# CONSTITUTIONALLY SUSPECT INTERVENTIONS IN THE SHAREHOLDER PROPOSAL FORUM

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*In recent years, shareholder proposals about social matters have increased significantly. While an average American may think such proposals are matters solely between a publicly traded corporation and its shareholders, the United States Securities and Exchange Commission (SEC) plays a key role in determining whether a particular proposal may be raised at a shareholder's meeting through its regulatory review process.*

*As social issues have become increasingly significant in corporate spaces due to the rise of environmental, social, and governance considerations, both scholars and courts have begun to examine the intersection between the SEC's regulatory regime and the First Amendment. This Article contributes to that examination by analogizing corporate proxy statements to limited public forums under the First Amendment and explaining how such an approach may result in some forms of the SEC's regulatory review of shareholder proposals being declared unconstitutional. This is because those regulatory determinations prevent certain shareholders from speaking based on normative judgments and thus create the potential for viewpoint discrimination.*

*To demonstrate this, the Article first examines the history of the SEC's regulatory review of shareholder proposals that involved social or political concerns. This review reveals the inconsistencies inherent in the SEC's approach to such shareholder proposals and its repeated difficulties in developing a consistent and workable standard for reviewing such proposals. Next, the Article considers the SEC's latest regulatory approach to shareholder proposals and examines*

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*how the SEC may exercise its discretion under that approach to advance or inhibit particular views.*

*Given the historic nature of the shareholder meeting and the Supreme Court's description of such meetings, this Article then argues that shareholder proposals are raised in a manner akin to a limited public forum, rendering the SEC's existing oversight of the shareholder proposal process constitutionally suspect. But removing the SEC from the process of screening shareholder proposals may not be bad for corporate governance. Although there is a risk that shareholders may abuse the proposal process absent SEC oversight, there is a potential benefit to allowing proposals to proceed to shareholder votes as this is consistent with the information-providing aspects of shareholder proposals and better enables private ordering to assess each proposal's merits.*

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## INTRODUCTION

In recent years, corporations have increasingly become involved in addressing social and political questions.[1] A prominent example of this trend is the dramatic increase in shareholder proposals regarding social or political matters at a corporation's annual meeting.[2] Yet while some of those proposals—such as one to reduce access to firearms—have been put to a shareholder vote, other proposals—such as one to preserve private access to firearms—have not due to the federal government's intervention.[3]

As a general matter, securities regulations presume that a publicly held corporation must include such proposals in the materials the corporation distributes to its shareholders prior to the shareholder meeting (its "proxy materials").[4] But corporations may—and regularly do—seek to exclude such proposals from their proxy materials for a variety of reasons.[5]

Corporations seeking to exclude a shareholder proposal must file their reasons for doing so with the Securities and Exchange Commission.[6] If the SEC agrees that there is a basis for excluding the proposal, it will issue a "no-action" letter, stating that the SEC will refrain from taking legal action against the company if the company excludes the disputed proposal from its proxy statement.[7] The company then relies on that letter as the basis for excluding that proposal.

Hence, the SEC plays a central role in determining whether certain controversial shareholder proposals may be excluded.[8] And, because most shareholders vote using proxy materials rather than attending, this means that the SEC effectively determines whether

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1. *See, e.g.*, Saura Masconale & Simone M. Sepe, *Citizen Corp.—Corporate Activism and Democracy*, 100 WASH. U. L. REV. 257, 268–78 (2022); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1540–67 (2018).

2. *See* Stefanie Spear, *Shareholders File More Than 500 ESG-Related Resolutions in Record-Breaking Year, Despite Political Attacks*, AS YOU SOW (Mar. 22, 2023), https://perma.cc/JR4Z-H69V.

3. *See infra* notes 189–90.

4. *See* 17 C.F.R. § 240.14a-8 (2024). The management of a corporation bears the burden of proving that a shareholder proposal should be excluded. *Id.* § 240.14a-8(g).

5. *Id.*

6. *Id.* § 240.14a-8(j).

7. *See 2023–2024 No-Action Responses Issued Under Exchange Act Rule 14a-8*, SEC (Jan. 31, 2024), https://perma.cc/AS9N-79HG.

8. *See id.* No-action requests are filed with the SEC's Division of Corporate Finance and may be appealed to the entire Commission. For ease of reference, this Article refers to the no-action process as filing with the "SEC" generally. For a description of the no-action process, see Section I.A.

shareholder proposals may be excluded from discussion—and a vote—at the meeting.[9]

As of late, with the rise of environmental, social, and governance (ESG) considerations, the SEC has taken a more permissive view toward admitting shareholder proposals that concern "transcendent" social issues.[10] Yet, even as the SEC has encouraged shareholder proposals on certain matters, it has faced criticisms regarding the consistency of its decision-making. Various law firms have voiced concern about the SEC's latest approach to shareholder proposals.[11] A working group in the House of Representatives has drafted multiple pieces of legislation to "reform" the shareholder proposal process.[12] Both in 2018 and again in June 2023, a commissioner of the SEC argued that the SEC should get out of the "social policy" business.[13] And, most significantly, the SEC now faces litigation with regard to its review of shareholder proposals—litigation that may well reach the Supreme Court.[14]

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9. *See* James D. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating a Corporate Public Square*, 3 COLUM. BUS. L. REV. 1147, 1162–66 (2021).

10. *See infra* Section I.B.

11. *See, e.g.*, *The Pendulum Swings (Far): SEC Staff Issues New Guidance on Shareholder Proposals*, GIBSON DUNN (Nov. 5, 2021), https://perma.cc/Q37A-HZQU ("SLB 14L injects more uncertainty for companies evaluating shareholder proposals under Rule 14a-8 and further clouds an already opaque no-action review process."); *SEC Staff Legal Bulletin Makes Exclusion of Certain Shareholder Proposals More Challenging*, COOLEY (Nov. 17, 2021), https://perma.cc/Q8YX-6MXM (similar).

12. Cydney S. Posner, *House ESG Working Group Takes on Shareholder Proposal Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 29, 2023), https://perma.cc/X3QM-BMGV.

13. Mark T. Uyeda, Comm'r, SEC, Remarks at the Society for Corporate Governance 2023 National Conference (June 21, 2023), https://perma.cc/L9X2-DQQM.

14. *See* Opening Brief for Petitioners at 20–38, Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230 (5th Cir. July 14, 2023) (arguing that the no-action determination was arbitrary and capricious and in violation of the First Amendment); Adam Feldman, *Supreme Court Eyeing Fifth Circuit, but Too Early to Decipher Why*, BLOOMBERG L. (Dec. 11, 2023), https://news.bloomberglaw.com/us-law-week/supreme-court-eyeing-fifth-circuit-but-too-early-to-decipher-why ("[W]e know that the Fifth Circuit's decisions in salient cases have the Supreme Court's attention.").

The Fifth Circuit has ruled that the case is both moot and jurisdictionally barred. Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2024 WL 4784358, at *10–11 (5th Cir. Nov. 14, 2024). Given Judge Jones's forceful dissent, *id.* ("The SEC is playing catch-me-if-you-can with legal challenges to its recent penchant for issuing viewpoint-discriminatory no-action letters about controversial shareholder proposals."), a rehearing en banc is a serious possibility as well as a petition for certiorari.

Although the SEC's no-action review process has long faced criticism for its inconsistency and shifting standards,[15] that process faces heightened attention in an increasingly polarized political climate and in an era where corporations are often presented with shareholder proposals that relate to the social questions of the day. This increase in social-policy-oriented shareholder proposals has brought to light potential First Amendment issues with the SEC's authority that previously lay dormant.[16] Indeed, at the same time that shareholder proposals involving social and political issues have dramatically increased, recent scholarship has renewed interest in exploring the intersection of the First Amendment with the SEC's regulatory actions.[17] To date, scholars have primarily focused on

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15. For just a few of the many criticisms, see, for example, Thomas M. Clusserath, *Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 19 (1963) ("[T]he following pages will demonstrate that the problem of whether a proposal, in whatever form, is a proper subject for action by security holders has generated, since 1954, some confusion and inconsistency in Commission and Division decisions."); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 903 (1994) ("[T]he SEC's attempt to impose its view of the 'proper subjects' on the shareholder-management dialogue has been, and will continue to be, a bureaucratic failure."); Adrien Anderson, *The Policy of Determining Significant Policy Under Rule 14a-8(i)(7)*, 93 DENV. L. REV. F. 183, 196 (2016) (noting that "[t]he 'ordinary business' exclusion remains an interpretive nightmare for companies, shareholders, and the SEC's Staff").

16. *See, e.g.*, Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 880–82 (2022) (arguing that the compelled commercial speech paradigm under the First Amendment requires the SEC to justify disclosure mandates as a form of investor protection and that disclosure mandates, such as the SEC's recent climate proposal rules, would fail heightened scrutiny); Mark R. Kubisch, *ESG, Public Pensions, and Compelled Speech*, 11 TEX. A&M L. REV. 71, 74–75 (2023) (arguing that the Supreme Court's "current compelled speech doctrine likely renders public pension funds (and other compelled investing) unconstitutional if invested according to ESG principles"); Jerry W. Markham, *Securities & Exchange Commission vs. Elon Musk & the First Amendment*, 70 CASE W. RSRV. L. REV. 339, 341 (2019) (arguing that the SEC should stop regulating viewpoint-based speech on X (formerly known as Twitter) and other social media platforms because of a need for full First Amendment protection).

17. *See* Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 NOTRE DAME L. REV. 97, 103 (2023) (noting the Supreme Court's "antiregulatory turn" and arguing that the securities law "framework's listener-centered functions align with First Amendment theory and doctrine"); Sarah H. Haan, The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule 1–23 (Jun. 16, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138712 (arguing that the application of the First Amendment to the SEC's climate disclosure rules would mark a significant change in the law and cautioning courts); Griffith, *supra* note 16, at 880–82.

justifications for affording reduced (or no) First Amendment protections to a corporation's external disclosures to the public because of the nature of securities themselves.[18]

This Article takes a different tack; namely, it explores how the application of the First Amendment to the SEC's no-action review process might impact a corporation's *internal* debates—in particular, with regard to shareholder proposals, by analogizing a corporate proxy statement to a kind of limited public forum. Viewed through this lens, the Article argues that SEC no-action determinations about shareholder proposals regarding social or political matters may be unconstitutional under the First Amendment because those determinations are based on normative judgments that lack an objective, workable standard and allow for viewpoint discrimination. As such, the Supreme Court's First Amendment jurisprudence may require the SEC to significantly reduce its role in determining whether a specific shareholder proposal must be included and leave much of the shareholder proposal process to private ordering.

This Article proceeds in four parts. First, it summarizes the current iteration of the SEC's no-action process before reviewing the SEC's application of no-action letters to shareholder proposals that involved general social or political concerns from the rule's inception to the present day. This review highlights the ad hoc nature of the SEC's application of no-action letters to such shareholder proposals and the SEC's repeated difficulties in developing a workable standard for reviewing such proposals. It concludes by considering the SEC's latest regulatory guidance on shareholder proposals and highlighting reasons why that guidance provides no more certainty than what has come before.

Second, with that history in mind, the Article then reviews the no-action determinations made by the SEC in the two years since the latest staff bulletin was provided. It identifies instances in which a proposal proceeds (or not) based on the normative commitments of the current SEC. What is more, the Article looks beyond the SEC's stated reasons for its no-action determination and considers the arguments that the corporation raised in its request for a no-action determination. This examination provides examples of how the SEC's discretion in selecting a basis for exclusion allows it to selectively opine about whether particular matters are "socially significant" and so not subject to the "ordinary business" exclusion. Hence, this review shows that the SEC's review of shareholder proposals remains an opaque process that, at times, appears to disadvantage particular views.

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For a detailed overview of the literature on shareholder proposals in general, see Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 288 n.101 (2016).

18. *See infra* Section III.E.

Third, the Article considers the implications that these inconsistencies have for the SEC's no-action determinations under the First Amendment. It argues that, given the historic nature of the shareholder meeting and the Supreme Court's description of such meetings, proxy statements should be considered as a type of limited public forum under Supreme Court precedent. This Article contends that the SEC's lack of a workable application for its substantive exclusions—combined with instances of apparent viewpoint discrimination—renders its oversight of the shareholder proposal process constitutionally suspect. It then examines how a forum-informed approach would align with the Supreme Court's view of proxy statements and why shareholder proposals have not previously been subject to First Amendment review.

Finally, this Article considers the potential implications of that conclusion. Removing the SEC from reviewing the substance of particular shareholder proposals may reinforce the information-providing aspects of shareholder proposals. And it will likely allow private ordering to assess the value of shareholder proposals and allow shareholders to have a greater voice in corporate affairs. At the same time, application of the First Amendment to the no-action process may lead to misuse of that process by repeat players, increasing the costs of such proposals.

Ultimately, then, the Supreme Court's jurisprudence may soon leave it to the market—and the dominant actors within it—to decide the future of shareholder proposals.

## I. THE SEC'S MEANDERING SUPERVISION OF PROXIES

This Part begins with a brief description of the SEC no-action process. Then, to illustrate the issues inherent with the SEC's review of shareholder proposals regarding social or political matters, it discusses the SEC's role in the shareholder proposal process from the beginning of federal oversight of such proposals to the present day. It describes the SEC's attempts to craft substantive rules for shareholder proposals that touch on social or political matters. And it highlights the SEC's repeated difficulties in drawing clear restrictions for such proposals, substantive changes to rules that appear tied to the whims (and personnel) of the Commission, and the continued criticism the SEC has received regarding its supervision of shareholder proxies. The Part concludes by considering the latest guidance offered by the SEC staff—a guidance that does not resolve the inherent difficulties with the SEC's oversight of this process.

### *A. No-Action Determinations of Shareholder Proposals*

A corporation's proxy materials are documents that the SEC requires the corporation to provide its shareholders so that the shareholders may make informed decisions about whether to authorize particular actions on their behalf at the annual shareholder

meeting.[19] These materials contain the corporation's proxy statement, which describes the matters to be raised at the shareholder meeting, as well as a "proxy," which a shareholder uses to authorize the voting of the shareholder's shares by a third party.[20] Because most corporations require a certain number of shares to be present at those meetings and most shareholders do not attend the annual shareholder meeting, proxy statements have essentially become the shareholder meeting as certain actions may occur only if a sufficient number of proxies have been given in support of a particular proposition.[21]

Under Rule 14a-8, shareholders of a public company have a right to have their proposals included on the company's proxy materials if the proposals meet certain procedural requirements and do not address a subject matter that is a basis for exclusion.[22] Some of these procedural requirements include that the shareholder proponent must own a certain minimum amount of shares (which varies depending on the length of time that the shareholder has held the stock) and must promise to hold those shares through the date of the annual shareholder meeting.[23] Shareholders, moreover, may only make one proposal per meeting, they must specify times at which they are available to meet with the company prior to the meeting, and they or their representative must attend the shareholder meeting.[24]

Even if a shareholder meets these procedural requirements, companies still may seek to exclude proposals from the corporate proxy materials if the proposal concerns a subject matter that the SEC has identified as a basis for exclusion.[25] These bases—which have developed over the years—include that the proposal is "[i]mproper under state law,"[26] a violation of state, federal, or foreign law,[27] a violation of the SEC's proxy rules,[28] of little relevance to the company,[29] relate to the company's ordinary business operations,[30] conflict with the company's own proposal,[31] have already been "substantially implemented,"[32] is duplicative,[33] or is a resubmission

19. *See* STEPHEN M. BAINBRIDGE, CORPORATE LAW 308–14 (4th ed. 2020).
20. *See id.* at 314.
21. *See id.* at 308; Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 334–35 (3d Cir. 2015).
22. 17 C.F.R. § 240.14a-8(b) (2024).
23. *Id.*
24. *Id.* § 240.14a-8(b)(1)(iii), (c), (h)(1).
25. *Id.* § 240.14a-8(i).
26. *Id.* § 240.14a-8(i)(1).
27. *Id.* § 240.14a-8(i)(2).
28. *Id.* § 240.14a-8(i)(3).
29. *Id.* § 240.14a-8(i)(5).
30. *Id.* § 240.14a-8(i)(7).
31. *Id.* § 240.14a-8(i)(9).
32. *Id.* § 240.14a-8(i)(10).
33. *Id.* § 240.14a-8(i)(11).

that has lacked a specified level of shareholder support.[34] Of these bases, the one most frequently relied upon by the SEC is the "ordinary business" exclusion.[35]

To exclude a proposal, a corporation must file its reasons for excluding the proposal "with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy" and provide the shareholder with a copy of those reasons.[36] Shareholders (regularly called "proponents" in this process) may file a response to the corporation's assertion with the SEC, and they are encouraged to do so "as soon as possible" so that the SEC has "time to consider fully" the proponent's response before it makes its determination.[37] No timeframe, however, is provided for the decision. Nor are there limitations on the number of responses the company and shareholder may make to each other's arguments. Finally, in assessing whether a particular basis for exclusion may apply, the SEC may consider both the proposal and the proponent's supporting statement accompanying it.[38]

If the proposal is—in the staff's view—excludable, the SEC's staff informs the company that the SEC will not seek to enjoin the distribution of the company's proxy materials if the proposal is omitted.[39] The precise basis for these determinations, however, can be difficult to discern as the SEC letters that contain the determination generally consist of a paragraph describing the proposal at issue, followed by a sentence or two regarding whether a particular basis for exclusion applies without elaboration.[40]

Given the letters' limitations, the SEC characterizes these letters as "informal advice and suggestions emanating from the staff in this area" that are not binding on either the company or shareholders.[41]

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34. *Id.* § 240.14a-8(i)(12).

35. 3 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 10:43 (8th ed. 2023).

36. 17 C.F.R. § 240.14a-8(j)(1); *see* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 939 (1998).

37. 17 C.F.R. § 240.14a-8(k).

38. *See* SEC Legal Bulletin No. 14C (CF) (June 28, 2005), https://perma.cc/5VFU-A5YM.

39. *Division of Corporation Finance: Informal Procedures Regarding Shareholder Proposals*, SEC (Nov. 21, 2022), https://perma.cc/4D9K-U567.

40. *See infra* Part II.

41. Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 19603, 1976 WL 160411, at *3 (July 7, 1976); SEC, *supra* note 39; *see* Note, *The SEC and "No-Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 HARV. L. REV. 835, 835 (1971) ("Informality has been, in large measure, the hallmark of the Commission's internal practices."). Courts have held that no-action letters are not binding on the parties. *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. SEC, 45 F.3d 7, 12 (2d Cir. 1995). But, given the highly collaborative nature of

Yet, the SEC instructs companies seeking to exclude proposals, where possible, to "refer to the most recent applicable authority, such as prior Division letters issued under the rule" when arguing for exclusion.[42] Accordingly, practitioners treat such letters as providing a "de facto law."[43]

In the event that the Division agrees with the company that a proposal may be excluded, a shareholder can still attempt to have the proposal added to the proxy materials, either by seeking declaratory and injunctive relief in federal district court[44] or by petitioning the Commission to review the staff determination.[45] Actions challenging the Division's determinations by either the corporation or the proponent, however, are exceedingly rare. To begin, the compressed timeframe of the proxy season does not lend itself to judicial review.[46] What is more, no-action determinations are generally the end of the matter, given the cost of litigation and the limited benefit of a successful outcome for the proponent.[47] Hence, companies regularly

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the no-action review process, such a determination is effectively binding on the parties. Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2024 WL 4784358, at *10–12 (5th Cir. Nov. 14, 2024) (Jones, J., dissenting); *see* James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 886 (2019).

In 2019, the SEC announced that it would respond to no-actions requests orally rather than in writing at times. *Announcement Regarding Rule 14a-8 No-Action Requests*, SEC (Sept. 6, 2019), https://perma.cc/C2FR-PQJR. After just two years (and a change in administration), however, the SEC discarded this approach in the interest of greater transparency. *Announcement Regarding Staff Responses to Rule 14a-8 No-Action Requests*, SEC (Dec. 13, 2021), https://perma.cc/L8X3-7FCT.

42. 17 C.F.R. § 240.14a-8(j)(2)(ii); *id.* § 202.1(d) (no-action letters "can be relied upon as representing the views of that division").

43. Nagy, *supra* note 36, at 924–25; *see Nat'l Ctr. for Pub. Pol'y Rsch.*, 2024 WL 4784358, at *10–12 (Jones, J., dissenting); *see also* Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1279 (1999) (describing the flaws inherent in ex ante review).

44. Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 425 (D.C. Cir. 1992); *see* Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254, 257 (2d Cir. 1994).

45. Nagy, *supra* note 36, at 943–44; *see also* Courtney Bartkus, Comment, *Appealing No-Action Responses Under Rule 14a-8: Informal Procedures of the SEC and the Availability of Meaningful Review*, 93 U. DENV. L. REV. F. 199, 208 (2016).

46. *See* Bartkus, *supra* note 45, at 210.

47. Reilly S. Steel, Note, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1553 (2016); Palmiter, *supra* note 15, at 881 ("Rarely do disappointed proponents seek judicial review. In fact, until 1990, only thirteen reported court cases (about one every four years) arose out of the hundreds of annual 14a-8 exclusions."); Lewis S. Black, Jr. & A. Gilchrist Sparks III, *The SEC as Referee—Shareholder Proposals and Rule 14a-8*, 2 J. CORP. L. 1, 10 (1976) ("For all practical purposes, the Staff's decision with respect to any particular proposal is final.").

request determinations from the Division by a particular date so that the company can print its proxy materials in light of that determination.[48]

The SEC's no-action determinations thus are effectively final and binding determinations regarding what proposals may be excluded from a corporate proxy statement.[49] For instance, in the 2021–2022 proxy season, the SEC denied no-action relief for 112 proposals and all but one of those proposals were then included in the relevant company proxies (the one proposal not included was withdrawn by the proponent).[50]

With this overview of the SEC no-action process in mind, this Article now turns to consider the historical development of this review process and the inherent issues within the process that history reveals.

### *B. The Evolution of the SEC's Oversight of Shareholder Proposals*

The history of federal oversight of shareholder proposals concerning social and political issues reveals inconsistency in the SEC's determinations regarding whether certain matters may be excluded from corporate proxy materials. It further shows the SEC's inability to draft a workable standard for its key substantive bases for excluding shareholder proposals. Simply put, the SEC has made different determinations over time on matters that appear functionally identical by modifying its conception of what constitutes appropriate matters for shareholders to consider. Taken as a whole, this history thus highlights differing views of the business of a corporation and how the SEC has inserted itself into that debate over the years through its oversight of shareholder proposals.

#### *1. The "Proper Subject" for Shareholder Proposals?*

As a preliminary matter, it is helpful to recall that early corporate laws in the United States expected shareholders to attend shareholder meetings in person, in part to "encourage a democratic-style exchange of ideas among decision makers."[51] As one treatise near the start of the twentieth century described it, "[t]he general meeting of a corporation is a deliberative body; and hence reasonable

48. *See infra* Part II.

49. *See* Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2024 WL 4784358, at *23–28 (5th Cir. Nov. 14, 2024) (Jones, J., dissenting); U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 598–99 (2016).

50. Opening Brief for Petitioners, *supra* note 14, at 45–46.

51. Sarah Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. CAL. L. REV. 881, 887–88 (2023) ("The earliest corporate laws assumed that shareholders would vote *in person*, gathered together in a meeting hall."); *id.* (identifying state laws that required in person shareholder attendance). This reflects the origins of the corporate form to some degree from political corporate bodies. *Id.* at 909–10.

debate must be allowed, and the minority cannot be cut short until after a reasonable opportunity for presenting their views."[52]

Yet, as corporations increased in size and ownership dispersed, proxy voting—that is, authorizing another to vote a shareholder's shares on her behalf—dramatically increased as most shareholders were no longer able to attend such meetings in person.[53] Indeed, by the 1930s, many recognized that "realistically the solicitation of proxies [was] the stockholders' meeting."[54] This development raised new issues as management would often solicit proxies without indicating to shareholders what matters would be voted upon and, thus, gave itself free rein to pursue its own interests.[55]

In the wake of a stock market crash and the ongoing Great Depression, Congress enacted the Securities Exchange Act of 1934 to prevent proxy abuse and, at least in the view of some members of Congress, to provide shareholders with a greater voice in corporate governance.[56] In the words of a Senate report about the Act, the Act

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52. 2 ARTHUR MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS 1060 (1908); *see* 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 453 (2d ed. 1886) ("The object of requiring the majority to express their will by vote at a meeting is to enable all the shareholders to consult and deliberate together. Every shareholder is entitled to be present at such meeting, and to have a reasonable hearing.").

53. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1135, 1138 (1993). Some shareholders were already dispersed in the nineteenth century. *See, e.g.*, Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early-Nineteenth Century*, 68 J. ECON. HIST. 645, 665, 679–80 (2008) (noting dispersal of corporate ownership in the nineteenth century).

54. Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 227 (1940).

55. *Id.*; Haan, *supra* note 51, at 892–93 (detailing abuse before the turn of the century).

56. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (describing "fair corporate suffrage" as driving the passage of § 14(a)); Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 105–06, 146 (1988) ("This close examination of Section 14's legislative history [reveals] . . . obvious congressional support for strong and active shareholder participation in the corporate enterprise within the general framework of management-shareholder relations established by the general common and statutory law across the several states."); David C. Bayne, *The Basic Rationale of Proper Subject*, 34 U. DET. L.J. 575, 587–88 (1957) (summarizing legislative history as favoring a broad view of shareholder rights). *But see* Fisch, *supra* note 53, at 1174–84 (describing dissenting views); Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 484 (1972) ("There was certainly no heed given to the shareholder democracy shibboleth that is now argued to justify broader authorizations to shareholders under state law or the developing federal common law.").

Certainly, some involved with implementing the Act at the SEC understood the Act as empowering shareholders. *See Securities and Exchange*

would require that shareholders be informed "as to the major questions of policy, which are decided at stockholders' meetings" so that they would be aware "of the real nature of the matters for which authority to cast [their] vote[s] [was] sought."[57] Yet even after preliminary SEC rules designed to empower shareholders after the Exchange Act were enacted,[58] some recognized that "[i]n the absence of an articulate opposition group[,] the most that the shareholder receive[d] even under the SEC rules [was] a partisan presentation subject to censorship and certain minimum informational standards."[59]

That changed in 1942 when the SEC promulgated the shareholder proposal rule—Rule 14a-8[60] under § 14(a) of the Exchange Act—to provide shareholders with a voice.[61] Relying on the "[d]uty of management to set forth stockholders' proposals," the SEC instructed that if a security holder gave management "reasonable notice" that "such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management *shall* set forth the proposal" and allow shareholders to specify their views on the proposal.[62] Inclusion of shareholder proposals was mandatory, so

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*Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate and Foreign Commerce*, 78th Cong. 13 (1943) [hereinafter *Purcell Testimony*] (statement of Ganson Purcell, Chairman, SEC) ("The congressional objective was to bring about, in the words of this committee, fair corporate suffrage. This meant, of course, adequate and accurate information to stockholders and *an opportunity to act on that information*." (emphasis added)).

57. Bernstein & Fischer, *supra* note 54, at 227–28 (citing S. REP. NO. 73-1455, at 74 (1934)).

58. For instance, in 1938, the SEC required that shareholders be allowed to vote on each item under consideration, eliminating the practice of having a ballot vote the same way on all issues. Note, *The SEC Proxy Rules and Shareholder Participation in Management*, 53 HARV. L. REV. 1165, 1171 (1940).

59. *Id.* at 1172.

60. 17 C.F.R. § 240.14a-8 (2024). Prior to the shareholder proposal rule, the SEC focused on ensuring management disclosed likely matters to arise at shareholder meetings in its solicitation of proxies. Exchange Act Release No. 34-2376, 1940 WL 7144 (Jan. 12, 1940); *see Purcell Testimony*, *supra* note 56, at 13–19.

61. *Purcell Testimony*, *supra* note 56, at 13–17; *see also* Fisch, *supra* note 53, at 1142 ("It seems to me that the heart of the problem lies in the failure of corporate practice to reproduce through the proxy medium an annual meeting substantially equivalent to the old meeting in person. I know that the old-fashioned meeting cannot be revived. Admittedly, that is impossible. It is not impossible, however, to utilize the proxy machinery to approximate the conditions of the old-fashioned meeting." (quoting Robert H. O'Brien, Comm'r, SEC, Address Before the Conference Board 3 (Jan. 21, 1943))).

62. Solicitation of Proxies Under the Act, Exchange Act Release No. 3347, 7 Fed. Reg. 10655, 10656 (Dec. 22, 1942) (emphasis added).

long as the subject was "proper"[63]—a limitation that was not in the original version of the rules.[64] What is more, even if management opposed the proposal, it was required to include "a statement of [the] security holder setting forth the reasons advanced by him in support of such proposal" upon that shareholder's request.[65] And the responsibility for providing the reasons in support of the proposal was that of the shareholder, not management.[66] The proxy materials further needed to provide the solicited stockholder with "an opportunity to specify *by ballot* a choice between approval or disapproval of each matter."[67]

From the start, it was unclear whether a shareholder proposal tied to a social or political topic was "proper." Scant case law existed that explained what constituted a "proper subject" for a shareholder proposal.[68] Nor did the initial rule specify particular grounds that would justify excluding a proposal.[69] Indeed, at a Congressional hearing in 1943, the Chair of the SEC confirmed that "a Communist" could use the shareholder proposal rule to "send to all of the

63. There was no "proper subject" limitation in the initial proposal. *See* Bayne, *supra* note 56, at 591 (quoting the initial proposal rule as "[t]he proposed proxy rules would give to any stockholder the right to have included in the proxy statement a hundred-word statement concerning any proposal which he desired to be submitted to stock holders for consideration and action"). There was pushback to the original language due to concerns that the proposal process would be abused. *Id.* at 592. At least one commissioner viewed the rule broadly. *Id.* ("I do not believe that the stockholders want either the Commission or anyone else to tell them what proposals they may have a real chance to act on and what proposals should be ruled out as impracticable or crackpot.").

64. *Purcell Testimony*, *supra* note 56, at 38.

65. Solicitation of Proxies Under the Act, Exchange Act Release No. 3347, 7 Fed. Reg. 10655, 10655 (1942).

66. *Id.* Management had to list the shareholders' contact information so that other shareholders could contact and obtain more information from the proponent. Harry Heller, *Stockholder Proposals*, VA. L. WKLY., 1953, at 72–73.

67. Solicitation of Proxies Under the Act, Exchange Act Release No. 3347, 7 Fed. Reg. 10655, 10655 (Dec. 22, 1942); Sarah C. Haan, *Delegated Corporate Voting and the Deliberative Franchise*, 47 SEATTLE U. L. REV. 483, 499 (2024) (noting that this language "underscored the [SEC's] view of the delegation as the point of exercise of the franchise").

68. *See* Bernstein & Fischer, *supra* note 54, at 235 n.38 (observing that "[v]ery little case law exists as to what a stockholder may properly raise from the floor"); Clusserath, *supra* note 15, at 18 ("Prior to the 1954 rule change, the Commission[] faced . . . state law that was and is meager in specifics with respect to proper subjects for stockholder action."); *see also* Mortimer M. Caplin, *Proxies, Annual Meetings, and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653, 670 (1951).

69. Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 428 (1984).

stockholders" a "philosophic" or "propaganda statement."[70] Emphasizing that the SEC "ha[d] never seen such a case," the Chair asserted that the SEC "would have to deal with [such a proposal] and make such appropriate changes as might seem necessary," adding that "use [of] the corporate proxy machinery for making a stump speech for some political party" was "obviously without the spirit of the rule" even though the rule provided no express limitation against such proposals.[71]

Given the open-endedness of the shareholder proposal regulations, the SEC soon found itself trying to clarify what constituted a "proper" proposal in 1946. That year, a stockholder proposed that stockholder dividends not be subject to federal income tax, that "the anti-trust laws and the enforcement thereof be revised," and that "all Federal legislation hereafter enacted providing for workers and farmers to be represented should be made to apply equally to investors."[72] In a letter to the SEC about these proposals, the management of the respective corporation argued that the proposals were "of a political and economic nature" and, so, beyond the scope of the corporation's business operations and not "proper subjects for action."[73]

In response, the Director of the SEC's Corporate Finance Division stated that the "matters relating to the affairs of the company concerned" are determined "under the laws of the state under which it is organized."[74] According to the Director, "[i]t was not the intent of [the shareholder proposal rule] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature" as "[o]ther forums exist for the presentation of such views."[75] The proposals therefore did not need to be included.[76]

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70. *Purcell Testimony*, *supra* note 56, at 163. Shareholders could make proposals, moreover, by owning a single share of stock. *Id.*

71. *Id.*

72. Letter of the Director of the Corporation Finance Division Relating to Section 20 and to Rule X-14A-7 Under the Securities Exchange Act of 1934, Exchange Act Release No. 34-3638, 11 Fed. Reg. 10995, 10995 (Sept. 27, 1946) [hereinafter Letter of the Director].

73. *Id.*

74. *Id.*

75. *Id.* There is earlier testimony along this line. *See Purcell Testimony*, *supra* note 56, at 163 ("[I]f [a shareholder proponent] were going to use the corporate proxy machinery for making a stump speech for some political party, that obviously is without the spirit of [Rule 14a-8].").

76. Letter of the Director, *supra* note 72, at 10995.

> [I]n 1948, the SEC added three grounds for omitting shareholder proposals that: (1) seek to redress a personal claim or grievance; (2) are offered by a shareholder who, in the prior two years, without good cause, failed to appear and present a proposal included in the proxy

Hence, in the early years of the shareholder proposal rule, the SEC understood "proper subjects of action" as requiring proposals to address matters relating to the affairs of the corporation and not "those matters of general interest to all citizens over which [the corporation] had no power to take any action and which therefore belonged in another forum."[77] But, while the SEC's approach pointed to state law as a guide, state law provided little guidance, leaving the SEC to determine for itself what "related" to the affairs of the corporation and what did not.[78]

Given the judgment calls inherent in determining whether something is "related" to the affairs of a corporation, the SEC soon entangled itself in overseeing shareholder proposals by establishing the no-action process.[79] In 1947, the SEC required management to file a copy of a shareholder proposal and any statement in support of that proposal as well as management's reasons for excluding the proposal with the SEC.[80] The SEC then would advise corporations about whether it would take action—or "no action"—if management decided to exclude a particular proposal.[81] This formalized process thus drew the SEC into determining whether certain significant social issues related to a business or not.

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materials; or (3) are substantially similar to proposals submitted at the previous meeting, which failed to amass at least 3% of the vote.

Maya Mueller, *The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments*, 28 STETSON L. REV. 451, 459–60 (1998).

77. Charles E. Murphy, Jr., *Securities Regulation—Amendment of the Social and Political Exclusion for Shareholder Proxy Proposals*, 51 N.C. L. REV. 358, 359 (1972); *see* Heller, *supra* note 66, at 73.

78. Med. Comm. for Hum. Rts. v. SEC, 432 F.2d 659, 677 (D.C. Cir. 1970) (noting "the paucity of applicable state law giving content to the concept of 'proper subject'" resulted in the SEC "develop[ing] its own 'common law' relating to proper subjects for shareholder action"), *vacated*, 404 U.S. 403 (1972); 2 LOUIS LOSS, SECURITIES REGULATION 906 (2d ed. 1961) ("Inevitably the Commission, while purporting to find and apply a generally nonexistent state law, has been building up a 'common law' of its own as to what constitutes a 'proper subject' for shareholder action.").

79. LOSS, *supra* note 78, at 906.

80. Solicitation of Proxies, Exchange Act Release No. 4037, 12 Fed. Reg. 8768, 8770 (Dec. 24, 1947).

81. The SEC provided an informal advisory process early on. *See* Comment, *Administrative Interpretation of the Securities Act of 1933*, 45 YALE L.J. 1076, 1078 (1936). Shareholder proposals did not occur in significant amounts at that time. *See* SEC, THIRTEENTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 42 (1948) (detailing shareholder proposals—there were 66 proposals in 1943; 38 in 1944; 34 in 1945 and 34 in 1946); FRANK D. EMERSON & FRANKLIN LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS 101–05 (1954) ("Of the 6,380 management proxy statements filed with the SEC . . . only 91 or 1.4% carried a security holder proposal.").

*2. Shareholder Proposals and Segregation*

While shareholder proposals increased in the first three years of the 1950s,[82] shareholder proposals asking corporations "to take action impinging on larger social issues" were "[a]lmost completely absent."[83] Yet the SEC's treatment of the few proposals that did raise such issues during that time demonstrated that the SEC vacillated on whether these proposals were permissible and ultimately focused on the proponents' motives for bringing certain proposals rather than the proposals' merits in deciding whether the proposals could be excluded.

For example, in the fall of 1949, two shareholders of Greyhound "submit[ted] a shareholder proposal for Greyhound's 1950 meeting entitled 'Compliance with the 1946 decision of the U.S. Supreme Court (in the Irene Morgan case) outlawing jimcrow seating in interstate bus travel.'"[84] According to the proponents themselves, this proposal was designed to generate publicity about the injustice of segregation perpetrated by Greyhound.[85] Greyhound sought to exclude the proposal as "not a proper subject for action by the stockholders."[86] The SEC informed one of the proponents in a letter that the proposal was "a proper subject for action by stockholders."[87] But the SEC then issued a no-action letter and allowed the proposal to be excluded on procedural grounds.[88]

The following year, when shareholders proposed "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South," Greyhound argued that exclusion was appropriate because the proposal was of a "general political, social, or economic nature."[89] In response to this renewed proposal, the SEC changed course and determined "some proposals may be improper under [Rule 14-a], particularly if they are in fact urged for propaganda purposes or to require the management

82. J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. L. REV. F. 151, 155 (2016).

83. Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of* Peck v. Greyhound, 45 SEATTLE U. L. REV. 1, 22 (2021).

84. *Id.* at 25.

85. *Id.* at 23. For recent scholarship highlighting the significance of *Peck*, see Lisa Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129, 1129–35 (2019); Sarah Haan, *Civil Rights and Shareholder Activism:* SEC v. Medical Committee for Human Rights, 76 WASH. & LEE L. REV. 1167, 1214–15 (2019); Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1555–56 (2006); Richard Marens, *Inventing Corporate Governance: The Emergence of Shareholder Activism*, 8 J. BUS. & MGMT. 365, 371–72 (2002).

86. Wells, *supra* note 83, at 25.

87. *Id.* at 26. *But see* Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 833 (1952).

88. Wells, *supra* note 83, at 25–26.

89. Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951).

to in effect to take consensus of stockholders in respect to what is essentially a general political, social or economic problem," and so the proposal was excluded.[90] Absent from the SEC's no-action letter, however, was any explanation as to why the Supreme Court's instruction regarding segregated busing would not directly affect Greyhound—a bus company operating in the racially-segregated South.[91] Nor did the SEC explain how it would determine whether a matter was presented for "propaganda purposes" or whether it sought a consensus about a general political or social problem.

In 1952, in response to the proposals about segregated busing,[92] the SEC specified that management "may omit" a proposal if the proposal was "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."[93] Yet the SEC provided no framework for assessing the underlying motivation for a proposal in its rulemaking—leaving that determination for SEC staff members to make on an ad hoc basis.[94]

Public statements by members of the SEC reflect this lack of an objective standard. In the aftermath of the segregated busing proposals, the Assistant Director of the Division of Corporation Finance at the SEC—the Division tasked with overseeing no-action determinations—observed in a law journal that the SEC's latest bases for exclusion were "operated to exclude frivolous and crackpot proposals as well as those motivated solely by considerations extraneous to the welfare of the particular company."[95] The Assistant Director conceded that the Greyhound proposal—as well as a proposal "from a federation of women shareholders requesting that women be extended the same and equal pension benefits as men, including time of retirement"—"appeared germane to the business of the company" but nevertheless were improper because of the *motive* of the

90. Wells, *supra* note 83, at 27 (quoting Press Release, Cong. Racial Equal., SEC Reverses Self; Backs Greyhound's Taboo on Jimcrow Issue (Mar. 22, 1951)). Efforts to obtain an injunction proved unsuccessful on what appear to be jurisdictional grounds. *Peck*, 97 F. Supp. at 681. Further litigation efforts were stonewalled by the SEC. *See* Wells, *supra* note 83, at 25–26.

91. Fairfax, *supra* note 85, at 1134–35; Wells, *supra* note 83, at 28 (noting "[t]he men had been careful to target their proposals not at segregation in general, but at the segregation policy adopted by Greyhound, which they argued harmed that corporation by opening it up to lawsuits by riders illegally discriminated against"). Such a proposal had to be advisory due to state law. Murphy, *supra* note 77, at 359.

92. Wells, *supra* note 83, at 3.

93. Solicitation of Proxies, Exchange Act Release No. 4775, 17 Fed. Reg. 11431, 11431 (Dec. 11, 1952). Wells notes that *race* and *religion* were also added to this list, though no religious proposal appears to have been made up until that point. Wells, *supra* note 83, at 31–32, 32 n.199.

94. *See* Wells, *supra* note 83, at 32.

95. Heller, *supra* note 66, at 77.

shareholder.[96] Hence, the concern was "to free corporations from harassment by shareholders whose motives are not primarily the welfare of the particular corporation but rather the advancement of special causes of their own."[97] This approach continued to be used when the SEC blessed the exclusion of a proposal that a woman be added to a corporate board in 1953, even though the proposal could potentially be justified as a business concern given the primarily female customer base of the corporation.[98] At bottom, then, a shareholder's rights varied based on her perceived belief in certain political or social causes.[99]

The lack of transparency regarding SEC no-action determinations and the relatively sparse number of such proposals during this time period gave the SEC free rein to take a viewpoint-driven adjudicatory approach without fear of judicial or public oversight. The SEC's process was opaque because the SEC did not specify the particular bases for its exclusion decisions,[100] and the

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96. *Id.* at 74. Looking at the motive of the investor seems misplaced, given Heller acknowledged that the proxy regulation was to promote corporate democracy. *Id.* at 72 ("The major premise of the regulation is that, to achieve true corporate democracy, the company's proxy statement should be as much a forum for proper stockholder proposals as it is for those of management.").

97. *Id.* at 73.

98. EMERSON & LATCHAM, *supra* note 81, at 104–05 (observing that seven shareholder proposals called for woman directors and that one proposal noted that "[c]ompany research and development work should benefit by woman's angle"). At the same time, the Assistant Director asserted that the shareholder proposal rule allowed shareholders "sincerely concerned with the welfare of the company" with "an inexpensive mode of bringing important problems . . . to the attention of his fellow stockholders, without too great a burden upon the corporation or its management." Heller, *supra* note 66, at 77.

99. *See* Murphy, *supra* note 77, at 360 ("The concern with motives has also resulted in the anomalous situation of some public-interest questions being excluded 'although they dealt with subject matters that another shareholder might have been allowed to raise,' often because an improper motive was inferred from an association of the shareholder with a certain political or social cause." (footnotes omitted) (quoting Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 448 (1971))); *see also* Note, *Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals*, 80 YALE L.J. 845, 855–56 (1971) (discussing how the SEC's "subjective test" gave the SEC "wide discretion to make arbitrary rulings" based on a shareholder's beliefs).

100. For instance,

> [o]ften, management will throw the whole book of objections at a particular stockholder proposal, and later the staff's letter to both concerned parties will only inform them that the Division or Commission will raise no objections if management omits the stockholder proposal from its proxy material or that the Division or Commission finds no reason for the omission of the stockholder proposal by management from its proxy material.

Clusserath, *supra* note 15, at 43.

SEC's no-action determinations overall were, at times, inconsistent.[101] Yet these inconsistencies went unchallenged as proponents rarely sought judicial oversight.[102] Indeed, from 1956 to 1969, of the 895 proposals that were excluded from corporate proxy statements, "only three were privately contested in the district courts."[103] That the SEC did not make its decisions publicly available at the time further hampered insight into the SEC's approach—and any efforts to challenge it.[104]

What is more, the SEC did little internally to ensure that it was consistently applying its own requirements regarding shareholder proposals. For instance, one former attorney-advisor to the SEC observed the repeat failure of counsel for management to cite a statute or case law from the relevant state to support its proffered opinion about excluding a proposal, even though the company bore the burden of proof when it came to matters of exclusion.[105] Perhaps this oversight was due to the fact that many no-action determinations at that time were made by nonlawyers.[106] In any event, all of these obstacles surrounding shareholder proposals reinforce the difficulty in viewing the SEC's no-action oversight as a transparent, orderly, impartial process.

*3. Renewed Interest in Social Questions*

Shareholder proposals that implicated social or political questions picked up again in the late 1960s and early 1970s.[107] Social activism regarding the role of corporations in society combined with a judicial ruling in favor of broader shareholder rights helped to lead the SEC to alter its prior stance on whether such proposals could properly be included in proxy statements and thus to expand its understanding of what "business" could be considered by

101. *Id.* at 13, 26 (providing examples of the SEC's inconsistencies).

102. For rare exceptions, see, e.g., Dyer v. SEC, 289 F.2d 242, 245 (8th Cir. 1961).

103. Comment, *SEC Determinations Not to Enforce Its Shareholder Proposal Rule Held Subject to Judicial Review*, 71 COLUM. L. REV. 344, 348 (1971).

104. *Id.* at 347 ("Commission precedents are not published, nor are they available to the public, even on request."). SEC has since made these determinations public. *See* 17 C.F.R. § 200.81 (2024).

105. Clusserath, *supra* note 15, at 41; *see* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4979, 19 Fed. Reg. 246, 246 (Jan. 14, 1954) ("The rule places the burden of proof upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material. Where management contends that a proposal may be omitted because it is not proper under state law, it will be incumbent upon management to refer to the applicable statute or case law and furnish a supporting opinion of counsel.").

106. *See* Clusserath, *supra* note 15, at 41.

107. *See* Donald E. Schwartz & Elliot J. Weiss, *An Assessment of the SEC Shareholder Proposal Rule*, 65 GEO. L.J. 635, 637 n.11 (1976).

shareholders.[108] As a result, proposals that ordinarily would likely have been rejected in the 1950s or 1960s were often allowed to proceed.

This shift began during the Vietnam War when the Medical Committee for Human Rights submitted a shareholder proposal in 1968 that asked Dow Chemical's board of directors to amend Dow's certificate of incorporation to prohibit the sale of napalm unless the buyer (i.e., the United States military) gave "reasonable assurance that the substance [would] not be used on or against human beings."[109] In support of its proposal, the Committee contended that "company statements and press reports" indicated that "it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth" due to Dow's affiliation with the Vietnam War as well as "an adverse impact on our global business, which our advisers indicate, suffers as a result of the public reaction to this product."[110] The following year, after the proposal was resubmitted, the SEC's Chief Counsel of the Division of Corporation Finance concluded that the proposal could be excluded and the SEC approved the Chief Counsel's no-action determination.[111]

In one of the first challenges to the SEC's decisions regarding exclusion of social or political proposals, the shareholders appealed the SEC's determination to the D.C. Court of Appeals and won.[112] There, the D.C. Circuit held that

> the clear import of the language, legislative history, and record of administration of section 14(a) is that its overriding purpose is to assure to corporate shareholders the ability to exercise their right—some would say their duty—to control the important decisions which affect them in their capacity as stockholders and owners of the corporation,

and the court remanded the case so that the SEC could provide an opinion in sufficient detail to permit review.[113] The D.C. Circuit thus set forth two important principles that would shape the SEC's treatment of proposals going forward—a more permissive view of proper subjects for shareholder proposals and a requirement for more transparent and reasoned SEC decision-making, given the application of judicial supervision to the process.

In light of this, even though the Supreme Court subsequently vacated the D.C. Circuit's decision on mootness grounds and Dow

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108. *Id.* at 637, 637 n.11.

109. Haan, *supra* note 85, at 1177 (quoting Med. Comm. for Hum. Rts. v. SEC, 432 F.2d 659, 662 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972)).

110. *Med. Comm. for Hum. Rts.*, 432 F.2d at 662.

111. *See id.* at 663, 672, 674, 678–81.

112. *See id.* at 680–82.

113. *Id.*

itself allowed the napalm proposal to proceed in 1971,[114] the SEC began allowing far more social proposals.[115] For instance, Campaign GM—an activist group affiliated with Ralph Nader that sought "to promote corporate responsibility and to educate management and the public about the social role of corporations"—engaged in a highly publicized proxy campaign with General Motors to "test the ability of the corporate and economic system to reform itself."[116] Although the SEC would have previously rejected all nine proposals brought by Campaign GM, it now allowed two of those proposals, including one that created a "Shareholders' Committee for Corporate Responsibility," to appear on GM's proxy materials.[117]

The SEC revised its guidance regarding exclusion of shareholder proposals to further reflect this shift in favor of permitting proposals regarding social or political issues. Instead of excluding proposals based on the proponent's purpose, the SEC "replace[d] the subjective terms" about a proposal being excludable if it is "primarily for the purpose of promoting general economic, political, racial, religious, [or] social" causes with an "objective standard[]" that purportedly "create[d] greater certainty in the application of the rule" by excluding a proposal based on the proposal being "not significantly related to the business of the issuer" or "not within the control of the issuer."[118] As a result of this change, social proposals dramatically increased.[119] Indeed, by the mid-1970s, there were over a hundred social proposals per year.[120]

In 1976, the SEC made additional substantial changes to further empower shareholders to make proposals that touched on social or political issues. As the SEC explained in the proposed rules, the ordinary business exclusion was being used "to exclude proposals that involve matters of considerable importance to the issuer and its security holders" and so was limiting "corporate suffrage."[121] And, in

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114. *See* SEC v. Med. Comm. for Hum. Rts., 404 U.S. 403, 406 (1972).

115. *See* D.A. Jeremy Telman, *Is the Quest for Corporate Responsibility a Wild Goose Chase? The Story of* Lovenheim v. Iroquois Brands, Ltd., 45 AKRON L. REV. 291, 304–05 (2012) (noting the dramatic change in the SEC's approach after *Dow*).

116. Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 423 (1971).

117. Manne, *supra* note 56, at 487–88; *see* Schwartz, *supra* note 116, at 423–24.

118. Proposed Proxy Rules, Exchange Act Release No. 34-9432, 1971 WL 126135, at *2 (proposed Dec. 22, 1971).

119. Manne, *supra* note 56, at 506.

120. Telman, *supra* note 115, at 311 n.154 ("Estimates range on the number of social proposals offered during this period, but there is no doubt that there was a significant increase."); Liebeler, *supra* note 69, at 467.

121. Proposals by Security Holders, Exchange Act Release No. 12598, Investment Company Act Release No. 9343, 41 Fed. Reg. 29982, 29984 (proposed July 20, 1976).

its final rule making later that year, the SEC reiterated its interest in protecting "the concept of corporate democracy underlying § 14(a) of the Exchange Act."[122]

In the new rules, when it came to the ordinary business exclusion, the SEC declined to alter the exclusion's language due to the difficulty of distinguishing between ordinary and significant business, but it took a more expansive view of what was "significant" to a firm.[123] While some commentators proposed omitting proposals that did not "bear a significant economic relation to the issuer's business," the SEC rejected this view because "there are many instances in which the matter involved in a proposal is significant to an issuer's business, even though such significance is not apparent from an economic viewpoint."[124] As an example, the SEC noted that "proposals relating to ethical issues such as political contributions also may be significant to the issuer's business, when viewed from a standpoint other than a purely economic one."[125]

Accordingly, the SEC retained the language of "ordinary business," while applying a "more flexible" approach when defining what fell outside the realm of "ordinary."[126] Observing that "the term 'ordinary business operations' has been deemed on occasion to include certain matters which have significant policy, economic, or other implications inherent in them," the SEC asserted that such proposals were no longer excludable as ordinary business.[127] Proposals involving "mundane" business matters could only be excluded so long as they "*do not* involve any substantial policy or other considerations."[128] Accordingly, over the following eight years, a

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122. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 41 Fed. Reg. 52994, 52995 (Dec. 3, 1976). For the varied meanings of corporate democracy, see Ryan, *supra* note 56, at 102.

123. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976).

124. *Id.* at 52997.

125. *Id.* While the SEC acknowledged circumstances where economic data might justify exclusion of a proposal, the SEC emphasized "that the significance of a particular matter to an issuer's present or prospective business depends upon that issuer's individual circumstances, and that there is no specific quantitative standard that is applicable in all instances." *Id.*

126. *Id.* at 52997–98.

127. *Id.* at 52998. The SEC's main example here was the decision of a utility company to construct a nuclear power plant. *Id.* ("In retrospect, however, it seems apparent that the economic and safety considerations attendant to nuclear power plants are of such magnitude that a determination whether to construct one is not an 'ordinary' business matter.").

128. *Id.* (emphasis added). The SEC also acknowledged that the "substantially the same" standard for exclusion of past proposals required subjective judgments. *Id.* at 52999 (noting "that the new standard would be almost impossible to administer because of the subjective determinations that would be required under it").

"substantial number of public policy resolutions"—from religious groups—were raised each proxy season as there was a "notable" increase in the number of proposals made and the number of shareholder proposals that proceeded to a shareholder vote.[129]

*4. Continued Inconsistencies by the SEC*

Perhaps unsurprisingly, the SEC's "flexible" approach continued to receive criticism even as potential alternatives were considered and rejected. In 1982, in response to complaints about inconsistent staff exclusion decisions due to "the imprecise concepts involved in certain of those exclusionary provisions," the SEC proposed either to permit corporations themselves to set the rules for shareholder proposals or to subject proposals to a numerical cap.[130] The following year, the SEC declined to follow the two approaches it had proposed, noting near universal opposition from commentators due to the purported "costs, confusion, complexity and delay" such approaches would create.[131]

Nevertheless, the SEC's difficulties in providing clear guidance about what social matters could (or could not) be considered did not end.[132] In 1992, in considering a proposal regarding Cracker Barrel's discrimination against employees based on their sexual orientation, the Division conceded that "the line between includable and excludable employment-related proposals based on social policy considerations has become increasingly difficult to draw" and that

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129. Liebeler, *supra* note 69, at 437–38.

130. Proposed Amendments to Rule 14a-8 Relating to Proposals by Security Holders, Exchange Act Release No. 12734, 1982 WL 600869, at *7 (proposed Oct. 14, 1982).

131. Amendments to Rule 14a-8 Relating to Proposals by Security Holders, Exchange Act Release No. 20091, 1983 WL 33272, at *9 (Aug. 16, 1983). With regard to the ordinary business exclusion, the SEC made a "significant change" by no longer treating a request for a report or a special committee as not excludable under Rule 14-8(c)(7) because that approach "raise[d] form over substance" and made the exclusion "largely a nullity." *Id.* at *7.

Even as no alternatives were taken, the SEC, by its own admission, added additional subjectivity to the process. With regard to whether a proposal was moot under Rule 14a-8(c)(10), the SEC now interpreted that provision to allow the omission of proposals "that have been 'substantially implemented by the issuer,'" an approach the SEC itself acknowledged "add[ed] more subjectivity to the application of the provision." *Id.* Likewise, when it came to barring repeat proposals, the SEC considered whether the proposal dealt with "substantially the same subject matter" as the previous proposal, an interpretation the Commission acknowledged "will continue to involve difficult subjective judgments." *Id.* at *7–8.

132. *See* Kevin W. Waite, Note, *The Ordinary Business Operations Exception to the Shareholder Proposal Rule: A Return to Predictability*, 64 FORDHAM L. REV. 1253, 1265–69 (1995) (providing examples of the SEC reversing itself on proposals related to plant-closings, tobacco products, and executive compensation).

"[t]he distinctions recognized by the staff are characterized by many as tenuous, without substance and effectively nullifying the application of the ordinary business exclusion to employment related proposals."[133] The Division then announced "that the fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant" and allowed the proposal's exclusion.[134] This approach—which diverged from the SEC's own rules—was affirmed by the SEC.[135]

Yet, just a few years later (and with a change in administration), the SEC took a different tack. Observing that its rules "continue to require us to make difficult judgments about interpretations of proposals, the motives of those submitting them, and the policies to which they relate,"[136] the SEC reversed its approach under *Cracker Barrel* and "return[ed] to its case-by-case approach that prevailed prior to [that] letter."[137] Acknowledging that it had reversed "its position on the excludability of a number of types of proposals, including plant closings, the manufacture of tobacco products, executive compensation, and golden parachutes," the SEC justified this reversal because "the relative importance of certain social issues relating to employment matters has reemerged as a consistent topic of widespread public debate" and because, "as a result of the extensive policy discussions," the SEC "gained a better understanding of the depth of interest among shareholders in having an opportunity to

133. Cracker Barrel Old Country Store, Inc., SEC Staff No-Action Letter, 1992 WL 289095, at *1 (Oct. 13, 1992). A court criticized the SEC for this change. *See* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 890 (S.D.N.Y. 1993) ("The court does not defer to the SEC's position in *Cracker Barrel* and is not persuaded by its reasoning, because the reasoning in *Cracker Barrel* sharply deviates from the standard articulated in the 1976 Interpretive Release.").

134. Cracker Barrel Old Country Store, Inc., SEC Staff No-Action Letter, 1992 WL 289095, at *1 (Oct. 13, 1992).

135. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

136. *Id.* at 29106; Patricia R. Uhlenbrock, Note, *Roll Out the Barrel: The SEC Reverses Its Stance on Employment-Related Shareholder Proposal Under Rule 14a-8—Again*, 25 DEL. J. CORP. L. 277, 280 (2000) ("Reversal of the SEC's *Cracker Barrel* standard under Rule 14a-8(i)(7) does not resolve the tension between the conflicting expectations of management and shareholders. Nor does it provide a meaningful, objective standard by which both shareholders and management can assess whether a shareholder proposal can be properly excluded from a company's proxy materials."); Shireen B. Rahnema, *The SEC's Reversal of* Cracker Barrel*: A Return to Uncertainty*, 7 U. MIAMI BUS. L. REV. 273, 276 (1999).

137. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

express their views to company management on employment-related proposals that raise sufficiently significant social policy issues."[138]

Hence, the SEC returned to the Commission's 1976 approach of making an exception to the ordinary business exclusion for proposals that raise significant social issues.[139] In doing so, however, the SEC itself "acknowledge[d] that there is no bright-line test to determine when employment-related shareholder proposals rais[e] social issues sufficiently important to fall outside the scope of the 'ordinary business' exclusion" and that some distinctions made by staff "may be somewhat tenuous."[140]

*5. The Staff Bulletins*

While the SEC has not engaged in additional rulemaking regarding bases for excluding shareholder proposals since 1998, its Division of Corporate Finance has provided an array of staff bulletins designed to guide staff conducting "no action" reviews.[141] While those documents are interpretive in nature, they further illustrate the SEC's shifting approach to shareholder proposals that touch on

138. *Id.*

139. *See id.*

140. *Id.*; *see* Sung Ho Choi, *It's Getting Hot in Here: The SEC's Regulation of Climate Change Shareholder Proposals Under the Ordinary Business Exception*, 17 DUKE ENV'T L. & POL'Y F. 165, 167–68 (2006) (demonstrating that "SEC decisions regarding climate change shareholder proposals during the years 1998-2005 have been inconsistent and even contradictory"); *see also* J. Robert Brown, Jr., *Protecting Shareholders from Themselves: The SEC and Restrictions on Shareholder Voting Rights* 27–32 (Univ. of Denver Legal Rsch. Paper Series, Paper No. 16-12, 2016), https://ssrn.com/abstract=2759506 (describing changes in the SEC's approach to proposals about auditor proposals).

In an attempt to clarify the scope social significance exception to ordinary business, the SEC identified two considerations that guided the application of the exclusion moving forward: (1) "the subject matter of the proposal" and (2) "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998). Even those considerations, however, prove elastic as the SEC says that proposals "focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." *Id.* And, as for the micro-management consideration, the SEC observed that it did not seek to imply that "all proposals seeking detail, or seeking to promote time-frames or methods, necessarily amount to 'ordinary business,'" observing "[t]iming questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations." *Id.* at 29108–09.

141. *See, e.g.*, SEC Staff Legal Bulletin No. 14A (July 15, 2002), https://perma.cc/WY9P-A8UR.

general political or social matters. At bottom, they demonstrate that the SEC continues to struggle with determining whether a proposal concerns a significant social issue related to the corporation.

For instance, at times, the Division has designated certain topics as matters of "widespread public debate" or significance without further justification and so allowed those topics to overcome the ordinary business exclusion.[142] In 2001, the Division decreed that "the public debate regarding shareholder approval of equity compensation plans has become significant in recent months" and, accordingly, "in view of the widespread public debate regarding shareholder approval of equity compensation plans," modified its treatment of such proposals to allow proposals that would previously have been excluded.[143] Yet, in reaching that conclusion, the Division provided no specific authorities or explanation for the view that equity compensation for a corporation's workforce had become a matter of "widespread public debate" other than its own conclusion.[144] Likewise, with a change in administration in 2009,[145] the Division reversed course on its treatment of CEO succession plans and determined such plans were no longer ordinary business because "[r]ecent events have underscored the importance of this board function to the governance of the corporation" and so CEO succession planning was now a significant policy issue.[146] Again, this occurred without any explanation from the SEC regarding what justified this change other than a vague reference to "recent events."[147]

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142. *Id.*

143. *Id.*

144. *See id.*

145. J. Robert Brown, Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501, 504, 530 (2012) ("An examination of staff interpretations under the [ordinary business] exclusion show that they shift significantly from administration to administration, particularly with changes in the political makeup of the agency.").

146. SEC Staff Legal Bulletin No. 14E (CF) (Oct. 27, 2009), https://perma.cc/JP55-EWQ7 (citing 1998 guidance that "[f]rom time to time, in light of experience dealing with proposals in specific subject areas, and reflecting changing societal views, the Division adjusts its view with respect to 'social policy' proposals involving ordinary business").

147. The SEC may have been referring to the significant number of departures or dismissals by senior management due to the 2008 financial crisis and economic downturn. *See* Matteo Tonello et al., *The Role of the Board in Turbulent Times: CEO Succession Planning* 2 (The Conf. Bd. Exec. Action Series, No. 312, 2009). If so, it should have elaborated on its reasoning for reaching that conclusion. Even with this assertion by the SEC, the Division provided itself with an escape hatch by observing that CEO succession planning could still be excluded "if it seeks to micro-manage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." SEC Staff Legal Bulletin No. 14E (CF) (Oct. 27, 2009), https://perma.cc/JP55-EWQ7.

In addition to decreeing certain matters as subjects of "widespread public debate," the Division's explanation of the line between proposals addressing significant social policy issues and those addressing ordinary business has been a moving target. For instance, in Staff Bulletin 14C, formulated during the Bush administration, the Division specified that the ordinary business exclusion applied to proposals that "focus on the company engaging in an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health."[148] But that exclusion did not apply to proposals that "focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health" at large.[149] Given the difficulties with differentiating those two rules, the SEC attempted to clarify its approach by observing that a proposal about requesting a report "on the potential environmental damage that would result from [Exxon] drilling for oil and gas in protected areas" would not be excludable, but a proposal asking the Xcel Energy Board of Directors to report on "the economic risks associated with the Company's past, present, and future emissions of carbon dioxide . . . and the public stance of the company regarding efforts to reduce these emissions" would be excludable.[150]

Just four years later, under the Obama administration, the Division determined that Staff Bulletin 14C's framework had likely excluded proposals that focused on significant policy issues without justification and emphasized the importance of the subject matter that the proposal addressed.[151] Arguing that "as most corporate decisions involve some evaluation of risk, the evaluation of risk should not be viewed as an end in itself, but rather, as a means to an end," the Division then applied a new standard: "focus[ing] on the subject matter to which the risk pertains or that gives rise to the risk."[152] Under this approach, then, the Xcel Energy proposal would likely be permissible, given the connection between carbon dioxide emissions and climate change. This approach was reinforced in 2015 when the Division concluded that "proposals focusing on a significant policy issue are not excludable under the ordinary business exception '*because* the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be

148. SEC Staff Legal Bulletin No. 14C (CF) (June 28, 2005), https://perma.cc/LFR5-WQRS.

149. *Id.*

150. *Id.*

151. SEC Staff Legal Bulletin No. 14E (CF) (Oct. 27, 2009), https://perma.cc/JP55-EWQ7.

152. *Id.*

appropriate for a shareholder vote.'"[153] Hence, according to the Division, "a proposal may transcend a company's ordinary business operations even if the significant policy issue relate[d] to the 'nitty-gritty of its core business.'"[154]

But another change in administration produced yet another new staff bulletin with a new approach to "ordinary business"—this time, with a renewed deference to management and a skeptical eye toward shareholders. In Staff Bulletin 14I in 2017, the Division observed that determining whether an ordinary business matter focuses on a "sufficiently significant" policy issue "raise[d] difficult judgment calls" that the corporation's "board of directors is generally in a better position to determine," given the board's fiduciary duties.[155] Accordingly, the Division specified that a company's no-action request should include "a discussion that reflects the board's analysis of the particular policy issue raised and its significance," which "detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned."[156] The following year, in another staff bulletin, the Division reiterated that decisions regarding the ordinary business exclusion would be made on a case-by-case basis and that "a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another."[157]

The SEC's ever-changing approach to social and political matters raised in shareholder proposals continues to this day. In 2021, the SEC stated it would "realign its approach for determining whether a

153. SEC Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2015), https://perma.cc/EE45-V4F4. In reaching this conclusion, the Division rejected the Third Circuit's majority opinion, which "viewed a proposal's focus as separate and distinct from whether a proposal transcends a company's ordinary business." *Id.*; Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 341, 345 (3d Cir. 2015); *see* Darren Pouliot, *A Trinity of Interpretations: Finding the Current Status of the SEC's Significant Social Policy Exception*, 2018 COLUM. BUS. L. REV. 287, 327 (2018).

154. SEC Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2015), https://perma.cc/EE45-V4F4.

155. SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017), https://perma.cc/XB7S-N276.

156. *Id.*

157. SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018), https://perma.cc/UB36-LCBG. Likewise, the Division provided similar guidance as to the "economic relevance" exclusion. Regarding that exclusion, the Division stated that a proposal may be excludable "unless the proponent demonstrates that it is 'otherwise significantly related to the company's business.'" SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017), https://perma.cc/XB7S-N2. This could be demonstrated by tying social or ethical issues "to a significant effect on the company's business," which would be considered "in light of the 'total mix' of information about the issuer"—which, as the Division acknowledged, "can raise difficult judgment calls." *Id.*

proposal relates to 'ordinary business' with the standard the Commission initially articulated in 1976."[158] Accordingly, "staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal."[159] Put another way, the subject matter of the proposal—as judged by the SEC—will determine whether the proposal may be excluded.[160]

What is more, besides broadening the subject matter of what may be proposed, the SEC has allowed shareholder proposals to be more prescriptive. Diverging from its past guidance, the SEC now rejects the idea that timelines or specific methods are *per se* micromanagement of a corporation.[161] Rather, the SEC considers whether, and to what extent, the proposal "*inappropriately* limits the discretion of the board or management"—leaving the propriety of a particular issue to the SEC.[162]

In sum, the SEC's latest approach to shareholder proposals leaves considerable discretion to the SEC to determine what matters shareholders may consider. Considering the history of federal oversight of shareholder proposals, however, this discretion is not an aberration. Rather, the SEC has repeatedly used that very discretion to make different determinations on matters that seem functionally identical over time based on differing views as to whether certain social or political issues are sufficiently connected to the corporation's affairs to justify shareholder consideration. With that in mind, this Article now turns to consider the SEC's performance under this latest bulletin.

## II. SEC'S ACTION IN THE BREACH

With the above background in mind, this Part analyzes no-action determinations made regarding social proposals since the SEC issued Staff Bulletin 14L in November 2021. In doing so, it illustrates how the SEC's no-action review process—along with its application of an amorphous standard—continues to allow for viewpoint

158. SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021), https://perma.cc/94DJ-LF3L.

159. *Id.* ("In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.").

160. *Id.* Interestingly, matters that have been the subject of international or national consideration are more likely to be permitted to be put in front of investors. *See id.*

161. *See id.*

162. *Id.* (emphasis added). Similarly, for the "economic relevance exclusion," the SEC revised its approach so that "proposals that raise 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)." *Id.*

discrimination regardless of whether the SEC intended to prejudice certain views or not.

As mentioned, this Part reviews the no-action determinations that were publicly available on the SEC's website for the 2021–2022 and 2022–2023 proxy seasons.[163] Each determination includes a letter from the SEC advising the corporation about whether it agrees that a specific proposal can be excluded as well as the letter from the corporation's counsel requesting the SEC's views about whether a proposal can be excluded.[164] They also contain the text of the proposal, any correspondence between the corporation and the proponent, and any responses from the proponent.[165] After reviewing these determinations over the past two years, three trends stand out based on the available episodic evidence.

*First*, the SEC appears to have used its broad discretion in providing explanations for its decisions in a manner that disfavors particular viewpoints. Specifically, the SEC appears to have disproportionately chosen to decide that proposals reflecting a "conservative" or "anti-ESG" viewpoint do not involve significant social issues—even when alternative bases for exclusion may have been available—thus taking a stance on the social significance of certain views and setting precedents that would justify exclusion of

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163. *2021–2022 No-Action Responses Issued Under Exchange Act Rule 14a-8*, SEC (Aug. 24, 2023), https://perma.cc/8EHH-DF7P; *2022–2023 No-Action Responses Issued Under Exchange Act Rule 14a-8*, SEC (June 26, 2024), https://perma.cc/85SM-PHQ4.

164. *See, e.g.*, Alphabet Inc., SEC Staff No-Action Letter, 2022 WL 392208, at *1 (Apr. 15, 2022). For other literature reviewing the impact of the SEC on shareholder proposals, see Gregory Burke, *SEC Rule 14a-8 Shareholder Proposals: No-Action Requests, Determinants, and the Role of SEC Staff*, 42 J. ACCT. & PUB. POL'Y 1, 2 (2023) ("[M]y findings suggest individual SEC staff members influence which proposals are voted on and which never appear on the proxy statement, inviting further questions regarding the SEC's role as a mediator between shareholders and managers."); Eugene F. Soltes et al., *What Else Do Shareholders Want? Shareholder Proposals Contested by Firm Management* 28–29 (Harv. Bus. Sch. Working Paper, No. 16-132, 2017), https://ssrn.com/abstract=2771114 (providing data revealing the role that the SEC has in mediating between shareholders and management).

There is some evidence the SEC exclusions do generate shareholder value. Maxime Couvert, *What Are the Shareholder Value Implications of SEC-Challenged Shareholder Proposals?* 2–3 (Swiss Fin. Inst., Rsch. Paper No. 18-79, 2023), https://ssrn.com/abstract=3300177 (reviewing the "stock market reaction to the SEC's exclusion decisions" and "find[ing] that markets react positively to exclusion decisions, suggesting that, on average, excluded proposals have a harmful nature"); John G. Matsusaka et al., *Can Shareholder Proposals Hurt Shareholders? Evidence from Securities and Exchange Commission No-Action-Letter Decisions*, 64 J.L. & ECON. 107, 109 (2021) (arguing that the no-action process potentially weeds out some value-reducing proposals).

165. *See, e.g.*, Alphabet Inc., SEC Staff No-Action Letter, 2022 WL 392208, at *1 (Apr. 15, 2022).

similar proposals under the ordinary business exclusion going forward.

On multiple occasions, the SEC has decided that a social issue does not "transcend" the ordinary business exclusion even when the SEC could have potentially avoided opining on the social significance of that issue by excluding the proposal on other grounds. For example, in 2022, BlackRock sought to exclude a shareholder proposal brought by the self-described "conservative" National Center for Public Policy Research seeking a report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity policy.[166] BlackRock argued the proposal should be excluded because (1) it was ordinary business, and (2) BlackRock had substantially implemented the proposal.[167] In its letter, BlackRock observed that it already addressed the motivating concern of the proposal because its "EEO Policy already protects employees from being discriminated against because of their political affiliations."[168] Nevertheless, rather than supporting the exclusion on substantial implementation grounds, the SEC applied the ordinary business exclusion and, in a single sentence, determined it unnecessary "to address the alternative basis for omission upon which [BlackRock] relies," without explaining why it considered the ordinary business exclusion first.[169]

Nor was this approach atypical. In the two proxy seasons reviewed, the SEC applied the ordinary business exclusion without finding it necessary to consider other bases on multiple occasions, allowing it to opine about whether certain social topics—often affiliated with conservative proponents—were socially significant. For instance, during the 2021–2022 proxy season, of the seventy-one no-action requests that were granted that season,[170] the SEC applied the ordinary business exclusion without ruling on other bases for exclusion eleven times, including for four proposals that were brought by "conservative" or "anti-ESG" proponents.[171] Likewise, in the 2022–

166. BlackRock, Inc., SEC Staff No-Action Letter, 2022 WL 225967, at *1 (Apr. 4, 2022).

167. *Id.* at *3–4.

168. *Id.* at *6.

169. *Id.* at *1.

170. *Shareholder Proposal Developments During the 2022 Proxy Season*, GIBSON DUNN (July 11, 2022), https://perma.cc/RA47-TJ7X.

171. Amazon.com, Inc., SEC Staff No-Action Letter, 2022 WL 216083, at *1 (Apr. 7, 2022) (proposal about temporary and part-time staffing); American Express Co., SEC Staff No-Action Letter, 2021 WL 6050373, at *1 (Mar. 11, 2022) (proposal from National Center for Public Policy Research about training materials); BlackRock, Inc., SEC Staff No-Action Letter, 2022 WL 225967, at *1 (Apr. 4, 2022) (viewpoint discrimination proposal); Coca-Cola Co., SEC Staff No-Action Letter, 2021 WL 6063313, at *1 (Feb. 16, 2022) (requiring shareholder proposal before the company can issue a political statement); Comcast Corp., SEC Staff No-Action Letter, 2022 WL 192902, at *1 (Apr. 13, 2022); Eagle Bancorp,

2023 season, of the eighty-two no-action requests that were granted that season,[172] the SEC applied the ordinary business exclusion without ruling on other bases for exclusion thirteen times, including five "anti-ESG" proposals.[173]

Other matters of procedure also, at times, appear suspect. For instance, in its no-action request dated January 13, 2023, Merck Corporation asserted only that a proposal raising concerns about the corporation excluding houses of worship from a donation-matching program was excludable because the proposal had been substantially implemented.[174] On March 27, 2023, however, Merck then asserted for the first time in writing that the proposal was excludable under

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Inc., SEC Staff No-Action Letter, 2022 WL 192903, at *1 (Mar. 29, 2022) (independent review of litigation); Exxon Mobil Corp., SEC Staff No-Action Letter, 2022 WL 216072, at *1 (Mar. 22, 2022) (proposal regarding industrial accidents and temporary workers); PayPal Holdings, Inc., SEC Staff No-Action Letter, 2022 WL 216078, at *1 (Apr. 7, 2022) (proposal requesting "that the board compare the Company's code of business conduct and ethics with the actual operations of the Company"); Rite Aid Corp., SEC Staff No-Action Letter, 2022 WL 392212, at *1 (May 2, 2022) (customer service proposal); Texas Pacific Land Corp., SEC Staff No-Action Letter, 2022 WL 3023084, at *1 (Sept. 26, 2022) (investigating misbehaving directors); Verizon Communications Inc., SEC Staff No-Action Letter, 2022 WL 110304, at *1 (Mar. 17, 2022) (proposal from National Center for Public Policy Research about DEI training materials).

172. *Shareholder Proposal Developments During the 2023 Proxy Season*, GIBSON DUNN (July 25, 2023), https://perma.cc/WNN5-DHWD.

173. Apple Inc., SEC Staff No-Action Letter, 2022 WL 16834604, at *1 (Jan. 3, 2023) (proposal regarding return to work in the office); Chubb Limited, SEC Staff No-Action Letter, 2023 WL 2672366, at *1 (Mar. 27, 2023) (proposal related to climate change); Elevance Health, Inc., SEC Staff No-Action Letter, 2022 WL 17884403, at *1 (Dec. 21, 2022) (plant-based food options); Gamestop Corp., SEC Staff No-Action Letter, 2023 WL 1829935, at *1 (Apr. 25, 2023) (requesting dividends); GameStop Corp., SEC Staff No-Action Letter, 2023 WL 1829933, at *1 (Apr. 25, 2023) (spin off of corporate entity); HCA Healthcare, Inc., SEC Staff No-Action Letter, 2022 WL 17884404, at *1 (Dec. 20, 2022) (vegan food options); JPMorgan Chase & Co., SEC Staff No-Action Letter, 2023 WL 2603115, at *1 (Mar. 21, 2023) (proposal from the National Center for Public Policy about nonpecuniary factors); McDonald's Corp., SEC Staff No-Action Letter, 2023 WL 421045, at *1 (Apr. 3, 2023) (proposal analyzing company policy statements from the Bahnsen Family Trust); Merck & Co., Inc., SEC Staff No-Action Letter, 2023 WL 2719988, at *1 (Mar. 29, 2023) (proposal about charitable contribution disclosures from the Bahnsen Family Trust); Sportsman's Warehouse Holdings, Inc., SEC Staff No-Action Letter, 2023 WL 1466629, at *1 (Apr. 10, 2023) (classified directors); UnitedHealth Group Inc., SEC Staff No-Action Letter, 2022 WL 19025741, at *1 (Mar. 16, 2023) (plant-based food options); Walmart Inc., SEC Staff No-Action Letter, 2023 WL 1466630, at *1 (Apr. 10, 2023) (proposal regarding analyzing social and political statements made by company from the Bahnsen Family Trust).

174. Merck & Co., Inc., SEC Staff No-Action Letter, 2023 WL 2719988, at *2–4 (Mar. 29, 2023).

the ordinary business exclusion.[175] That same day—perhaps because the exclusion had been raised with the proponent as well—the proponent filed a response to that new assertion.[176] And, two days after that new basis was raised, the SEC determined that the proposal was excludable under the ordinary business exclusion without ever addressing the initial basis sought for the exclusion.[177]

Taken as a whole, these determinations reveal the absence of a clear adjudicatory framework by the SEC and, more importantly, suggest that the SEC may, at times, use that lack of structure to declare certain positions to be (or not be) "socially significant" even without an immediate need for doing so.

*Second*, the SEC offers little objective guidance when deciding whether a matter is one of social significance that transcends the corporation's ordinary business, and this uncertainty provides the SEC discretion to advance (or suppress) certain views. Consider some determinations made for proposals from Amazon shareholders in 2022. A proposal directing Amazon's board to consider the alignment of the investment options in Amazon's retirement funds with Amazon's climate action goals was a significant social policy.[178] But a proposal to encourage the company to offer stock-based incentives to more of its employees as a means to address income inequality was not.[179] Likewise, a proposal for an independent audit and report regarding the working conditions and treatment of Amazon warehouse workers did involve a significant policy issue that transcended ordinary business.[180] But a UAW Retiree Medical Benefits Trust proposal calling for a report on how to adequately staff Amazon's business—including analysis of the potential overuse of temporary and contract workers—did not transcend ordinary business.[181]

Apart from the difficulty of harmonizing the proposals raised at a particular company, deciding which subject matters are "socially

175. *Id.* at *33.

176. *Id.* at *34–36.

177. *Id.* at *1–2, *12.

178. *See* Amazon.com, Inc., SEC Staff No-Action Letter, 2022 WL 216073, at *1, *6 (Apr. 8, 2022).

179. Amazon.com, Inc., SEC Staff No-Action, 2022 WL 216079, at *1, *10 (Apr. 8, 2022) (proponents of the proposal argued in the supporting statement that "[e]mployee ownership is key to addressing this social policy in a bipartisan manner"). Compare that determination with a different proposal that was allowed that same year. Amazon.com, Inc., SEC Staff No-Action Letter, 2022 WL 216081, at *1, *9 (Apr. 5, 2022) (finding tax disclosure proposal transcended ordinary business where supporting state said that "tax avoidance is key driver of global inequality").

180. Amazon.com, Inc., SEC Staff No-Action Letter, 2022 WL 225963, at *1, *3 (Apr. 6, 2022).

181. Amazon.com, Inc., SEC Staff No-Action Letter, 2022 WL 216083, at *1 (Apr. 7, 2022).

significant" and which are not is challenging. Consider, for instance, two recent proposals: one concerning whether methods of slaughtering animals for leather production were consistent with Levi Strauss's animal welfare policy, and another concerning whether public displays of the pride flag at Intel adversely affected employees' views of the company. Which deals with a matter of social significance?

The SEC determined the animal slaughter method dealt with a matter of social significance and so was not excludable as ordinary business,[182] while the display of the pride flag at Intel could be excluded under the ordinary business exclusion.[183] Why?

As mentioned above, the SEC's no-action letters provide conclusions with no analysis, leaving the reader to guess. And the SEC's ruling seems hard to justify. The pride flag proposal's supporting statement observed that "Intel, for several years, has publicly and visibly aligned itself with the LGBTQ Pride movement through the display of the pride flag at many of its campuses throughout the month of June," and it requested "a report to shareholders on whether, and/or to what extent, the public display of the pride flag has impacted current, and to the extent reasonable, past and prospective employee's view of the company as a desirable place to work."[184] That request appears plausible, especially given the backlash experienced by Target and Budweiser over high-profile controversies related to LGBT+ matters and the resulting impact of those controversies on the companies.[185]

To be sure, as one securities treatise describes it, "[s]ome of the apparent inconsistency in the staff responses may be explained by nuanced differences between the proposals."[186] But that finely-tuned parsing leaves the SEC with considerable discretion, and there is some evidence to suggest viewpoint discrimination by the SEC.[187]

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182. Levi Strauss & Co., SEC Staff No-Action Letter, 2021 WL 6063318, at *1, *4 (Feb. 8, 2022).

183. Intel Corp., SEC Staff No-Action Letter, 2022 WL 110298, at *1, *8 (Mar. 18, 2022).

184. *Id.* at *8.

185. Christina Cheddar Berk, *Boycotts Hit Stocks Hard. Here's What Might Be Next for Bud, Target and Others Caught in the Anti-Pride Backlash*, CNBC (Jun. 5, 2023), https://www.cnbc.com/2023/06/03/anti-pride-backlash-what-target-anheuser-busch-and-others-should-expect-next-.html. This subject appears likely to remain a significant social issue. *See, e.g.*, Brendan Farrington, *Florida GOP Lawmakers Seek to Ban Rainbow Flags in Schools, Saying They're Bad for Students*, ASSOCIATED PRESS (Jan. 17, 2024), https://apnews.com/article/lgbtq-desantis-florida-goverment-cb504dfe7d344dfb0bc9a54cfc157b4b.

186. HAZEN, *supra* note 35, § 10:43.

187. CONSUMERS' RSCH., CONSUMERS' RESEARCH SEC NO-ACTION AUDIT 2018–2022, at 4 (2023). Consumers' Research describes itself as conservative. *See also* SULLIVAN & CROMWELL LLP, 2022 PROXY SEASON REVIEW: PART 1, at 6 (10th ed.

Indeed, as highlighted in ongoing litigation in the Fifth Circuit, two recent SEC no-action determinations appeared to turn on a particular view regarding the merits of gun control policies and exercise of Second Amendment rights.[188] In a 2022 no-action determination, the SEC ruled that a "blue-state" proposal urging Mastercard to release a report about how it would reduce the risk from processing "payments involving . . . the sale and purchase of untraceable firearms, including 'Buy, Build, Shoot' firearm kits, components, and/or accessories used to assemble privately made firearms known as 'Ghost Guns'" involved a significant social policy issue and thus transcended ordinary business.[189] The following year, however, the SEC determined that the self-described conservative National Center for Public Policy Research's proposal that American Express release a report on how "the Company intends to reduce the risk associated with tracking, collecting, or sharing information regarding the processing of payments . . . or the sale and purchase of firearms" did not concern a significant policy issue that transcends ordinary business.[190] These proposals are functionally the same, as both address the social policy concerns raised with respect to private gun ownership. The key difference in the SEC's determinations thus appears to be based on the proposal's *viewpoint*: the first proposal took the view that reducing access to firearms is a matter of social significance, while the second took the view that preserving private access to firearms is not a matter of social significance. The SEC's differing treatment of these two viewpoints is problematic.

Nor is this an isolated instance. For instance, the pending Fifth Circuit case centers around a proposal that is identical to a 2019 proposal, save that "sexual orientation" and "gender identity" were replaced with "viewpoint" and "ideology."[191] The 2019 proposal asked

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2022), https://perma.cc/XJ87-R5UG ("Companies were much more successful in excluding these [anti-ESG] proposals (including on 'ordinary business' grounds), receiving no-action relief in 50% of the instances where relief was requested (compared to a 37% success rate across all proposals). Companies also had a 50% success rate for excluding social/political proposals from 'anti-ESG' proponents, compared to 26% across all social/political proposals considered by the SEC.").

188. Opening Brief for Petitioners, *supra* note 14, at 34–35.

189. Mastercard Inc., SEC Staff No-Action Letter, 2022 WL 392206, at *1, *3 (Apr. 22, 2022).

190. American Express Co., SEC Staff No-Action Letter, 2023 WL 2524429, at *1–2 (Mar. 9, 2023). That same cycle, the "blue-state" City of New York Controller withdrew a shareholder proposal after receiving "acknowledge[ment] [that] American Express' commit[ed] to adopt the Merchant Category Code (MCC) for gun and ammunition stores that was created by the International Organization for Standardization in September 2022." American Express Co., SEC Staff No-Action Letter, 2023 WL 2344718, at *1, *12 (Jan. 9, 2023).

191. *See* Opening Brief for Petitioners, *supra* note 14, at 10–11, 13. This was the case even though some jurisdictions expressly protect workers from

a company to "issue a public report detailing the potential risks associated with omitting 'sexual orientation' and 'gender identity' from its written equal employment opportunity (EEO) policy."[192] The 2023 proposal asked a company to "issue a public report detailing the potential risks associated with omitting 'viewpoint' and 'ideology' from its written equal employment opportunity (EEO) policy."[193] While the SEC found the 2019 proposal transcended ordinary business, the 2023 proposal concerning viewpoint did not.[194] Similarly, the SEC found that a report by Chase Bank concerning "the risks created by [c]ompany business practices that prioritize non-pecuniary factors when it comes to establishing, rejecting, or failing to continue client relationships"—that is, a proposal aimed at determining whether pursuing ESG initiatives harmed Chase's business—did not transcend ordinary business even as the SEC allowed a proposal that BlackRock adopt stewardship practices that prioritize "curtail[ing] corporate activities that externalize social and environmental costs that are likely to decrease the returns of portfolios that are diversified in accordance with portfolio theory, even if such curtailment could decrease returns at the externalizing company."[195] At bottom, this distinction depended on the SEC's view that pursuing ESG matters is socially significant, while efforts to limit ESG matters were not. Put simply, then, the SEC's determination of what "transcends" the ordinary business of a corporation continues to be difficult to predict and, at times, advances (or suppresses) certain views.

*Third*, it is often difficult for proponents to obtain review of the SEC's determinations, thus allowing the SEC to reach conclusions with little concern about judicial oversight.[196] As mentioned in Section I.A, proponents have a right to appeal determinations from the Division of Corporate Finance to the Commission.[197] Yet the SEC may deny requests for consideration if the corporation has begun

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discrimination on the basis of political affiliation. *See, e.g.*, D.C. CODE § 2-1402.11 (2024).

192. Corvel Corp., SEC Staff No-Action Letter, 2019 WL 1640021, at *3 (June 5, 2019).

193. Kroger Co., SEC Staff No-Action Letter, 2023 WL 2060072, at *2 (Apr. 12, 2023).

194. *Id.*

195. JPMorgan Chase & Co., SEC Staff No-Action Letter, 2023 WL 2603115, at *1, *8 (Mar. 21, 2023); BlackRock, Inc., SEC Staff No-Action Letter, 2022 WL 225966, at *1 (Apr. 4, 2022).

196. Exxon's filing for a declaratory judgment in Texas likewise reflects the challenges for management in obtaining judicial review in a timely manner as the proponents mooted the case by withdrawing their proposal and disclaiming that they would present such a proposal again. *See* Exxon Mobil Corp. v. Arjuna Cap., LLC, No. 24-cv-00069-P, 2024 WL 3075862, at *1, *4 (N.D. Tex. June 17, 2024).

197. *See supra* Section I.A.

printing its proxy materials—a position used to preclude appeals within even minutes of the SEC's initial determination. For instance, the National Center for Public Policy Research asserted that it had informed the corporation of its intent to challenge the determination within approximately fifteen minutes of the SEC's determination, but that challenge was nevertheless denied on the basis that printing of the proxy materials had already begun within those fifteen minutes.[198]

To summarize, then, a review of the SEC's no-action determination over the recent two proxy seasons provides anecdotal evidence that the SEC does, at times, appear to advance (or suppress) certain proposals based on the views expressed within those proposals. What is more, the SEC's use of its discretion to, at times, address the social significance of proposals from self-described conservative proponents before ruling on other grounds provides some support for the view that the SEC is discriminating on the basis of viewpoint. Finally, the ability to appeal such SEC determinations itself can be undermined. Accordingly, this Article now considers how the First Amendment might apply to the shareholder proposal process, given both the latest determinations by the SEC as well as its historically unsettled oversight of the shareholder proposal process.

## III. SHAREHOLDER SPEECH AND THE FIRST AMENDMENT

Having reviewed the SEC's past and present approach to no-action determinations for shareholder proposals, this Part considers how the First Amendment might raise questions about the constitutionality of the SEC's involvement in excluding shareholder proposals. The constitutionality of the SEC's pre-screening process has, to date, received minimal attention primarily because consideration of the First Amendment's application to the SEC's regulatory regime has been limited. This is mainly for two reasons: first, securities law has historically been viewed as existing outside of First Amendment protections, and second, scholarship to date has primarily focused on SEC-required *external* disclosures rather than the *internal* debate between shareholders that shareholder proposals facilitate.

With that in mind, this Part argues that the First Amendment framework that best fits proxy statements and shareholder proposals is that of a limited public forum analysis, given the nature of shareholder meetings and the federally required proxy statement. This Part then discusses why the SEC's current approach to pre-screening the substance of shareholder proposals is constitutionally

198. AT&T Inc., SEC Staff No-Action Letter, 2023 WL 108213, at *11 (Mar. 15, 2023); *see* Goldman Sachs Group, Inc., SEC Staff No-Action Letter, 2022 WL 981199, at *1 (Mar. 21, 2022).

suspect when analyzed using the forum approach. Finally, it explains how this approach would align with existing guidance about proxy statements from the Supreme Court and how this approach fits within renewed scholarly interest in the intersection of securities law and the First Amendment.

### *A. What Makes Shareholder Proposals Unique for First Amendment Purposes*

To assess why shareholder proposals might warrant distinct treatment under the First Amendment, consider the differences between a corporation's regular disclosures to the SEC and the corporate proxy statement distributed to shareholders in both purpose and in the SEC's regulatory approach.

*First*, shareholder proposals and disclosures to the SEC involve different speakers engaged in speech for different purposes. A corporation's 10-K or quarterly earnings report is a disclosure from the corporation oriented toward investors at large—and those disclosures are aimed at providing information about the company to help investors decide whether to buy or sell shares.[199] On the other hand, shareholder proposals are speech by shareholders to other shareholders providing their opinions on actions the company should take and designed to facilitate the exercise of shareholder voting rights.[200] To be sure, the proxy statements (and the shareholder proposals included in them) are publicly available. Investors thus may read them, and proponents may (and do) use shareholder proposals to promote a message to a broader audience.[201] But the primary purpose of corporate proxy statements is to facilitate shareholder participation in the governance of the corporation in

199. *See* Full Value Advisors, LLC v. SEC, 633 F.3d 1101, 1108 (D.C. Cir. 2011) ("Here the Commission—not the public—is Full Value's only audience."); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 507 (2020) ("There is, however, one regulatory sphere that requires a holistic set of disclosures for public consumption: the federal securities laws. Whenever a company makes its securities—namely, its stock, or its bonds—available for generalized trading, it becomes subject to a host of public disclosure requirements.").

200. *See* Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 282 (1988). In my view, the danger of a statement in a shareholder proposal being false or misleading is reduced, given that the resolution of the proposal directs a particular course of action and the proposal and its supporting statement are subject to a response from management. The SEC's use of the exclusions for false or misleading statements has itself been used in the past as an "encrypted" editing tool. *See* J. Robert Brown, Jr., *Shareholder Proposals and the Limits of Encrypted Interpretations*, 63 VILL. L. REV. 35, 38, 43–51, 55, 60–63 (2018).

201. A company's proxy statement can be found on the SEC's database, EDGAR.

theory, even if certain (primarily retail) investors do not routinely exercise these rights in practice.[202]

The distinct purposes that disclosures and shareholder proposals serve lead to differing First Amendment considerations. Corporate disclosures are corporate speech, and shareholders thus have no right to alter or participate in shaping the corporate message found in these disclosures.[203] For instance, a shareholder does not have the right to add discussion of a particular concern in the corporation's filing, regardless of how much the shareholder may believe that that particular concern represents a significant risk to the corporation.

Moreover, corporate disclosures are intended to present an objective assessment of the corporation's financial status and risks. There is the possibility, therefore, that these disclosures may be incomplete, misleading, or fraudulent if certain information is omitted. The government therefore has an interest in imposing rules to prevent fraud in these disclosures, as these rules promote market efficiency and capital formation by ensuring that the information about a product is accurate.[204] By necessity, such rules are "both content-based and speaker-based" in that "they regulate only certain expression (that is, securities-related speech that is false or misleading) by certain speakers (securities issuers and other market participants) precisely because those distinctions are relevant to the expression's potential for harm."[205] There is nothing constitutionally suspect about regulation of *fraudulent* speech and thus these kinds of securities regulations have some constitutional footing.

Shareholder proposals by contrast are *shareholder* speech that the company presumptively must include in its proxy statement. If a shareholder follows the specified procedures and presents an appropriate proposal, the company "must include [the] shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."[206] Plus, the company must provide other shareholders the right to speak in support or opposition to the shareholder's proposal. Specifically, the company must provide other shareholders the means to specify their "choice between approval or disapproval, or abstention" with respect to the shareholder's proposal.[207] Hence, shareholder proposals give shareholders the presumptive right to

202. *See* Caleb N. Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689, 716–17 (2023).

203. A shareholder may, of course, sue a corporation for false or misleading disclosures. *See* 15 U.S.C. § 78j(b).

204. Norton, *supra* note 17, at 107.

205. *Id.* at 111.

206. 17 C.F.R. § 240.14a-8 (2024).

207. *Id.*

deliberate regarding the best way to guide the corporation.[208] In short, then, the shareholder proposal process plays a role within the governance of the corporation as it provides a forum for shareholders to raise or signal their concerns to management.[209]

As proposals for debate, moreover, shareholder proposals do not raise the same fraud concerns that drive much of the regulation of corporate disclosures. A shareholder proposal is primarily a forward-looking statement about what a particular shareholder thinks the corporation should do.[210] They do not present factual information from corporate management about what the corporation *is doing*. And, because shareholder proposals raise questions regarding how the corporation should act in the future, management and the proponent may—and often do—provide differing views on whether a particular proposal should be ratified.[211] They thus invite debate and discussion, and other shareholders may raise questions about the proposals at shareholder meetings.[212] These proposals therefore are

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208. For an argument that greater First Amendment scrutiny should apply to corporate elections, see generally Karl M.F. Lockhart, Note, *A 'Corporate Democracy'?: Freedom of Speech and the SEC*, 104 VA. L. REV. 1593 (2018). The rise of the universal proxy potentially makes corporate elections more deliberative. *See* Haan, *supra* note 67, at 494, 509 (describing the lack of deliberation with regard to director candidates in the proxy system prior to universal proxies and the possibility that a universal proxy will make voting more deliberative).

209. *See* Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy: Gadflies and Low-Cost Activism*, 34 REV. FIN. STUD. 5629, 5632 (2020); *see also Shareholder Proposals, Index Fund Voting, Proxy Advisors: Hearing on H.R. 4578-4600 Before H. Comm. on Fin. Servs.*, 118th Cong. 9 (2023) (testimony of Lawrence A. Cunningham, Special Counsel, Mayer Brown LLP) (noting that "even nominally precatory proposals can become functionally binding because powerful proxy advisors . . . announce that they will vote against directors whose boards do not implement them"); *cf.* Haan, *supra* note 67, at 503 (observing that with the implementation of a universal proxy, the SEC has "shift[ed] the exercise of the shareholder franchise from the meeting to the proxy solicitation itself" and so "the fully-instructed proxy card has opened up new opportunities—heretofore foreclosed—for deliberative shareholder governance at the point of solicitation"). Some scholars have called for a return of a fully electronic shareholder forum. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Corporate Forum*, 102 B.U. L. REV. 1861, 1863 (2022).

210. *Cf.* 15 U.S.C. § 78u-5 (safe harbor provision for forward looking statements).

211. *See, e.g.*, Lowe's Cos., Inc., Notice of Annual Meeting of Shareholders & Proxy Statement (Form DEF 14A) 72 (Apr. 4, 2022); Dayton Power & Light Co., SEC Staff No-Action Letter, 1980 WL 15267, at *3 (Feb. 28, 1980) ("[I]f management believes that the subject clauses raise an improper inference or implication, it could, in our view, effectively dispel such inferences or implications in its own comment on the proposal.").

212. *See, e.g.*, *Attending the 2024 Annual Meeting*, COCA-COLA (2024), https://perma.cc/CMU5-2PH6.

not intended to be or perceived to be factual statements from a corporation about its performance, but rather are viewed as opinions that are presented for discussion and debate. Unlike other disclosures, therefore, shareholder proposals do not warrant the same degree of extensive regulation to prevent fraud.[213] Nor is the SEC's examination of proposals through the "no action" process primarily aimed at preventing fraud.[214] The SEC therefore has a far less compelling reason to regulate shareholder speech on proxy statements than it does to regulate a corporation's informational speech in its required disclosures.

*Second*, the SEC's regulatory approach to disclosures and shareholder proposals differs in a key way. Many corporate disclosures are examples of compelled speech in that the corporation is required, for instance, to *include* additional information, such as disclosing the material risks it faces[215] or adding management's discussion and analysis of its financial performance.[216] And compliance with the rules requiring these inclusions is not enforced pre-publication;[217] rather, enforcement is left to post-disclosure litigation.[218] By contrast, the SEC decides whether shareholder proposals can be *excluded* from the proxy materials sent to shareholders based on its views about whether the proposals address an improper topic for shareholder consideration.[219] Hence, the SEC performs a gatekeeping function that excludes certain proposals from publication for consideration by the corporate body as a whole. And it makes these determinations before publication of the corporation's

213. Moreover, these proposals regularly implicate decisions that depend on the shareholders' prior normative commitments (such as, for instance, that viewpoint diversity among clients is an important value for a corporation to promote or that laws restricting abortion access will adversely affect a corporation's ability to recruit in a particular region).

214. Consider, for instance, the SEC's frequently used "ordinary business" and "substantially implemented" exclusions.

215. 17 C.F.R. § 229.105 (2024).

216. *Id.* § 229.303.

217. *Exchange Act Reporting and Registration*, SEC (Nov. 12, 2024), https://perma.cc/46NV-MXZS (noting that these reports are immediately available on EDGAR to the general public).

218. *See* 17 C.F.R. § 240.10b-5. To be sure, those enforcement decisions themselves guide conduct. *See* Alexander I. Platt, *"Gatekeeping" in the Dark: SEC Control over Private Securities Litigation Revisited*, 72 ADMIN. L. REV. 27, 32–33, 65 (2020) (describing this and faulting the SEC for its failure to consider private litigation consequences of its enforcement actions).

219. Palmiter, *supra* note 15, at 918. The SEC can, however, review 10-K filings and provide feedback. *Filing Review Process*, SEC (Sept. 27, 2019), https://perma.cc/7PM9-ZECY.

proxy materials, thus restraining shareholder speech before it can be disseminated to other shareholders.[220]

Of course, there are other securities restrictions that restrain certain disclosures.[221] Yet the SEC's intrusion into shareholder governance in a manner that may discriminate based on a proponent's views and at a stage prior to consideration by shareholders themselves makes that action particularly problematic.

Hence, shareholder proxy disclosures have distinct attributes in the securities regime that warrant separate consideration under the First Amendment. Whereas most disclosures to the SEC are designed to provide factual information to potential investors so that they can assess the risks and benefits of investing, shareholder proposals are disclosed primarily to facilitate debate about proposed future courses of action to allow shareholder participation in the governance of a publicly held corporation. These differing purposes give rise to different justifications for government regulation of speech and thus implicate differing First Amendment analyses.

### *B. Corporate Proxies as a Type of LimitedPublic Forum*

Given the proxy statement's focus on involvement of the shareholder in the process of corporate governance, this Section turns to examining whether and how the SEC's involvement in deciding which shareholder proposals may be excluded from proxy materials should be altered in light of the First Amendment. And it does so by applying the First Amendment forum analysis to the SEC's "no action" review process. This First Amendment forum analysis provides an appropriate framework for analyzing shareholder proposals under Rule 14a-8, given that these proposals involve debate in a forum created and controlled by the federal government.[222]

To begin, a brief recap of the public forum doctrine is helpful. Whether the public forum doctrine applies depends on if the government is "acting as a proprietor, managing its internal operations" or "as lawmaker with the power to regulate or license" when it restricts speech on government property.[223] Put another way, "the core of public forum doctrine is a concern with the nature of

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220. *Cf.* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) (Prior Restraint Doctrine). Of course, shareholders could potentially raise those proposals at the meeting themselves or independently solicit proxies, but those efforts are effectively unavailable due to matters of cost and the discretion accorded management. Brown, *supra* note 140, at 6–9, 23.

221. Wolfson, *supra* note 200, at 287.

222. The Supreme Court has acknowledged that this framework can apply where a forum exists "more in a metaphysical than in a spatial or geographic sense." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

223. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

managerial authority, rather than with the character of government property."[224]

Under the doctrine, the Supreme Court "recognize[s] three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums."[225] Traditional public forums, such as public sidewalks, streets, and parks, receive the highest degree of protection as content-based restrictions are subject to "strict scrutiny" and restrictions based on viewpoint are prohibited.[226] Next, designated public forums—"spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose'"—are subject to the same standards.[227] Finally, a "nonpublic forum" is "a space that is 'not by tradition or designation a forum for public communication'" and so "the government has much more flexibility to craft rules limiting speech."[228] Indeed, "[t]he government may reserve such a forum 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'"[229]

To determine which forum is applicable, a court considers the nature of the property, "its compatibility with expressive activity," and the "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[230]

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224. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1781 (1987).

225. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). There is "considerable confusion" as to whether a "limited public forum" is "(1) a synonym for or subtype of 'designated public forum'; (2) a synonym for 'nonpublic forum'; or (3) a completely separate fourth category." White Coat Waste Project v. Greater Richmond Transit Co., 35 F.4th 179, 196 n.13 (4th Cir. 2022). But "the limited public forum is best understood as a type of *nonpublic forum*, in which the government sets aside property for purposes other than the indiscriminate facilitation of speech." Randy J. Kozel, *Government Employee Speech and Forum Analysis*, 1 J. FREE SPEECH L. 579, 597–98 (2022).

226. *Mansky*, 138 S. Ct. at 1885.

227. *Id.* (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009)).

228. *Id.* (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983)).

229. *Id.* (quoting *Perry*, 460 U.S. at 46); *see* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (observing that "[w]hen the State establishes a limited public forum, . . . the State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics'" (last alteration in original) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995))).

230. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); *see* Cox & Thomas, *supra* note 9, at 1152.

Of course, a corporate proxy statement is the property of the shareholders—not the government.[231] Nor is it comparable in tradition to a park or sidewalk as only members of the corporation are permitted to participate in a shareholder meeting. So, a shareholder meeting does not seem readily comparable to a traditional public forum or designated public forum.

Yet the SEC's treatment of corporate proxy statements reflects the creation of a forum for shareholder deliberation by the federal government.[232] Corporate proxy statements are generally required under the Exchange Act,[233] and access to the proxy is "limited to use by certain groups"—namely, shareholders.[234] As mentioned earlier, companies "must" include these shareholder proposals when they accord with the applicable rules, shareholders must have an opportunity to vote on the proposals, and management must have an opportunity to respond to the proposal at issue.[235]

What is more, although restricted to shareholders, shareholder meetings have historically served as a type of deliberative forum. Consider, for instance, that in the early nineteenth century,

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231. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15 (1986); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542, 544 (2001) (observing that a legal corporation created by Congress to give funds to local grantee organization was "designed to facilitate" private speech and drawing on analogies to forum analysis); *see also* Vidal v. Elster, 144 S. Ct. 1507, 1528 (2024) (Barrett, J., concurring in part) (analogizing to public forum analysis under the Lanham Act).

To be sure, "a private entity such as [a corporation] who opens its property for speech by others is not transformed by that fact alone into a state actor." Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 828 (1996) (Thomas, J., concurring in part and dissenting in part) ("Our public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum.").

But there is a categorical distinction for that situation where the government both generally requires the opening of the property for speech and then adjudicates whether certain speech may (or may not) be raised there. *Cf. Halleck*, 139 S. Ct. at 1931 n.2 ("A distinct question not raised here is the degree to which the First Amendment *protects* private entities such as Time Warner or MNN from government legislation or regulation requiring those private entities to open their property for speech by others."). What is more, rather than further First Amendment aims, the SEC's intervention in the proxy process precludes the private owners (shareholders) "from exercising editorial discretion over speech and speakers on their property." *Id.*; *see infra* notes 313–18 and accompanying text.

232. *See supra* Sections I.A, I.B.1.

233. *See* HAZEN, *supra* note 35, § 10:7.

234. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 679 n.11 (2010).

235. 17 C.F.R. § 240.14a-8 (2024).

shareholder meetings often reflected a one-person one-vote framework—just like political bodies.[236] While this common law default rule could be overridden, minutes from shareholder meetings indicate voice votes—which remain one person, one vote—occurred even after that rule had been overridden.[237] What is more, unless proxy voting was authorized by the applicable legislative charter, states nearly unanimously required only in-person voting at meetings, which "reflected a preference for shareholder governance that encouraged a democratic-style exchange of ideas among decision makers."[238]

Of course, as the nineteenth century progressed, there was a shift toward the "plutocratic" one-share one-vote model,[239] and proxy rules liberalized.[240] Nonetheless, that the voting norms changed does not erase the deliberative character of the shareholder meeting.[241] As noted above, even in the twentieth century, a treatise characterized "[t]he general meeting of a corporation [as] a deliberative body" where "reasonable debate must be allowed."[242] And Congress's intention in enacting the Securities and Exchange Act was, in part, to restore this deliberative function.[243]

With time, shareholder meetings have changed dramatically as most shareholders in publicly held companies do not personally attend annual meetings anymore, even as states such as Delaware require a set number of shares entitled to vote to be present for a

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236. Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 66, 73–74 (Kenneth Lipartito & David B. Sicilia eds., 2004); *cf.* 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 3, at 4 (Bos., Little, Brown & Co., 2d ed. 1886) (comparing public and private corporations).

237. Dunlavy, *supra* note 236, at 73–74.

238. Haan, *supra* note 51, at 888, 892 ("[P]roxy voting was sometimes presented as essential to basic corporate governance, and to the ordinary operation of firms.").

239. Dunlavy, *supra* note 236, at 74.

240. Haan, *supra* note 51, at 884–85.

241. *Id.* at 887 ("The earliest corporate laws assumed that shareholders would vote in person, gathered together in a meeting hall."); *see, e.g.*, Taylor v. Griswold, 14 N.J.L. 222, 229 (1834) ("The interest of the company, the good of the public, would be better promoted and more effectually secured by the personal attendance of, and mutual interchange of opinions among the members, than by the action of proxies.").

242. MACHEN, *supra* note 52, § 1278; *see also* EMERSON & LATCHAM, *supra* note 81, at 13, 16. Of course, many scholars are skeptical of viewing modern corporations as associational entities. *See, e.g.*, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1697–1708 (2015).

243. *See* Mortimer M. Caplin, *Shareholder Nominations of Directors: A Program for Fair Corporate Suffrage*, 39 VA. L. REV. 141, 159 (1953).

shareholder meeting to proceed.[244] Because shares may be present by proxy, voting by proxy has "become an indispensable part of corporate governance because [of] the '[r]ealities of modern corporate life.'"[245] As a result, as the SEC itself has observed, "the proxy solicitation process rather than the shareholder's meeting itself ha[s] become the forum for shareholder suffrage."[246] To be sure, many shareholders today do not have any expressive interest in the shareholder meetings,[247] but the fact that most individuals do not use a particular forum does not render that forum a non-forum.

Taken as a whole, then, the corporate proxy statement required under federal law should be considered a "government-controlled space[]"[248] created by the SEC to facilitate shareholder deliberation and governance over the corporation. In that way, these corporate proxy statements represent a type of "limited public forum" even if they exist "more in a metaphysical than in a spatial or geographic sense."[249]

If proxy statements are akin to a "limited public forum," then the government may limit the proxy statements by regulating the "time, place, and manner" as well as imposing "reasonable" restrictions to "reserve the forum for its intended purpose."[250] But the government may not "suppress expression merely because public officials oppose

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244. Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 881 (S.D.N.Y. 1993).

245. *Id.* (last alteration in original) (quoting Stroud v. Grace, 606 A.2d 75, 86 (Del. 1992)); Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 334 (3d Cir. 2015) (quoting *id.*); *see also* Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1490 (1970) ("[P]roxy voting has become the dominant mode of shareholder decision making in publicly held corporations.").

246. Proposed Amendments to Rule 14a-8 Relating to Proposals by Security Holders, Exchange Act Release No. 12734, 1982 WL 600869, at *7 (proposed Oct. 14, 1982). In 2008, the SEC issued regulations in support of e-forum shareholder meetings. 17 C.F.R. § 240.14a-2(b)(6) (2024); *see* Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4453 (Jan. 25, 2008) (codified at 17 C.F.R. § 240.14a-17); Ricci & Sautter, *supra* note 209, at 1863 (arguing "that the time is now ripe to revive the forum concept," given "the reemergence of retail investors along with their inclinations to gather online and desire to interact with corporate management").

247. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1029 (2011) ("[I]t is more reasonable to hypothesize based on the nature of the shareholders' investments that most do not identify with the speech of corporations they invest in. Individual shareholders generally invest in publicly held corporations through diversified portfolios and through other institutions such as mutual or pension funds. These shareholders may have little idea which stocks they are holding and are concerned only with the total risk and return of their portfolio.").

248. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018).

249. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995) (recognizing that some forums exist in such a sense).

250. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 n.11 (2010).

the speaker's view"[251] and any restrictions must be viewpoint neutral.[252] This reflects the underlying point that the Court's First Amendment jurisprudence appears to be driven more by a concern for addressing viewpoint discrimination rather than content discrimination.[253]

### *C. Viewpoint Discrimination in the Corporate Forum*

Hence, the question becomes whether the government's actions constitute discrimination on the basis of viewpoint. In determining whether the SEC's actions constitute discrimination on the basis of viewpoint, the Supreme Court's recent decision in *Minnesota Voters Alliance v. Mansky* is instructive.

In *Mansky*, the Court considered a Minnesota law that prohibited voters from wearing "a political badge, political button, or anything bearing political insignia inside a polling place on Election Day."[254] To enforce this law, election judges had the authority to decide whether an item fell within the ban and ask the individual to remove or conceal it.[255] Acknowledging that the polling place was a nonpublic forum, the Court recognized that the law did not discriminate on viewpoint on its face, and so the question became whether the law was reasonable in light of the purpose served by the forum.[256]

The Court held that Minnesota's objective in ensuring a non-campaigning voting place was permissible, but it observed that "the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out," and it determined that the "unmoored use of the term 'political'" as well as "haphazard

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251. *Perry*, 460 U.S. at 46. Nor may the government coerce a third party to suppress the speech on the government's behalf. *See* Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316, 1332 (2024) ("[T]he critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, . . . through private intermediaries."). As the direct regulatory and enforcement authority, the SEC wields significant power over corporate behavior. *Cf. id.*

252. *Mansky*, 138 S. Ct. at 1885; *Christian Legal Soc'y*, 561 U.S. at 679 n.11; *see* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."); Matal v. Tam, 582 U.S. 218, 243 (2017) (plurality opinion) (observing that viewpoint discrimination is prohibited even when "a unit of government creates a limited public forum for private speech").

253. *See* Randy J. Kozel, *Content Under Pressure*, 100 WASH. U. L. REV. 59, 71, 80 (2022) (arguing that First Amendment doctrine is viewpoint based).

254. *Mansky*, 138 S. Ct. at 1882.

255. Individuals could still vote even if they refused to do so, though they were warned the incident would be recorded and referred to the appropriate authorities. *Id.* at 1883.

256. *Id.* at 1886.

interpretations the State provided in official guidance and representations in Court" caused the restriction to fail.[257]

In reaching this conclusion, the Court observed that the term "political" was not statutorily defined and was expansive in scope.[258] What is more, the Court found that the State's construction of the term "introduce[d] confusing line-drawing problems" that added to the term's indeterminacy.[259] For instance, the State argued that "Please I.D. Me" buttons could be banned because some candidates' positions on voter ID laws, which the Court concluded was unreasonable, given "fair enforcement [would] require[] an election judge to maintain a mental index of the platforms and positions of every candidate and party."[260] Likewise, when the State attempted to limit the statute by arguing "that the ban covers only apparel promoting groups whose political positions are sufficiently 'well-known,'" the Court countered that such an approach "increases the potential for erratic application" because "that measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it."[261] Hence, the Court concluded that statute lacked an "objective, workable standard[]" as Minnesota's approach allowed for a "virtually open-ended interpretation."[262]

For the reasons identified and discussed in Parts I and II, the history of the "ordinary business" exclusion and related substantive exclusion applied by the SEC reflects an indeterminacy similar to that found unconstitutional in *Mansky*. Whether certain social or political issues are relevant to a corporation ultimately turns on normative priors about the business of a corporation and what will best promote shareholder value. Nor has the SEC's regulations on this topic provided guidance. Rather, as noted above, the SEC's line drawing about "ordinary business" and other exclusions has repeatedly changed on particular matters and has led the Commission itself to recognize the difficulties of applying those exclusions on anything but a "case by case" basis. Accordingly, parts of the SEC's oversight of shareholder proposals through the no-action process are likely constitutionally deficient under the First Amendment.

### *D. Support from the Supreme Court*

To be sure, applying a type of forum analysis to a corporation's proxy statement would mark a significant change in First Amendment doctrine. Yet, while the Supreme Court itself has

257. *Id.* at 1888.
258. *Id.*
259. *Id.* at 1889.
260. *Id.*
261. *Id.* at 1890.
262. *Id.* at 1891; *see also* Vidal v. Elster, 144 S. Ct. 1507, 1514 (2024).

provided scant discussion of proxy statements, there is evidence that the Court considers disclosures related to shareholder voting as falling within a distinct category due to the governance function involved.

The most helpful case for understanding this view is *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.[263] In *Pacific*, the Court held that a state commission could not require a privately-owned utility company to include the speech of a third party on the company's billing envelopes.[264] The Court reasoned this requirement violated the First Amendment because the commission's order did "not equally constrain both sides of the debate about utility regulation" as it required the company to enhance the views of its opponent by forcing it to assist in disseminating the third party's message.[265]

Responding to the dissent's argument that this principle would call into question the SEC's requirement that "the incumbent board of directors transmit proposals of dissident shareholders which it opposes,"[266] the plurality argued that the SEC's regulations of shareholder proposals differed in two important ways. First, the SEC's regulations "allocate[d] shareholder property between management and certain groups of shareholders" and, because "[m]anagement ha[d] no interest in corporate property except such interest as derives from the shareholders," "regulations that limit management's ability to exclude some shareholders' views from corporate communications do not infringe corporate First Amendment rights."[267] "Second, the regulations govern[ed] speech by a corporation *to itself*," and so simply focused on "[r]ules that define how corporations govern themselves" and not the corporation's right to "speak to the public at large."[268]

Importantly, the Court describes the SEC's regulations as allocating "shareholder property," illustrating that, in the Court's

263. 475 U.S. 1 (1986).

264. *Id.* at 20–21.

265. *Id.* at 14.

266. *Id.* at 39 (Stevens, J., dissenting).

267. *Id.* at 14 n.10 (majority opinion).

268. *Id.* Some scholars have argued that shareholder proposals represent compelled speech because they force the company to provide the speech of third parties. *See* Sean J. Griffith, *Corporate Speech and Corporate Purpose: A Theory of Corporate First Amendment Rights*, 5 J. FREE SPEECH L. 441, 508–10 (2024). But that concern does not seem applicable to this context, given the Supreme Court's description of the proxy statement as the shareholder's property used to determine the corporation's own behavior. *Cf.* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2399–2400 (2024) ("We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates the First Amendment. And we have repeatedly held that it does so if, *though only if*, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt." (emphasis added)).

view, corporate proxy statements belong to shareholders—not the company at large as represented by management. This view is reinforced by the Court's second point—that the regulations govern intra-corporate speech—that is, the associational rights within the corporation itself. Hence, this language reflects the Supreme Court's view that a company's proxy statement belongs to shareholders to be used by shareholders to engage in the governance of the corporation.

Other decisions reflect this view. In *J.I. Case Co. v. Borak*,[269] for instance, the Court recognized that § 14(a)'s purpose was to ensure that shareholders are properly informed so that they can exercise their governance rights in their designation of proxies.[270] In reaching this conclusion, the Court noted that this idea was reflected in the legislative history, given a Congressional report's observation that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange" and that the section "was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders.'"[271]

Likewise, in *First National Bank of Boston v. Bellotti*,[272] the Court struck down a Massachusetts criminal statute forbidding certain expenditures by corporations "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[273] One of Massachusetts's asserted interests in the statute was "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."[274] In concluding that the statute was overinclusive, the Court observed that "shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[275] The Court presumed that shareholders could protect their own interests through "intracorporate remedies" by acting on "their power to elect the board of directors" or by "insist[ing] upon protective provisions in the corporation's charter"—actions regularly occurring via corporate proxy statements.[276] Indeed, when dissenting Justices compared the

269. 377 U.S. 426 (1964).

270. *Id.* at 431–32.

271. *Id.* (alterations in original); *see* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976) (citing House and Senate reports).

272. 435 U.S. 765 (1978).

273. *Id.* at 767–68.

274. *Id.* at 787.

275. *Id.* at 794.

276. *Id.* at 794–95. The dissent acknowledged this as well. *Id.* at 807–08 (White, J., dissenting) (recognizing "there may be certain communications undertaken by corporations which could not be restricted without impinging

situation to the union dues found unconstitutional in *Abood*, the Court determined that the "more relevant analogy" was where "an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue."[277]

Finally, in *Citizens United*, the Court addressed the asserted interest for limiting corporate independent expenditures: namely, "protecting dissenting shareholders from being compelled to fund corporate political speech."[278] Citing *Bellotti*, the Court again concluded that there was "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[279] And, at points in the opinion, the Court described corporations as "associations of citizens."[280]

Taken as a whole, these cases suggest that the Court views corporate proxy statements as the means for shareholders to voice their views on how that corporation should act.[281] Implicit in the Court's reasoning is the principle that if corporations possess certain constitutional rights,[282] then the *process* for determining the governance of the corporation should likewise receive constitutional protection both for the shareholder as well as the corporation.[283]

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seriously upon the right to receive information" as shareholders need "to be able to receive communications about matters relating to the functioning of corporations" and "[s]uch communications are clearly desired by all investors and may well be viewed as an associational form of self-expression"). *But see id.* at 819 (citing the SEC's prohibitions on shareholder proposals not directly related to the business).

277. *Bellotti*, 435 U.S. at 794 n.34.

278. Citizens United v. FCC, 558 U.S. 310, 361 (2010).

279. *Id.* at 361–62; *see* Ribstein, *supra* note 247, at 1051 (noting that "corporate governance, and specifically proxy regulation, may be a significant battleground for *Citizens United*'s shareholder protection rationale for regulating corporate speech").

280. *Citizens United*, 558 U.S. at 356; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."). Of course, these arguments have been criticized by a number of scholars. *See, e.g.*, Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 495 (2019). But this Article focuses on the type of forum analysis that would fit within the Supreme Court's established jurisprudence, putting aside whether that jurisprudence is accurate.

281. *See also* Bayne, *supra* note 56, at 590–91 (making a similar argument).

282. *See, e.g.*, *Citizens United*, 558 U.S. at 365–66; Hale v. Henkel, 201 U.S. 43, 76 (1906).

283. *Cf. Burwell*, 573 U.S. at 706–07; Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 68 (2006) ("If the government were free to restrict

### *E. Shareholder Proposals and the First Amendment*

Of course, securities law clearly regulates the contents of speech as commonly understood.[284] And, ordinarily, the First Amendment prohibits the government from regulating speech based on the substantive content or message the speech conveys.[285] So, why, if the SEC is regulating the content of speech, has it not faced regular challenges to its exercise of that power?

The Supreme Court's historical treatment of First Amendment challenges to federal laws generally and SEC regulation in particular provides much of the answer to this question. As Justice Scalia observed in *Citizens United v. FCC*,[286] the Supreme Court's First Amendment jurisprudence has developed slowly.[287] Indeed, the Court did not invalidate a state law on First Amendment grounds until 1931 (just a few years before federal regulation of securities began)[288] and did not invalidate a federal law until 1965.[289] Plus, in 1942 (the same year the SEC required the inclusion of shareholder proposals on proxy statements[290]), the Court created the commercial speech doctrine when it observed that while the First Amendment safeguards "communicating information and disseminating opinion," the Constitution imposes "no such restraint on government as respects purely commercial advertising."[291] This doctrine reflected a broader judicial trend of deference toward legislative regulations affecting "ordinary commercial transactions."[292] While the Supreme Court expanded the protections accorded to commercial speech in the 1970s and 1980s,[293] by that point, "entire generations of securities law

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individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.").

284. Roberta S. Karmel, *The First Amendment and Government Regulation of Financial Markets*, 55 BROOK. L. REV. 1, 1 (1989) ("Securities regulation is essentially the regulation of speech."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1779 (2004) (describing "content regulation in the world of securities regulation").

285. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (1995).

286. 558 U.S. 310 (2010).

287. *Id.* at 389 n.5 (Scalia, J., concurring).

288. Stromberg v. California, 283 U.S. 359, 369 (1931).

289. Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965).

290. *See supra* Section I.B.

291. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

292. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); *see* Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 789–90 (2007).

293. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

scholars and practitioners [had] grown up taking its constitutionality" for granted.[294]

Moreover, the Supreme Court had suggested that regulation of securities was particularly and uniquely shielded from First Amendment challenge. Dicta from the Supreme Court during the 1970s suggested that the securities regime was not subject to First Amendment scrutiny.[295] In *Paris Adult Theater I v. Slaton*,[296] the Court observed, in holding that obscene material was outside the First Amendment's protection, that "from the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions" and that on the basis of these assumptions, Congress and state legislatures "have strictly regulated public expression by issuers of and dealers in securities."[297] Likewise, in *Ohralik v. Ohio State Bar Ass'n*,[298] the Court noted that "communications that are regulated without offending the First Amendment, [include] the exchange of information about securities" and "corporate proxy statements."[299] The Court's confidence that securities law was immune from First Amendment challenge is perhaps unsurprising, given that the SEC was organized according to a regulatory model "envisioned" by one Justice and effectuated by another before his appointment to the bench.[300] Hence, for a considerable period of time, there was an understanding that the First Amendment did not apply to the regulation of securities.

More recently, however, questions have been raised regarding whether securities law is truly immune from challenge under the First Amendment. For instance, in the 1980s, the Supreme Court increased the protections accorded commercial speech[301] and, in dicta, suggested that similar scrutiny might apply to securities regulations.[302] Likewise, around that time, a leading First Amendment lawyer argued that the First Amendment and securities

294. Griffith, *supra* note 16, at 904.

295. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61–62 (1973); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Griffith, *supra* note 16, at 904 n.169 (noting a third case that raises the issue where it is "dicta-squared").

296. 413 U.S. 49 (1973).

297. *Id.* at 61.

298. 436 U.S. 447 (1978).

299. *Id.* at 456.

300. Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 844 (1985) (noting that the SEC was "originally envisioned by Justice Brandeis and actually constructed by Justice Frankfurter").

301. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571 (1980).

302. Lowe v. SEC, 472 U.S. 181, 210 n.58 (1985); *see* Lively, *supra* note 300, at 846.

law were on a collision course.[303] And, in the late 1980s and early 1990s, Professor Wolfson repeatedly argued that commercial speech was indistinguishable from other types of speech and that the First Amendment applied to securities regimes.[304]

Despite this renewed interest in the First Amendment's application to securities law, much of the scholarly discussion has focused on the compelled speech issues inherent in government regulation of corporate disclosures.[305] Even those who have argued for greater First Amendment protections have primarily focused on the securities regime as a whole[306] rather than the distinct interests—and challenges—posed by the governance function of shareholder proposals.[307] For instance, Professor Drury argued for "extending First Amendment protection to corporate speech made in the form of

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303. James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y. L.J., Apr. 8, 1983, at 1, 1.

304. *See* Wolfson, *supra* note 200, at 275. *But see* Allen D. Boyer, *Free Speech, Free Markets, and Foolish Consistency*, 92 COLUM. L. REV. 474, 482 (1992) (critiquing Wolfson's argument regarding commercial speech). *See generally* NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC (1990).

305. Professor Schauer has contended that while securities regulations concern "'speech' in the ordinary language sense of the word," the "entire event"—that is the action of which the speech is an inherent part—lacks "a First Amendment issue at all." Schauer, *supra* note 284, at 1769. Similarly, relying on Professor Schaeur's institutional approach to the First Amendment, Professor Siebecker has emphasized the importance of securities regulation regarding the role it plays in ensuring the integrity of capital markets and argued that this supports greater speech regulation. *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 653, 672 (2006); Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 J.L. & POL. 535, 537 (2014). Most recently, Professor Norton has argued that securities law remains consistent with a "lengthy regulatory tradition" of restricting speech where it serves a "listener-centered function" through disclosures that inform investors "diverse methodologies for assessing value and risk." Norton, *supra* note 17, at 97, 98; *see also* Haan, *supra* note 17, at 10 n.52.

306. There are exceptions. *See* Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 163–64 (1994) (distinguishing proxy speech, which should be treated as political speech, from speech related to continuous disclosure, sale of securities, insider trading, and takeovers, which, although arguably commercial speech, may not be appropriate for constitutional free speech regulation); WOLFSON, *supra* note 304, at 124–25; *see also* Clark A. Remington, Note, *A Political Speech Exception to the Regulation of Proxy Solicitations*, 86 COLUM. L. REV. 1453, 1453 (1986) (arguing that proxy solicitations on matters of public interest should receive full First Amendment protection and should not be subject to prior restraint involved in securities regulation).

307. Securities law originally was largely directed at penalizing fraud and misrepresentation, which were not generally within the scope of First Amendment protection in any event. *See, e.g.*, Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).

SEC disclosures" without once mentioning shareholder proposals.[308] And other scholars have focused on interpreting certain disclosure requirements—such as investment newsletters—through the lens of the commercial speech doctrine as it relates to the corporate entity.[309] SEC regulation of shareholder proposals poses distinct First Amendment problems because they involve the government's prescreening of shareholder efforts to participate in the governance of a corporation, not government-mandated disclosures to ensure that a corporation's informational disclosures to the public are complete and accurate. As the previous Sections describe, the SEC regulation of these proposals is akin to the government engaging in viewpoint discrimination in a limited public forum and thus poses First Amendment concerns.

## IV. IMPLICATIONS

Having identified the constitutional infirmities with the current structure of the SEC's review of shareholder proposals, this Article briefly considers what a revised shareholder proposals process might look like. While some may worry that application of the First Amendment to the no-action process will generate chaos, there are reasons to suspect that a revised no-action process may be more efficient than the SEC's current approach.[310]

If the corporate proxy statement is viewed as a limited public forum, then the SEC may impose restrictions "that are reasonable and viewpoint-neutral."[311] In assessing the reasonableness of the restriction, the question becomes whether the restrictions are "reasonable in light of the purpose served by the forum."[312] As the Supreme Court has repeatedly observed, the purpose of the corporate proxy statement is to effectuate "shareholder democracy."[313] Hence, restrictions on shareholder proposals should be assessed with that guiding principle in mind and the SEC's discretion in promoting that purpose "must be guided by objective, workable standards."[314]

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308. Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 763 (2007) (concluding further that even under this heightened standard, most securities regulations were permissible); *see also* Page, *supra* note 292, at 829 (reaching a similar conclusion).

309. Lively, *supra* note 300, at 847, 855–65 (explaining "why regulation of investment newsletters offends the First Amendment").

310. *See* Daniel Fischel & Frank Easterbrook, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 419 (1983) (observing that federal law is created via fiat and so should not receive the presumption of efficiency that state law has).

311. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 679 n.11 (2010).

312. *Mansky*, 138 S. Ct. at 1886.

313. *See supra* Section III.C.

314. *Mansky*, 138 S. Ct. at 1891.

Applying that framework to the shareholder proxy process, the procedural requirements for submitting a shareholder proposal imposed by the SEC are likely permissible, given that such requirements are objective and workable. For instance, the SEC may impose a deadline for the submission of proposals.[315] Similarly, the SEC may cap the number of proposals an individual shareholder may make, specify the maximum length the proposal and accompanying statement may be, and set length and amount requirements for stock ownership before a shareholder is eligible to make proposals.[316] And the SEC may allow a corporation to set its own policies for which shareholders may be included on the corporate proxy statement.[317]

Yet many of the SEC's substantive exclusions are more problematic because they depend upon normative priors about the business of the corporation, the means to deliver long-term value to shareholders, or speculation about the personal motivations of the proponent. Hence, what constitutes a proposal that "is not significantly related to the company's business" or a "personal grievance" hinges on the adjudicator.[318] Likewise, whether a proposal has been "substantially implemented," duplicates a prior proposal, or

315. 17 C.F.R. § 240.14a-8(e) (2024).

316. *Id.* § 240.14a-8(b)–(d).

317. Professor Mohsen Manesh argues that corporations can avoid shareholder proposals through private ordering by precluding shareholder proposals through the corporation's bylaws and charters. *See* Mohsen Manesh, *The Corporate Contract and the Private Ordering of Shareholder Proposals*, 50 J. CORP. L. 1, 21–23 (2024). In particular, he asserts that corporations could alter who could propose based on the "holding securities entitled to vote" language as well as by making it "not a proper subject for shareholder action" under a corporation's bylaws (which would only require a board of director's vote). *Id.* at 21 (quoting 17 C.F.R. § 240.14a-8(b), (i)).

But that does not necessarily cure the constitutional issues created by the SEC's oversight of shareholder proposals for corporations that do not contract around the SEC's regulatory regime. While the availability of an opt-out may address the *corporation's* potential compelled speech claim by giving the corporation the ability to avoid compulsion, it does not protect the individual shareholder from the SEC's exercise of discretion. An individual shareholder whose proposal is excluded on the basis of a SEC no-action determination still would be harmed because the SEC would be interfering with the individual shareholder's First Amendment right to participate in the deliberation of the corporate entity. *Cf.* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) (holding Florida statute requiring a newspaper to provide political candidates free space to reply to personal attacks was a First Amendment violation even though newspaper could have avoided right-to-access requirement by not publishing on that topic). And, as Manesh acknowledges, most companies are likely to continue to use the SEC no-action process. Manesh, *supra* note 317, at 6.

318. 17 C.F.R. § 240.14a-8(i)(4)–(5).

"addresses substantially the same subject matter" raises similar concerns.[319]

To be sure, there are some substantive rules that the SEC likely still could determine. For instance, whether a proposal would cause a company to "violate any state, federal, or foreign law to which it is subject" is an appropriate subject for the SEC to determine, given its role in enforcing federal law.[320] And a rule prohibiting shareholder proposals that would require the company to pay shareholders specific amounts of cash or stock dividends appears workable.[321] As a whole, however, courts should be hesitant to permit the SEC to review the substance of shareholder proposals outside of clear, objectively workable standards—and, as the SEC's no-action history shows, that universe is likely much smaller than believed.

Under this revised proposal process, one can identify several possible benefits.

*First*, the SEC's withdrawal from the business of judging the social significance or "extraordinariness" of shareholder proposals may improve the information-providing function of shareholder proposals in several ways.[322] For instance, because the number of bases for exclusion would be significantly reduced, including the base most regularly used to exclude proposals,[323] shareholders proposals may have an easier path to inclusion on the corporate proxy statement. At a minimum, the elimination of certain substantive bases for exclusion may lessen the negotiating leverage for management in attempting to block certain proposals from advancing to a vote. Indeed, by removing the SEC from much of the process,

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319. *Id.* § 240.14a-8(i)(10)–(12).

320. *Id.* § 240.14a-8(i)(12). While state law may provide clarity regarding what constitutes "ordinary business," *see* Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 736–38 (2016) (arguing that the ordinary business should be understood according to state law and analogizing to what shareholders may amend in a corporation's bylaws), it may still be too indeterminate to confine SEC discretion under a workable standard, *id.* at 740 (acknowledging state law is a "standard" and that "there is an unfortunate degree of inconsistency from state to state as to which actions are deemed extraordinary and which are deemed ordinary"). Whether state law suffers from the same constitutional infirmity as the SEC's approach is beyond the scope of this Article.

321. *See* 17 C.F.R. § 240.14a-8(i)(13).

322. *See* Milton V. Freeman, *An Estimate of the Practical Consequences of the Stockholder's Proposal Rule*, 34 U. DET. L.J. 549, 555 (1957) ("The value which I see in the rule is that to the extent that stockholders challenge & the judgment of management, management is required to make a defense of its position.").

323. The ordinary business exclusion is the exclusion most regularly relied upon.

shareholders may have "the right to demand and receive from management a public justification of its action."[324]

For similar reasons, with this more flexible process, shareholder proposals may better inform other shareholders of the views of their peers both by the matters proposed as well as by whether such proposals are adopted.[325] A more flexible approach might further empower small time, individual investors by providing them with a means to voice their concerns, given that institutional investors already may be heard outside of the shareholder proposal process through direct engagement with management.[326] And this move toward further empowering individual shareholders appears consistent with the trend toward greater shareholder empowerment with regard to the universal proxy[327] as well as pass-through voting.[328]

This revised approach may also bring matters to the attention of the board of directors that the board had not previously considered,[329] especially because "[a] shareholder vote acts as a measure of the intensity of shareholders' interests, more accurately conveying . . . the concerns and beliefs of the shareholders."[330] Of course, many—if not most—proposals are likely to fail, but the existence of such proposals at the shareholder meetings itself impacts the relationship between management and shareholders as well as between shareholders.[331]

*Second*, this process may better allow for private ordering to assess the value of shareholder proposals.[332] Under this new framework with reduced SEC oversight, corporations may now be incentivized to determine the value of shareholder proposals by altering rules to prohibit such proposals if they are not value-

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324. Cox & Thomas, *supra* note 9, at 1186; *see* Schwartz & Weiss, *supra* note 107, at 639.

325. Schwartz & Weiss, *supra* note 107, at 639.

326. Cox & Thomas, *supra* note 9, at 1154.

327. *See* 17 C.F.R. § 240.14a-19 (2024).

328. Danielle Gurrieri & Chuck Callan, *Pass-Through Voting: Giving Individual Investors a Voice in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 17, 2024), https://perma.cc/22X6-KE8L.

329. Cox & Thomas, *supra* note 9, at 1165.

330. Randall S. Thomas & Paul H. Edelman, *The Theory and Practice of Corporate Voting at U.S. Public Companies*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 459, 468 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

331. Cox & Thomas, *supra* note 9, at 1194.

332. *See* Couvert, *supra* note 164, at 2 (presenting data that is "consistent with the SEC challenge being able to filter out some of the proposals whose implementation would harm firm value"). For a more general discussion of the government and market forces driving the recent ESG trend, see generally Allen Mendenhall & Daniel Sutter, *ESG Investing: Government Push or Market Pull?*, 22 SANTA CLARA J. INT'L L. 75 (2024).

enhancing.[333] It further may allow the market to determine how much information it needs about the proponent of the proposal as well.[334] And it may allow shareholders to indicate how willing they are to subsidize the speech of their fellow shareholders.[335] Given the "case by case" nature of shareholder proposals, a corporation appears to be in the best position to assess whether a particular proposal should go forward.[336] Indeed, at least one SEC commissioner has argued that private ordering can better regulate the markets and the SEC rules do not preempt actions on that matter.[337]

Nor would this approach be without precedent. In the past, the SEC has proposed leaving proxy access to private ordering.[338] And, in that proposal, the SEC argued that stockholders would be best position to consider how much cost to bear.[339] Companies could thus determine on which bases to exclude proposals according to their bylaws and then defer to their boards to determine whether certain proposals are permissible.[340] Disputes over what the bylaws require would be questions of Delaware law.[341] For instance, if companies required shareholders to have 1% ownership of the company to make proposals, then certain companies would only be subject to proposals from the top seven investing institutions.[342]

*Third*, this revised approach aligns with a more circumscribed view of the judiciary's institutional capacity and role in the corporate sphere.[343] As currently constructed, the SEC's substantive limitations

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333. While corporations may already be able to do so, *see* Manesh, *supra* note 317, at 10 n.67, the reduction of the SEC's rule may force the issue for corporations that would otherwise remain with the status quo.

334. Manne, *supra* note 56, at 503–04.

335. *See* Ryan, *supra* note 56, at 120–21.

336. *Cf.* Robert T. Miller, *What Is a Compelling Governmental Interest?*, 21 J. MKT. & MORALITY 71, 76 (2018) (arguing that a compelling government interest should focus on the "government" aspect, which relates to whether the government is uniquely situated to address the problem in a way that other social institutions have not).

337. Uyeda, *supra* note 13.

338. Proposed Amendments to Rule 14a-8 Relating to Proposals by Security Holders, Exchange Act Release No. 12734, 1982 WL 600869, at *7 (proposed Oct. 14, 1982).

339. *Id.*

340. *See* Manesh, *supra* note 317, at 21–23.

341. *Id.* at 46.

342. Soltes et al., *supra* note 164, at 27 ("For many of the largest firms, the significant increase in required holdings would allow management to contest, and successfully exclude, virtually all shareholder proposals. For example, a shareholder submitting a proposal to Apple and Exxon would be required to hold $7.2 and $3.5 billion stock respectively to successfully meet this reliability requirement. For Apple and Exxon, only 5 institutional investors—all of which have large indexing activities—would meet this substantial threshold.").

343. *See* Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 113–15.

on shareholder proposals at times causes federal judges to make determinations regarding a corporation's business purpose and strategy that the judiciary is ill-equipped to address.[344] To be sure, such litigation is infrequent. Nonetheless, a revised approach would further remove the federal judiciary from this sphere and be more consistent with the Supreme Court's faith in a corporation's ability to manage its own affairs[345] as well as the business judgment rule.[346]

Of course, application of the First Amendment to shareholder proposal process may have adverse consequences. For instance, removal of the SEC from the shareholder process could impose significant costs, especially in the short-term, given that there is some evidence that the SEC's no-action determinations generated value.[347] Removing the SEC from the shareholder process may lead to a significant rise in shareholder proposals and to the "tyranny of minority" as a small group of shareholders—including corporate "gadflies"—could subject corporations to a constant barrage of proposals based on the proponent's personal interests.[348] And this may be especially true in an era marked by increasing polarization.[349]

Yet, this critique can, in some respects, already be applied to the current process and, by relying on the SEC as an intermediary without any incentives tied to the success of the firm, the current process incentivizes connections in a political sphere removed from the corporation itself.[350] Putting that problem aside, other steps can be taken to address this "floodgates" concern. For instance, the SEC might increase certain procedural barriers, such as the length of time a stock is held before a proposal is allowed.[351] And, as mentioned

344. *See, e.g.*, Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 345 (3d Cir. 2015).

345. *See* Citizens United v. FCC, 558 U.S. 310, 361–62 (2010).

346. *See* Ribstein, *supra* note 247, at 1029–30. For an argument that the business judgment rule is a type of abstention doctrine, see STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 67 (2023), and see generally Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

347. *See, e.g.*, Matsusaka et al., *supra* note 164, at 125–26 (determining that the SEC's decision to omit shareholder proposal resulted in statistically significant positive returns, indicating that the no-action review blocked negative value proposals).

348. Uyeda, *supra* note 13.

349. Margaret V. Sachs, *Social Proposals Under Rule 14a-8: A Fall-Back Remedy in an Era of Congressional Inaction*, 2 U.C. IRVINE L. REV. 931, 937–44 (2012) (observing the advantages of shareholder proposals compared to congressional legislation and the likelihood that conservatives will soon avail themselves of that process).

350. *See generally* Joseph Engelberg et al., *The Partisanship of Financial Regulators*, 36 REV. FIN. STUD. 4373 (2023).

351. *See* Manne, *supra* note 56, at 504–05 (discussing minimum holding periods).

above, corporations could impose their own restrictions on shareholder proposals. Of course, application of the public forum doctrine to shareholder proposals may place First Amendment doctrine in tension with modern financial practices.[352] Roughly 80 percent of shares in U.S. public corporations, for instance, are owned by institutional investors rather than living, breathing human beings.[353] And many of these institutions, for instance, rely on "robo-voting," which undermines the sense of deliberation that characterizes the Court's reasoning described above.[354] Likewise, that many shareholders are diversified exacerbates the feelings of discomfort with treating corporations as "organizations."[355] Yet, like other major groundbreaking applications of the First Amendment,[356] the Supreme Court may decide to leave it to private order to resolve those tensions.[357]

## CONCLUSION

The SEC's no-action review process for shareholder proposals concerning social and political matters has been plagued by inconsistencies. Indeed, the SEC's history is filled with repeat attempts to develop a workable standard for reviewing such letters—attempts that, as recent proxy seasons demonstrate, remain unaccomplished. This indeterminacy, however, is a feature, not a bug, of much of the no-action review process. Given that shareholder proposals address the purpose and role of corporations in society, the SEC's current attempt to police the substance of such proposals is destined to fall short.

Indeed, given the Supreme Court's view of the corporate proxy statement's role in "corporate democracy," it is hard to see how such substantive determinations could not be left to the marketplace. In the end, the Supreme Court's First Amendment jurisprudence may

352. Macey & Strine, *supra* note 280, at 499.

353. *Id.*

354. John G. Matsusaka & Chong Shu, *Robo-Voting: Does Delegated Proxy Voting Pose a Challenge for Shareholder Democracy?*, 47 SEATTLE U. L. REV. 605, 606–09 (2024).

355. *See* Michael P. Dooley, *The First Amendment and the SEC: A Comment*, 20 CONN. L. REV. 335, 340 (1988); RONALD J. COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION 48–49 (2015) (observing that the separation of ownership and control makes the modern corporation hard to recognize as a Tocquevillian association).

356. *See* Citizens United v. FCC, 558 U.S. 310, 361–62 (2010).

357. *See* Alexander Osipovich, *Votes for Sale! A Startup Is Letting Shareholders Sell Their Proxies*, WALL. ST. J. (Jan. 21, 2024), https://wsj.com/finance/stocks/buy-my-vote-a-startup-is-letting-shareholders-sell-their-proxies-122f0eb9 (describing start up that allows shareholders to sell their proxies).

offer a path for the market—and the dominant actors within it—to decide the future of shareholder proposals.