

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.

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 resolutions¹⁵⁶ 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 resolutions¹⁶³ 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.

<i>Year</i>	<i>Percentage of Proposals That Would Have Been Subject to the Cost-Shifting Regime</i>	<i>Estimated Costs Shifted (million, USD)</i>
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

189. Liebler, *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 Liebler 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 ordering¹⁹⁴ 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-state-ments/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.