action letters, increasing the risk that exclusion

146. The focus of this Article is on E & S resolutions, but also governance-related proposals may produce indirect costs. On the indirect costs of both E & S and governance resolutions. *See* Liebeler, *supra* note 7, at 455–57.

147. *See supra* Section I.C.2.

148. *Id.*

149. *See Division of Corporation Finance: Informal Procedures Regarding Shareholder Proposals*, U.S. SEC. & EXCH. COMM'N (Nov. 21, 2022), https://www.sec.gov/rules-regulations/shareholder-proposals/division-corporation-finance-informal-procedures-regarding-shareholder-proposals [https://perma.cc/CBK8-DUNN] (observing that "[i]t is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views", that "[t]he determinations reached by the staff in connection with these submissions do not and cannot adjudicate the merits of a company's position with respect to the proposal", and that "[o]nly a court, such as a U.S. District Court, can decide whether a shareholder proposal can be excluded from a company's proxy materials.").

150. *See id.* (explaining that "a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court should the company's management omit the proposal from the company's proxy materials.").

decisions would lead to litigation. A company seeking to exclude an E & S shareholder proposal could find that, unlike under the pre-2021 framework, many of its no-action requests would be denied by the SEC, and omitting the resolution without SEC support carries significant legal risks. As a result, companies wishing to omit E & S proposals may have needed to obtain a court ruling affirming their right to do so.

D. Value Destruction

Many E & S initiatives—and particularly the most aggressive ones—may well lead to the destruction of economic value.[151] To the extent that firm managers surrender to such initiatives,[152] facilitating E & S resolutions might lead to value destruction.[153] But even if shareholders do not support such initiatives, and managers do not surrender to them, value will still be destroyed, as the companies will incur the costs for processing the proposal.[154]

IV. RECENT DEVELOPMENTS AND POLICY OPTIONS

After noting that the post-2021 landscape has proven undesirable and that, therefore, the rescission of the 2021 Bulletin was desirable, in this Part I also discuss why mere rescission may not be enough to prevent future overuse of Rule 14a-8, particularly by activists with small stakes and extreme agendas. I then set forth some policy solutions that would prevent—regardless of the specific SEC staff's interpretations—new overuse of Rule 14a-8.

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151. *See, e.g.*, Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS L. REV. 195, 196 (2022) (providing examples of initiatives in which "shareholders seem to be pushing companies to do things that might reduce value . . ." and explaining that this behavior can be better explained using a shareholder welfare maximization model, as opposed to the traditional shareholder value maximization paradigm).

152. *See, e.g.*, Berkman et al., *supra* note 44, at 2.

153. While value-decreasing E & S initiatives could, in theory, be possible in the short run, they would not be sustainable in the long term, at least for firms operating in competitive markets. *See* Mark. J. Roe, *Corporate Purpose and Corporate Competition*, 88 WASH. U. L. REV. 223, 236–37 (2021).

154. *See supra* Section III.B.

A. Learning From the Past and Looking Ahead: Why Staff Legal Bulletin 14M Might Not Be Enough

The 2021 Bulletin unleashed the submission of a large volume of E & S proposals.[155] Despite the precatory nature of these resolutions, the post-2021 landscape has proven largely undesirable, as it facilitated the submission of costly E & S resolutions[156] generally unpopular with the majority of shareholders.[157] By reintroducing the company-specific approach and rescinding the 2021 Bulletin,[158] the 2025 Bulletin offers an appropriate response to remedy this situation and was, therefore, a necessary corrective.

In other circumstances, the analysis might conclude here. But the analysis conducted so far also shows that, despite their non-binding nature,[159] SEC Bulletins exert a significant influence on the behavior of market participants, and on that of shareholder-proponents in particular. Decisions about whether to facilitate or constrain the submission of E & S proposals, however, should not rest with the SEC staff's discretion, particularly when such interpretative shifts carry large systemic consequences and are achieved through non-binding acts that, unlike rulemaking, are not subject to requirements such as notice and comment.

Additionally, the developments affecting the interpretation of Rule 14a-8 offer the opportunity to reflect more broadly about E & S resolutions. Rule 14a-8, in fact, has been leveraged by activists pushing for specific social agendas for many years now and E & S resolutions have become a battleground between activist shareholders (such as pension funds and unconventional activists) and managers. This phenomenon is shown by the troubled evolution of the SEC staff interpretation of the ordinary business and economic relevance exclusions.[160] Moreover, as discussed, in recent years, U.S. public companies have also experienced a rise in the number of anti-E&S proposals.

155. *See supra* Section II.B.
156. *See supra* Sections III.B–D.
157. *See supra* Sections II.C–D.
158. *See supra* Section I.F.
159. *See supra* Section I.C.2.
160. *See supra* Sections I.C.–D., I.F.

To be sure: E & S resolutions can be a meaningful tool to monitor management on non-financial issues.[161] Therefore, what should be discouraged is not the submission of E & S proposals that, if implemented, might lead to the creation of economic value for shareholders or to the mitigation of non-financial risks for the company. If E & S resolutions seek to pursue these objectives or are put forward by shareholders that have sufficient skin in the game, they are yet another activist tactic that should not, per se, be discouraged, at least no more than any other tactic. What should be disincentivized, however, is the submission of numerous frivolous proposals, which at worst (if implemented) would lead to the destruction of value and at best (if not implemented) would entail costs for shareholders, both economic and in terms of managerial distraction.[162] In this regard, simply rescinding the 2021 Bulletin leaves open the possibility of future reversals on the SEC staff's part and is, therefore, insufficient to prevent future overuse of Rule 14a-8.

As a consequence, on the one hand, it is necessary to prevent possible future reversals of the current SEC stance from having a largely disproportionate impact on market participants' behavior. On the other hand, it is desirable to correct the misuse of Rule 14a-8, by preventing its overuse, to ultimately ensure that E & S resolutions and anti-ESG resolutions[163] do not translate into costly initiatives to promote extreme agendas. Instead, these resolutions should be deployed as a helpful tool to mitigate non-financial risks, keep managers accountable on material E & S issues, and promote long-term value creation.[164] Although, as I will detail in the Sections below, these results could theoretically be achieved through different policy measures, in Section IV.E. I explain that the most appropriate policy response would be to introduce a regime to allow shareholders more control over E & S resolutions.

161. *See supra* Section I.B.

162. *See supra* Section III.B.

163. *See supra* Section II.A.

164. *See supra* Section I.B.

B. Shifting Costs

As discussed, shareholder proposals are a source of direct costs, but they can also produce indirect costs, such as the destruction of shareholder value.[165] In the case of indirect costs, one could argue that, all things considered, if managers decide to implement the resolution it is, most likely, because a non-negligible number of shareholders supported it and managers believed, in exercising their discretion, that implementation of the proposal was in the best interests of the company. In other words, such indirect costs arise only insofar as managers decide to implement the resolution.

On the other hand, direct costs are incurred by the company regardless of whether the proposal is implemented and, most importantly, regardless of the support it received amongst shareholders. One can rationally assume that whether costs are justified depends on the rate of support that the proposal receives, as (*i*) such support signals that the resolution is considered by shareholders as worthy, and (*ii*) proposals with higher rates of support are more likely to prompt managerial action.[166] On the contrary, when proposals receive very low support, the costs borne by the company are less justified.

As proponents do not bear the direct costs of processing the proposal, some of them—notably, unconventional activists—are incentivized to file resolutions seeking to implement radical actions, which would not create value for shareholders and, consequently, might not be supported by most of them. This equilibrium is undesirable, as it incentivizes a small fraction of shareholders, who are not animated by the objective of promoting the creation of value, to submit proposals without bearing the costs of such initiatives.

A possible option to remedy the situation is to shift quantifiable direct costs from the company to the proponent. In order to prevent such a measure from deterring optimal activism, including on E & S issues, the shift could be triggered only for resolutions that do not reach a minimum percentage of votes cast in favor. Knowing that, should the proposal only receive the support from a small fraction of shareholders, they would incur

165. *See supra* Section III.B.

166. *See supra* Sections I.A.1, II.C.

the costs borne by the company to process the resolution, proponents would be incentivized to conduct *ex ante* analyses to carefully assess—also by looking at the results of prior proxy seasons—the extent to which other shareholders might consider the proposal worthy. Ultimately, this would discourage excessively frivolous resolutions, while not penalizing more worthy ones, which have better chances of gaining other shareholders' support.

Because precatory proposals do not generally receive very high rates of support, in order not to deter reasonable activism, the measure should be designed to penalize proposals that receive low support (even relative to the other precatory resolutions), and not with the objective of penalizing those resolution that, despite not being supported by a majority of the votes cast, still get substantial support from the other shareholders. In this regard, the threshold that would trigger cost-shifting should be intended as a minimum floor: for example, 5%, so that cost-shifting would be applied to all proposals receiving less than 5% of the votes cast in support. This Article focuses solely on E & S proposals, but the measure could also be extended to governance-related proposals.

To estimate the actual impact and effectiveness of such a measure, I have calculated the effects that it would have produced, had it been in place between 2014 and 2024. The data are the same as those used in Section II. For the calculation, I have imagined the cost-shifting to be associated with a 5% threshold, so that it would be triggered only for proposals that received 4.99% or less of votes cast in support (hereafter, "below-threshold proposals"). Starting from my sample of E & S resolutions,[167] I identified proposals that received less than 5% of votes cast in favor. For each year I then calculated what percentage, out of the total number of E & S resolutions voted on, the below-threshold proposals represented,[168] and provided an estimate of the costs that would have been shifted. To calculate the amount, I used the same conservative estimate of $50,000 worth of direct costs for each proposal that I used in Section III.B, which I multiplied by

167. *See supra* Section II.A.

168. As with the analyses conducted in Sections III.C. and D., I only considered proposals that were actually voted on. For details, *see supra* notes 112 and 115.

the number of proposals that would have been subject to the cost-shifting regime. Table 1 below reports the results.

Table 1. Cost-Shifting Measure, 2014–2024

Year	*Percentage of Proposals That Would Have Been Subject to the Cost-Shifting Regime*	*Estimated Costs Shifted (million, USD)*
2014	17.6	1.85
2015	20.8	2.05
2016	14.8	1.6
2017	14.4	1.55
2018	7	0.55
2019	9.2	0.75
2020	8.3	0.7
2021	4.4	0.35
2022	11.9	1.7
2023	16.1	2.8
2024	22.5	4.3

The analysis indicates that, for most of the years examined, a non-negligible percentage of proposals would have been subject to a cost-shifting regime, had such a policy been in place with a 5% floor between 2014 and 2024. While, unsurprisingly, these percentages are quite substantial for the years (from 2022 to 2024) that followed the publication of the 2021 Bulletin, they would have also been substantial between 2014 and 2017 and non-negligible in 2018, 2019, and 2020. In such a scenario, a cost-shifting policy would have translated, from an aggregate perspective, into millions of dollars in savings for companies in most of the years. Although, for each company individually, the corresponding savings might, all things considered, be negligible, it is crucial to remember two aspects. First, the analysis above only considers E & S resolutions: hence, the estimated savings would be higher if the measure was extended also to governance-related proposals. Second, and more crucially, the measure would be implemented not as a cost-saving device for companies but, rather, as a disincentive for proponents. As, often times, the number of

proponents of E & S resolutions is concentrated amongst a relatively limited number of activists, such a measure would be particularly effective because, in any given year, a single proponent might put forward E & S proposals in more than one company and would thus risk having to bear the consequences of the cost-shifting for more than one resolution. So, going back to the analysis above: suppose that in 2024 an unconventional activist submitted five E & S resolutions in five different companies and that three of these proposals received less than 5% of the votes cast in support. Maintaining the hypothetical's assumption of $50,000 worth of direct costs for each proposal, in that year the proponent would incur costs of $150,000.

As for the effects of such measures on the practice of co-filing proposals, the cost-shifting policy might produce two opposite results. If all the co-filers were to be liable to pay a proportionate fraction of the costs, the measure would be effective in limiting "blind" co-filings. As they would now have to bear part of the costs if the resolution does not receive the required support, co-filers would presumably conduct a careful assessment before deciding to co-sign another shareholder's proposal. At the same time, however, the proposed measure could incentivize co-filings, which proponents could use as a way to limit the amount of costs they would incur, should the cost-shifting mechanism be triggered. This distortion could easily be prevented either by providing that the main proponent is exclusively liable for the costs or by having the main proponent bear the substantial majority of such costs.

C. Tightening the Resubmission Exclusion

An alternative policy route could be to tighten the resubmission exclusion under Rule 14a-8(i)(12). Currently, this ground for exclusion allows companies to omit from their proxy materials proposals addressing substantially the same subject matter as a proposal previously included in the company's proxy materials if the following conditions are met: (*i*) the previous proposal was included in the company's proxy materials within the preceding five calendar years; (*ii*) the most recent vote on such proposal occurred within the previous three calendar years; and (*iii*) the proposal received less than 5% (if it was previously voted

on once), 15% (if it was previously voted on twice) or 25% (if it was previously voted on three times or more) of the votes cast in favor.

The resubmission thresholds could be increased to expand the scope of application of the exclusion and, hence, reduce the number of proposals potentially being included in the company's proxy materials. The current resubmission thresholds were introduced in 2020 to replace the previous ones (respectively, 3%, 6% and 10%).[169] On that occasion, the SEC had considered introducing even higher thresholds (either 6%, 15% and 30% or 10%, 25% and 50%),[170] but had ended up adopting the 5%, 15% and 25% combination in the belief that it would "appropriately calibrate the resubmission criteria, taking into account the costs to companies and shareholders of responding to proposals that do not garner significant shareholder support and are unlikely to do so in the near future . . . ".[171]

Among the current thresholds, the one (5%) referring to proposals that were previously voted on once seems too low to be able to deter undesirable E & S resolutions.[172] As currently structured, the resubmission exception allows resubmission of a proposal addressing substantially the same subject matter as a proposal submitted in the preceding five years, even if the previous proposal, when voted on once, received, for example, only 5% or 6% of the votes cast in support. Such levels of support do not indicate broad shareholder backing, nor do they suggest that, if resubmitted, the proposal would likely receive significantly higher support. Hence, in such scenario, shareholders would collectively have to bear the costs of processing again a proposal that has already proven largely unpopular amongst them.

The SEC should then consider amending at least the threshold for proposals previously voted on once, in order to increase it to

169. *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-89964, 85 Fed. Reg. 70240 (Nov. 4, 2020).

170. *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act. Release No. 34-87458, 84 Fed. Reg. 66458, 66473 (Nov. 5, 2019).

171. Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. at 70259.

172. After all, when adopting the new thresholds in 2020, the SEC had explicitly recognized that "[t]he amendments represent a modest increase to the initial resubmission threshold, and more significant increases to the second and third thresholds." *Id.*

10%. The increase could be introduced for E & S proposals only, so as not to excessively deter governance-related activism, or could be applied, as under the current approach, to all proposals, regardless of their subject. Setting the threshold to 10% would ensure that only proposals that have received a non-negligible rate of support—and that, therefore, if resubmitted within a relatively short timeframe, could potentially obtain broader support—could be resubmitted, providing a stronger justification for the costs that companies incur for re-processing previously-processed proposals. At the same time, such an increase would be in line with the perspective of numerous commenters—who had expressed support for resubmission thresholds even higher than those proposed in 2019 by the SEC—indicating that the measure would not likely face significant opposition.[173]

D. Increasing the Ownership Thresholds for E & S Resolutions

A more radical approach would be to increase the ownership thresholds necessary to submit a proposal under the Rule. After all, it was the overuse of Rule 14a-8 that motivated the SEC to introduce ownership thresholds in the first place.[174] As discussed,[175] in 2020, the SEC amended the ownership thresholds

173. Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. at 70257 (explaining that "[s]everal commenters that were supportive of the proposed amendment expressed a preference for resubmission thresholds that are higher than those that were proposed.").

174. Under its original formulation, the Rule did not condition the submission of shareholder proposals to ownership of a minimum amount of shares. In 1982, however, the SEC reconsidered its position and proposed the introduction an ownership threshold and a holding period requirement, approved in 1983. *See* Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-20091, 48 Fed. Reg. 38218 (Aug. 23, 1983). The SEC did so in light of "criticisms of the current rule that [had] increased with the pressure placed upon the existing mechanism by the large number of proposals submitted each year and the increasing complexity of the issues involved in those proposals, as well as the susceptibility of certain provisions of the rule and the staffs interpretations thereunder to abuse by a few proponents and issuers". *See* Proposed Amendments to Rule 14a-8, Exchange Act Release No. 34-19135, Public Utility Holding Company Act Release No. 35-22666, Investment Company Act Release No. IC-12734, 47 Fed. Reg. 47420, 47421 (Oct. 26, 1982).

175. *See supra* Section I.A.1.

as well as the holding periods and adopted a tiered approach. However, when such amendments were implemented, the 2021 Bulletin had not been published yet, so its effects were not factored into the SEC's analysis. The increase in the ownership thresholds and the lengthening of the holding periods introduced with the 2020 amendments toughened the conditions that shareholders must satisfy to submit proposals. Despite this, the current thresholds continue to appear too low to prevent unreasonable initiatives, especially when it comes to E & S resolutions. As of December 2018, a year before the SEC proposed the heightened requirements, the SEC reported that the three proposed thresholds, which it then adopted—depending on the holding period, at least $2,000, $15,000 or $25,000 in market value of the company's securities entitled to vote on the proposal—corresponded, respectively, to 0.0013%, 0.0098%, and 0.0164% of the market value of the 3,000th registrant in the Russell 3000, and to 0.0001%, 0.0005%, and 0.0009% of the 500th registrant in the S&P 500.[176]

The current thresholds do not appear particularly high, also when compared to those of other jurisdictions. In the European Union (EU), for example, Member States are free to decide whether to condition shareholders' right to put forward resolutions to the proponent holding a minimum stake in the company. If a Member State decides to introduce this requirement, however, the minimum stake cannot exceed 5% of the share capital.[177] Many countries in the EU have decided to implement this option. Italy, for example, has introduced a minimum threshold of 2.5% of share capital (although each shareholder may, regardless of the ownership percentage, submit proposals directly at the general meeting).[178] In Germany, only shareholders holding at least 5% of the share capital or shares, with a nominal value of at least EUR 500,000, have the right to request the addition of items to the agenda of the general

176. *See See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act. Release No. 34-87458, 84 Fed. Reg. 66458, 66464 (Nov. 5, 2019).

177. *See* Directive 2007/36, of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies, art. 6(2), 2007 O.J. (L 184) 17.

178. Art. 126, Testo Unico della Finanza, Decreto Legislativo 24 febbraio 1998 [Legislative Decree of February 24, 1998], n. 58, Feb. 24, 1998 (It.).

meeting.[179] Similarly, in France, only shareholders representing 5% of the share capital have the right to request the inclusion of items or draft resolutions on the agenda of the general meeting.[180]

Outside the EU, the UK requires companies to give notice of a proposal if the request is submitted from (*i*) members representing at least 5% of the total voting rights of all the members who have a right to vote on the resolution; or (*ii*) at least 100 members who have a right to vote on the resolution, provided that they hold shares in the company on which there has been paid up an average sum, per member, of at least £100.[181] All these thresholds are more stringent than the ones under Rule 14a–8, especially considering the high levels of ownership concentration that characterize companies incorporated in some of these jurisdictions.

Rule 14a–8 could be amended to increase the thresholds, so as to ensure that shareholder-proponents have sufficient skin in the game. Introducing a blanket increase—that is, increasing the thresholds for all the proposals, regardless of their subject—is unlikely to discourage or hinder governance-related activism. In fact, many activists, such as hedge funds, generally have substantial (although noncontrolling) stakes:[182] as a consequence, higher thresholds are unlikely to yield negative effects on their ability to submit resolutions, including on material E & S issues. The amendment, however, would have significant consequences for shareholders—such as unconventional activists—that often build just enough stakes in target corporations to submit Rule 14a–8 proposals. After all, some of such activists have already

179. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT [BGBL I] at 1089, §122(2), as amended by Gesetzes [G], Oct. 23, 2024, BGBl I at 323 (Ger.).

180. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-105 (Fr.). However, for larger companies the required percentage decreases progressively as the capital increases. Indeed, for companies with a share capital exceeding EUR 750,000, shareholders are required to own shares equal to the sum of 4% of the shares for the first 750,000 euros of capital, 2.5% of the shares for the portion between 750,000 and 7,500,000 euros, 1% of the shares for the portion between 7,500,000 and 15,000,000 euros and 0.5% of the shares for the portion exceeding 15,000,000 euros. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. R. 225-71(Fr.).

181. Companies Act 2006, c. 46, §338 (a)–(b) (UK).

182. *See,* e.g., Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and The Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 866-67 (2013).

attempted fighting in court the 2020 amendments to thresholds and holding periods.[183]

Alternatively, Rule 14a-8 could be amended to provide a special regime with higher thresholds for E & S resolutions only. The result would be to have two different eligibility requirements for submitting Rule 14a–8 resolutions: one, with the current thresholds and holding periods, for governance-related resolutions, and the other, with higher ownership thresholds, for E & S proposals. The change would not deter shareholder activism on governance issues, as the ownership thresholds for proposals relating to such matters would remain unchanged. Additionally, as in the case of a blanket increase, the special regime would be unlikely to discourage reasonable activism on material E & S issues, as resolutions on such matters would be promoted by proponents with sufficient economic stakes in the company. Unlike a blanket increase, however, the special regime would preserve small shareholders' ability to put forward governance-related proposals.

E. Letting Shareholders Decide

One objection that could be made to the proposals set forth above—if introduced for all precatory resolutions, regardless of whether they deal with E & S or governance matters—is that they would unreasonably constrain shareholders' ability to bring proposals under Rule 14a-8. If, however, such measures were implemented for E & S resolutions only, it could be objected that they would penalize such proposals over governance-related ones even in companies with more socially responsible shareholders. In other words, these measures would apply to all companies and would disincentivize the submission of E & S proposals regardless of the fact that some companies might have more E-&-S-friendly shareholders, which may well regard E & S proposals as something to be incentivized, rather than hindered.

A more appropriate policy response would then be to enact legislation to allow shareholders more control over E & S

183. When the SEC increased the thresholds in 2020, As You Sow, along with the Interfaith Center on Corporate Responsibility and James McRitchie, filed a complaint against the SEC requesting that the United States District Court for the District of Columbia vacated and set aside the SEC's amendments in their entirety.

resolutions. This objective could be attained through two distinct solutions. Under the first approach, shareholders would be able to decide whether they want the company to solicit E & S resolutions. The second approach would allow companies to introduce in their bylaws a provision preventing E & S resolutions from being submitted. Below I will consider each of them separately.

1. Inviting A Shareholder Vote

One way to have shareholders exert more control over E & S precatory resolutions is to let them decide whether they want the company to solicit such proposals. This could be achieved by amending securities law—and particularly the Securities Exchange Act of 1934—to introduce a requirement for all public companies to hold a periodic binding vote to decide whether shareholders at the company can submit E & S resolutions. If allowing shareholders to submit E & S resolutions is supported by a majority of votes cast, then the current Rule 14a-8 regime would apply. Conversely, if shareholders vote against, then they would be unable to submit Rule 14a-8 resolutions on E & S issues until a new vote is held. Such a vote could be held, for example, every three years, similar to say-on-pay advisory votes under Section 14A(a)-21 of the Securities and Exchange Act of 1934. The requirement, however, could also be introduced with the possibility for an earlier vote on the matter to be called, if the majority of the outstanding shares so requires.

This arrangement would bring several advantages. First, it would allow for E & S resolutions to be submitted only to companies where there is a broader number of shareholders that are particularly sensitive to E & S issues. This would arguably lead to better quality proposals and, most importantly, to E & S resolutions having higher chances of receiving broader shareholder backing. Second, it would permit companies whose shareholders do not vote in favor of allowing E & S resolutions to be submitted—and, hence, companies in which shareholders are less likely to support such resolutions—to save the costs of processing these proposals. Third—related to this efficiency advantage—insofar as a significant number of companies will not permit the submission of E & S resolutions, this would, from an

aggregate perspective, result in fewer E & S resolutions and no-action requests, and the risks of litigation on such issues would also decrease. Fourth, it would make the number of E & S resolutions submitted largely insensitive to future changes in the SEC staff interpretation of Rule 14a-8 and of its grounds for exclusion. Fifth, through the mechanism of a periodic vote—and, possibly, also the ability to call for an earlier vote—it would warrant sufficient flexibility to account for significant changes in shareholders' preferences on the matter. Sixth, it would allow for a company-specific approach so that, for example, shareholders of companies that are active in sectors that are more sensitive to E & S issues (such as the oil and gas industry) may vote to ensure that E & S resolutions can be submitted. Seventh, by being enacted through federal legislation, it would not create any risks of conflicts with the current Rule 14a-8 regime.

The effectiveness of the new rule could also be calibrated by granting the vote the authority to either opt the company into Rule 14a-8's regime or to opt the company out of it. In other words, the default regime could be that shareholders can submit Rule 14a-8 resolutions on E & S issues unless otherwise determined by the vote or, on the contrary, that shareholders cannot submit such proposals unless otherwise determined by the vote. This second arrangement appears preferable. Behavioral economics indicates that when a default option exists, a large number of individuals will tend to maintain that option, and the more this option is represented as the norm, the more this tendency will be reinforced.[184] Hence, setting the default to the rule that shareholders cannot submit E & S proposals unless otherwise determined by the vote would present the advantage of more aware opt-ins.[185] This way, the rule would act as a stronger filter, ensuring that E & S resolutions can be submitted only if a

184. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 108 (2021) (observing that "if, for a given choice, there is a default option—an option that will prevail if the chooser does nothing—then we can usually expect a large number of people to end up with that option, whether or not it is good for them" and that "these behavioral tendencies toward doing nothing will be reinforced if the default option comes with some implicit or explicit suggestion that it represents the normal or the recommended course of action.").

185. *Id.* at 110 (explaining that "[i]f people know their preferences, and know that they dislike the outcome that is embedded in the default, they will probably change it.").

significant fraction of the shareholders really believes that this should be the case.

2. Anti-E&S Bylaws Provisions

The option outlined in Section IV.E.1. would be workable for companies that are already publicly listed. But what about firms preparing to go public? Suppose, for example, that a founder wishes to ensure the company is insulated from certain forms of shareholder activism—particularly E & S proposals—once it becomes publicly traded. Under current law, this kind of targeted opt-out is not available, even if limited solely to E & S resolutions under Rule 14a-8.

In 2017, the SEC granted no-action relief to a financial trust that sought to exclude a shareholder proposal under Rule 14a-8. The trust relied on language in its Declaration of Trust stating that the company would not present proposals to shareholders—whether binding or precatory—unless the subject matter fell within those specifically enumerated in the Declaration.[186] The SEC subsequently granted similar relief to other trusts with comparable provisions. These developments raised concerns that companies might attempt to emulate such structures by using bylaw provisions to narrow the application of Rule 14a-8.[187]

Whether such an approach would be legally viable remains contested. In a 1947 decision, the Court of Appeals for the Third Circuit held that companies could not use a bylaw provision to thwart the intent of Congress in enacting Rule X-14A-7 (now Rule 14a-8).[188] Yet at least one commentator, writing in 1984, argued

186. *See* Letter from Keith E. Gottfried, Couns. for RAIT Fin. Tr., to Office of Chief Couns., Div. Corp. Fin., Sec. & Exch. Comm'n (Jan. 24, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/edwardfriedman031017-14a8.pdf [https://perma.cc/KU88-TK7X]; *see also* Letter from Matt S. McNair, Senior Special Couns., Div. Corp. Fin., Sec. & Exch. Comm'n, to Keith E. Gottfried, Couns. for RAIT Fin. Tr. (Mar. 10, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/edwardfriedman031017-14a8.pdf [https://perma.cc/KU88-TK7X].

187. *See* Phillip Goldstein, *Can a Public Company Effectively Opt Out of Rule 14a-8?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2020), https://corpgov.law.harvard.edu/2020/03/30/can-a-public-company-effectively-opt-out-of-rule-14a-8/ [https://perma.cc/YJ6T-MZVA].

188. *See* SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947).

that properly structured bylaws may still impose "reasonable restrictions" on shareholders' ability to present proposals at the general meeting.[189]

Recent developments suggest that companies may indeed attempt to push the boundaries of Rule 14a-8 through structural workarounds. In 2020, for example, in response to the trust-related no-action reliefs discussed above, Phillip Goldstein, co-founder of Bulldog Investors, wrote to the SEC warning that corporate issuers might try to use bylaws to circumvent their obligations under Rule 14a-8.[190] More recently, it has been suggested that companies might regulate shareholder proposals through private ordering.[191]

Despite these interpretations, the legal baseline is clear: companies may not opt out of Rule 14a-8 entirely. Bylaws cannot contain provisions that are inconsistent with the law.[192] Similarly, state law could not authorize opt-out mechanisms that contradict federal securities regulation.[193]

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189. Liebeler, *supra* note 7, at 461.

190. Letter from Phillip Goldstein, Managing Member, Bulldog Investors, LLC, to Jay Clayton, Chairman, Sec. & Exch. Comm'n (Mar. 9, 2020), https://www.sec.gov/comments/s7-23-19/s72319-6934490-211741.pdf [https://perma.cc/QBA9-FEJK].

191. *See* Mohsen Manesh, *The Corporate Contract & The Private Ordering of Shareholder Proposals*, 50 J. CORP. L. 1, 20–23 (2024).

192. *See, e.g.*, DEL. CODE ANN. tit. 8, § 109(b) (West 2025); CAL. CORP. CODE § 212(b) (West 2025).

193. However, moving from the assumption that Congress did not preempt state corporation law when enacting the Securities and Exchange Act 1934, Susan Liebeler argues that "presumably . . . state law could preclude corporations from paying to insurgent groups any of their expenses" or "impose or authorize minimum ownership requirements in order to bring a matter before the shareholders." *Supra* note 7 at 462. More recently, it has been argued that Delaware law does not itself confer on stockholders a right to submit non-binding proposals and that, consequently, Delaware corporations could potentially adopt bylaw provisions "providing for, and regulating, the submission of precatory stakeholder proposals." *See* Kyle A. Pinder, *The Non-Binding Bind: Reframing Precatory Stockholder Proposals under Delaware Law*, 15 MICH. BUS. & ENTREPRENEURIAL L. REV. (forthcoming December 2025) (manuscript at 19), https://papers.ssrn.com/sol3/abstract_id=5418534 [https://perma.cc/W9MD-YVPH]. A related point was recently raised by the current SEC Chairman, Paul S. Atkins, who observed that it is appropriate for the Commission to defer "to those who practice Delaware law . . ." to determine whether precatory proposals are a "proper subject" under Delaware law. He suggested that if Delaware law recognizes no fundamental right for shareholders to vote on precatory resolutions—and such a right is not created by a company's governing

That said, Congress could amend the Securities Exchange Act of 1934 to authorize a limited bylaw-based exclusion—specifically, allowing companies that go public to include an anti-E&S provision in their bylaws. Such a provision would bar the submission of E & S proposals. This option could be provided either at the IPO stage—ensuring prospective investors have information about the restriction before acquiring shares at the IPO—or post-listing.

This model would preserve investor choice and allow for tailored governance structures, with advantages similar to those discussed in Section IV.E.1. Companies adopting anti-E&S bylaw provisions would likely attract investors uninterested in using the proxy process to advance social agendas. At the same time, the mechanism would remain flexible: if shareholder preferences shift, the provision could be repealed through standard amendment procedures.

The proposal has another key advantage. As mentioned, recent commentary has suggested that companies may regulate shareholder proposals through private ordering[194] or state law.[195] These interpretative efforts provide valuable insight given the current legal framework. Yet both approaches risk creating significant legal uncertainty. By contrast, the statutory reform proposed in this Article would clarify the federal baseline, eliminating the legal uncertainty associated with private ordering and the ambiguities that currently surround the interaction between Rule 14a-8 and state corporate law.

documents—"then one could make an argument that a precatory shareholder proposal submitted to a Delaware company is excludable under paragraph (i)(1) of Rule 14a-8", which allows exclusion of proposals that are not a proper subject for action by shareholders under state law. *See* Paul S. Atkins, Chairman, Sec. & Exch. Comm'n, Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala (Oct. 9, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala [https://perma.cc/BA6J-5N2Y].

194. *See* Manesh, *supra* note 191.

195. *See* Pinder, *supra* note 193; Atkins, *supra* note 193.

CONCLUSION

E & S precatory resolutions can be a meaningful tool to monitor managers on non-financial issues. If such resolutions seek to pursue these objectives or are submitted by shareholders with sufficient skin in the game, they are yet another activist tactic that should not, per se, be discouraged, at least no more than any other tactic. However, facilitating the submission of numerous frivolous E & S proposals is likely to prove undesirable, as—through the gates of Rule 14a–8—it can transform general meetings into ideological battlegrounds and impose non-negligible costs on shareholders. The need to safeguard Rule's 14a–8 proper purposes—fostering shareholder democracy and ensuring that shareholders can stimulate managerial action—and prevent its misuse or overreliance is even more pressing today, as the Rule is being used not only—as it has been for years now—by a small number of shareholders to push for E & S agendas, but also, more recently and for opposite purposes, by anti-E&S supporters.

In this regard, the experience with the 2021 Bulletin is quite telling: despite the precatory nature of these resolutions, the post-2021 landscape has proven largely undesirable, in that it facilitated the submission of costly E & S proposals generally unpopular with the majority of shareholders. By rescinding the 2021 Bulletin and reintroducing a company-specific approach to interpret the ordinary business and the economic relevance exclusions, the 2025 Bulletin offers an appropriate response to remedy this situation and was, therefore, desirable.

The analysis, however, also indicates that, although not binding, SEC Bulletins exert a significant influence on market participants, and particularly on shareholder-proponents. Decisions about whether to facilitate or constrain the submission of E & S proposals, however, should not rest with the SEC staff's discretion, especially when such interpretative shifts carry large systemic consequences and are achieved through non-binding acts that, unlike rulemaking, are not subject to requirements such as notice and comment.

Although the 2021 Bulletin's demise was a fortunate one, it would be naïve to think the story ends here. In law and policy, demises are not always final, and resurrections are not unheard of. Simply rescinding the Bulletin leaves open the possibility of

future reversals and is, therefore, insufficient to prevent future overuse of Rule 14a–8. To provide more durable protection, policy interventions should be considered to preserve the Rule's proper purposes and to prevent activists' overreliance on it—regardless of future SEC staff's informal stances. This result could be achieved through different responses: shifting quantifiable direct costs from the company to the proponent for proposals that prove to be largely unpopular, tightening the resubmission exclusion, or increasing the ownership thresholds necessary to submit a proposal under the Rule.

However, to avoid unreasonable restraints on shareholders' ability to bring proposals under Rule 14a-8 and disincentives to the submission of E & S proposals even in those companies that might have more E-&-S-friendly shareholders, the most appropriate response would be to amend securities law to allow shareholders more control over E & S resolutions. This result could be attained either by letting shareholders decide whether they want the company to solicit E & S resolutions or by allowing companies to introduce anti-E&S bylaw provisions.