

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 Kishanthe 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 meetings⁸⁹ 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-MGY5>] (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 shareholder 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/uploaded_files/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-like⁹⁷ 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 resolutions¹⁰⁵ (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.

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 Proposals*, 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 Screening¹⁰⁸ 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.

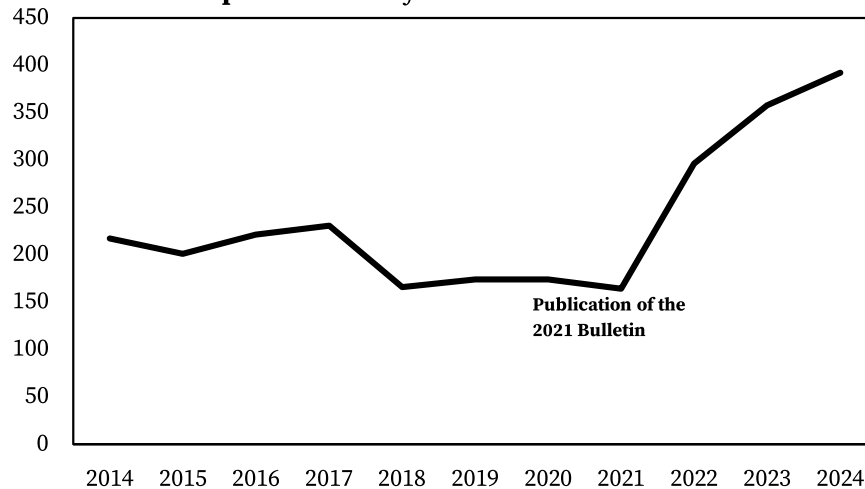
108. The analyses conducted *infra* in Section II.C. (support rates for E & S resolutions) and in Section II.D. (proposals that received a majority of votes cast in favor) also rely on data from FactSet.

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—though 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

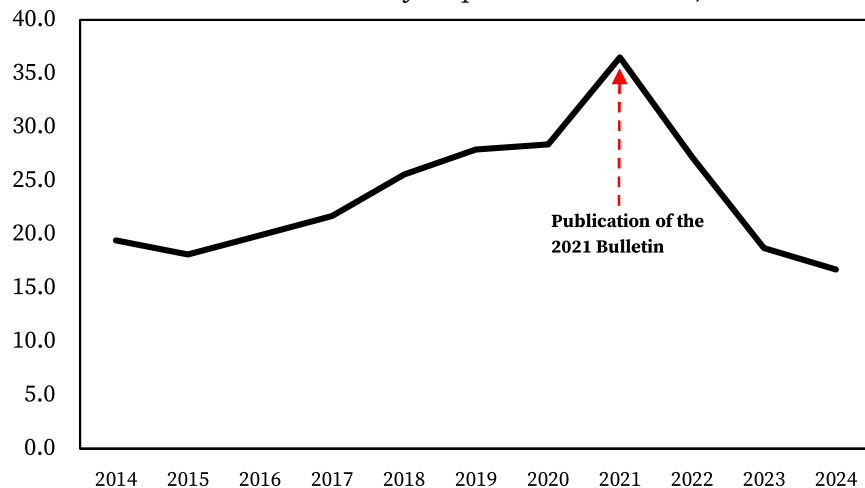
The remarkable growth experienced by E & S resolutions, by itself, only tells part of the story. Indeed, it might be the case that the 2021 Bulletin unleashed the submission of high-quality E & S proposals that, prior to the policy shift, were being omitted from companies' proxy materials based on the 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 study¹¹³ 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%.”).

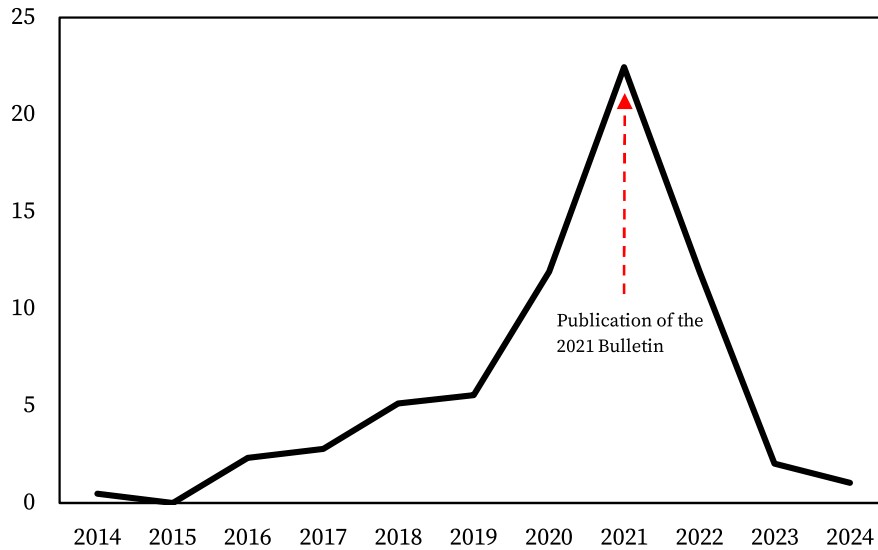
unleashed the submission of more unworthy resolutions, but the final outcome—the number of proposals approved—would either remain substantially unchanged or even improve (if more E & S resolutions were approved). To be sure, it is rare for precatory proposals to receive a majority of votes cast.¹¹⁴ However, 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)



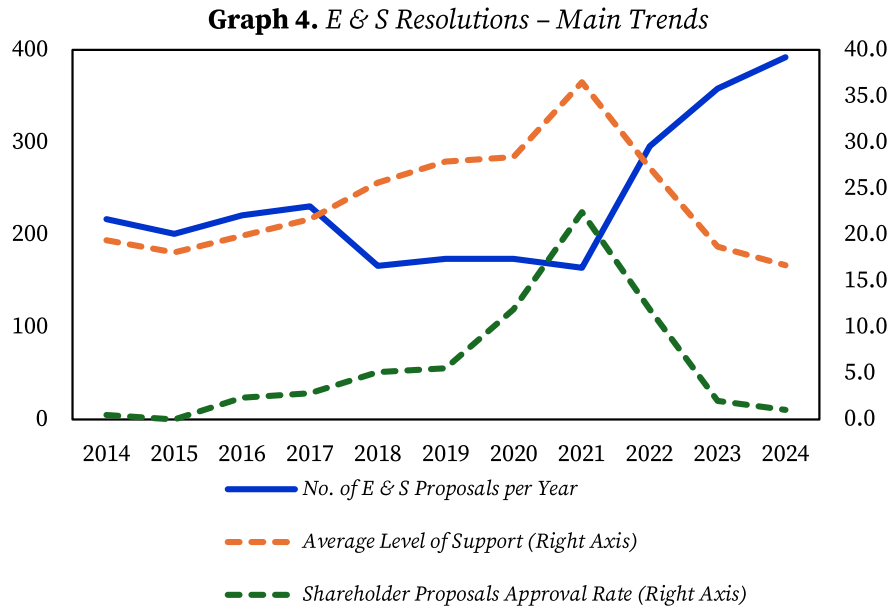
Consistent with the trend characterizing the average level of support analyzed in Section II.D., as well as with the research hypothesis, the SPAR was on the rise starting in 2015 and grew by a remarkable 307% between 2019 and 2021, representing an annual average growth of 153%. In 2021, the SPAR reached 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).



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 change¹¹⁷ 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 Energies¹¹⁹—ensuring to always maintain sufficient stakes so as to have the right, based on the applicable law, to file a shareholder proposal¹²⁰—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 resolutions¹²⁴—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.

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 divesting¹³¹—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

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 Liebler, *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 disagreement¹⁴⁰—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* Liebler, *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.”).