

## 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*In 2021, the SEC published its now rescinded Staff Legal Bulletin No. 14L (“the 2021 Bulletin”), revising its interpretations of the “ordinary business” and “economic relevance” exclusions under Rule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.*

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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”),<sup>1</sup> 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.

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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”),<sup>2</sup> 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

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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 I 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 II tests the research hypothesis against empirical evidence by collecting data on the volume of E & S shareholder proposals submitted in Russell 3000<sup>3</sup> 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 III discusses the costs associated with facilitating the submission of E & S precatory resolutions. Building on the analyses conducted in the previous Parts, Part IV 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. The Article then 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,<sup>4</sup> also known as the “Town Hall

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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,”<sup>5</sup> first introduced in 1942.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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 (5<sup>th</sup> 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.<sup>10</sup> 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,<sup>11</sup> including specific ownership thresholds. Following the amendments that came into effect in 2020,<sup>12</sup> 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.<sup>13</sup> Importantly, for the purpose of meeting such thresholds, shareholders cannot aggregate their holdings with those of other shareholders.<sup>14</sup>

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."<sup>15</sup> Despite their precatory nature, these proposals can still have a significant influence on public corporations,<sup>16</sup> especially if they receive

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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://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,<sup>17</sup> in more recent times the trend seems to have reversed, with more of them receiving higher rates of support.<sup>18</sup>

## 2. Shareholder Proposals as an Activist Tactic

Precatory proposals are a key tool through which shareholders express concerns and influence board action.<sup>19</sup> When the Rule was first introduced, U.S. corporations were largely characterized by dispersed ownership, as described in the Berle-Means framework,<sup>20</sup> and proposals were primarily submitted by small groups of individual activists—often regarded as the founders of shareholder activism<sup>21</sup>—known as corporate gadflies,<sup>22</sup> who focused on issues like executive compensation and cumulative voting.<sup>23</sup> In the 1960s, social activists joined this small cohort,<sup>24</sup> 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.<sup>25</sup> At that point, shareholder proposals had gained little traction and most had failed to receive significant shareholder support.<sup>26</sup> Gadflies lacked influence,<sup>27</sup> and until 1970 companies could still exclude proposals “of a general political, social, or economic nature”.<sup>28</sup> For decades, the Rule “amounted to little more than nuisance for corporate management and a slight burden on the SEC staff.”<sup>29</sup>

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<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> Pension funds and other long-term investors now regularly submit proposals as part of their

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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.<sup>33</sup> Similarly, activist hedge funds have embraced shareholder resolutions as a key element of their campaigns.<sup>34</sup>

### B. Shareholders' Resolutions on Environmental and Social Issues

The submission of shareholder proposals on E & S issues is not a new phenomenon. As discussed,<sup>35</sup> 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.<sup>36</sup>

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<sup>37</sup> and this trend is set to continue.<sup>38</sup> 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://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,<sup>39</sup> 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.<sup>40</sup> E & S resolutions might, for example, be helpful in monitoring management on non-financial issues that are material to the company's business,<sup>41</sup> including by improving non-financial risks management<sup>42</sup> as well as transparency on the disclosure of non-financial issues.<sup>43</sup> Long-term investors might also file such resolutions to address what they view as managers' excessive short-termism.<sup>44</sup>

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://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://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,<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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".<sup>48</sup> The ordinary business exclusion was introduced in 1954<sup>49</sup> to allow exclusion of proposals on matters falling in the directors' competence,<sup>50</sup> thereby preserving state laws' allocation of authority between management and shareholders.<sup>51</sup>

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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”.<sup>52</sup> 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.”<sup>53</sup> SEC guidance applies a two pronged assessment,<sup>54</sup> 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.”<sup>55</sup> 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.”<sup>56</sup>

## 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,<sup>57</sup> the SEC has developed mechanisms to provide guidance and reduce litigation.<sup>58</sup>

Interpretations are conveyed both formally and informally. Formal interpretations appear in “adopting releases” issued in connection with Rule amendments.<sup>59</sup> Informal guidance is

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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.<sup>60</sup> 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.<sup>61</sup> Staff Legal Bulletins, also non-binding, outline the SEC “staff’s views regarding various aspects of the federal securities laws and SEC regulations.”<sup>62</sup> 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.”<sup>63</sup> 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.<sup>64</sup> 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

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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.”<sup>65</sup>

*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.<sup>66</sup>

Bulletin 14K clarified that the SEC staff would no longer deem “particular issues or categories of issues as universally ‘significant.’”<sup>67</sup> 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.<sup>68</sup>

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."<sup>69</sup> According to the agency, this approach produced two costs.<sup>70</sup> First, it forced the SEC staff to engage in factual considerations.<sup>71</sup> Second, using a company-specific approach yielded inconsistent and unpredictable results.<sup>72</sup> 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

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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.<sup>73</sup> 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.”<sup>74</sup>

#### *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.<sup>75</sup> Under its current version—the result of amendments proposed in 1982<sup>76</sup> and adopted in 1983<sup>77</sup>—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.<sup>78</sup>

Two years after the 1983 amendments, the District Court for the District of Columbia rendered its decision in *Lovenheim v. Iroquois Brands, Ltd.*<sup>79</sup> 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