The Corporate Contract & The Private Ordering of Shareholder Proposals

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Should Coca-Cola do more to protect abortion rights? Should Mastercard track gun purchases? Should Disney's workplace DEI trainings be more sensitive to conservative perspectives? Under Exchange Act Rule 14a-8 (the "Rule"), an activist holding only a nominal stake in a public corporation is able to force a shareholder vote on such proposals, focusing attention on whatever hot-button issue they wish to spotlight.

Today, activists pepper corporations with politically divisive proposals in record numbers. While left-leaning groups, organized under the ESG banner, target corporations with proposals focused on progressive priorities, right-leaning outfits submit competing proposals, seeking to undermine ESG initiatives and urging a focus on corporate profits. Caught in the crossfire are America's largest businesses. Corporate leaders complain that these divisive proposals are costly distractions, and average investors have shown little enthusiasm for them.

This Article offers corporate America a path out of this morass. Under Delaware law, which governs most public companies, a corporation's charter and bylaws represent a binding contract between the corporation and its shareholders. Moreover, Delaware law affords broad freedom in the corporate contract to regulate shareholders' governance rights, including the right to make or vote upon a proposal at a shareholder meeting. And because a shareholder's access to the Rule is itself dependent on these state-law rights, a provision in the corporate contract restricting shareholder proposals is not preempted by the Rule or the Exchange Act.

Importantly, not every public company may want to restrict shareholder proposals through private ordering. The risk of political backlash, resistance among investors, and other practical considerations may lead some, perhaps most, companies to leave shareholder proposal rights untouched. At the same time, the opportunity to escape the SEC's unpredictable no-action process, in favor of adjudicating shareholder-proposal disputes before the sophisticated and politically insulated courts of Delaware, could prove tempting. Different companies will weigh these considerations differently. Through private ordering, each corporation may tailor shareholder proposal rights to best meet its needs, and securities markets may efficiently price those rights for the benefit of investors.

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I. INTRODUCTION

Should Coca-Cola do more to protect abortion rights?[1] Should Mastercard track gun purchases?[2] Should Disney's workplace DEI trainings be more sensitive to conservative perspectives?[3] More importantly, should an activist holding only a nominal stake in any of these corporations be able to force a shareholder vote on such divisive questions? Under Rule 14a-8, the answer is yes.[4]

Promulgated under the Securities Exchange Act of 1934 (the "Exchange Act"), Rule 14a-8 (the "Rule") requires a public corporation to include any qualifying shareholder

1. Coca-Cola Co., 2023 Definitive Proxy Statement (Form 14A) 118 (Mar. 18, 2024) (proposal concerning the company's efforts to protect reproductive rights in states with anti-abortion laws).

2. *See* Mastercard Inc., 2022 Definitive Proxy Statement (Form 14A) 126 (Apr. 29, 2022) (proposal concerning the risks of enabling transactions in untraceable firearms).

3. *See* Walt Disney Co., 2022 Definitive Proxy Statement (DEF 14A) 83 (Jan. 19, 2022) (proposal concerning the discriminatory impact of DEI trainings against white people).

4. *See* 17 C.F.R. § 240.14a-8 (2024).

proposal on the corporation's proxy statement.[5] The Rule thus enables a single shareholder to force a corporate referendum on whatever hot-button issue that they wish to spotlight.[6]

Today, shareholder-activists pepper corporations with proposals in record numbers.[7] And unlike the individual "gadflies" who have long used the Rule to propose reforms to corporate governance,[8] today's activists are well-funded organizations with a decisively political bent.[9] Under the ESG banner,[10] As You Sow and other like outfits annually target corporations with proposals concerning progressive priorities ranging from climate change,[11] environmental degradation,[12] labor relations,[13] political lobbying,[14] reproductive rights,[15] gun safety,[16] and diversity, equity, and inclusion.[17] These proposals have, in

5. *See id.*

6. *See* CTR. FOR CAP. MKTS. COMPETITIVENESS, SHAREHOLDER PROPOSAL REFORM 1 (2017) (on file with *the Journal of Corporation Law*) ("[P]roposals dealing with social or political issues . . . are ending up in proxy statements with increasing frequency, even when the proposal's subject matter is wholly unrelated to a company's long-term performance."); Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 589 (2021) ("The relative ease with which a shareholder proposal can be submitted, and the low cost associated with it, grants individual shareholders powers they usually are not accorded in corporate America."); Paul Kiernan, *SEC Seeks to Curb Shareholder Resolutions*, WALL ST. J. (Feb. 9, 2020), https://www.wsj.com/articles/sec-seeks-to-curb-shareholder-resolutions-11581264001 (on file with the *Journal of Corporation Law*) (quoting one commentator's perspective that the shareholder proposal process has "devolved into a free-for-all that a small minority of interests use to advance idiosyncratic agendas at the expense of Main Street investors").

7. *See* MEREL SPIERINGS, 2023 PROXY SEASON REVIEW 1 (2023), https://www.conference-board.org/pdf-download.cfm?masterProductID=49228 [https://perma.cc/57VA-PMLV] ("The 2023 proxy season was marked by a record number of shareholder proposals, declining support for proposals, and shareholder proposal fatigue among companies and institutional investors."); SULLIVAN & CROMWELL, LLP, 2023 PROXY SEASON REVIEW: PART 1, at 1 (2023), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2023-proxy-season-review-part-1.pdf [https://perma.cc/JN2n-AHY2] (reporting that, based on the results of the first half of the year, 2023 is on pace to be set records for the number of proposals submitted and voted upon); *U.S. Shareholder Proposals Jump to a New Record in 2023*, ISS CORP. SOLS. (May 24, 2023), https://www.iss-corporate.com/library/us-shareholder-proposals-jump-to-a-new-record-in-2023/ [https://perma.cc/MB63-63LG] ("Based on submissions since 2019, the number of proposals among Russell 3000 companies hit a record high . . . .").

8. *See* Kastiel & Nili, *supra* note 6, at 589–96 (discussing the phenomenon of so-called "gadflies" and their focus on corporate governance proposals rather than environmental or social topics).

9. *See* Richard Vanderford, *Shareholder Activists Drag Companies into U.S. Culture Wars*, WALL ST. J. (May 23, 2023), https://www.wsj.com/articles/shareholder-activists-drag-companies-into-u-s-culture-wars-775804cd (on file with *the Journal of Corporation Law*) (reporting on the proliferation of shareholder proposals submitted by left-leaning and right-leaning organizations).

10. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN L. REV. 381, 388 (2020) ("ESG investing resists precise definition, but roughly speaking, it is an umbrella term that refers to an investment strategy that emphasizes a firm's governance structure or the environmental or social impacts of the firm's products or practices. . . . Other labels for the practice include ethical investing, economically targeted investing, sustainable or responsible investing, and impact investing.").

11. *See, e.g.*, Amazon.com, Inc., 2023 Definitive Proxy Statement (Form 14A) 27 (May 24, 2023).

12. *See, e.g.*, *id*. at 78–79.

13. *See, e.g.*, Delta Air Lines, Inc., 2023 Definitive Proxy Statement (Form 14A) 72 (Apr. 28, 2023).

14. *See, e.g.*, FedEx Corp., 2021 Definitive Proxy Statement (Form 14A) 94 (Sept. 27, 2021).

15. *See, e.g.*, Coca-Cola Co., *supra* note 1.

16. *See, e.g.*, Sturm, Ruger & Company, Inc., 2022 Definitive Proxy Statement (Form 14A) 25 (Apr. 22, 2021).

17. *See, e.g.*, United Parcel Service, Inc., 2023 Definitive Proxy Statement (Form 14A) 75 (May 5, 2022).

turn, stoked a backlash among anti-ESG activists.[18] In the last few proxy seasons, conservative organizations like the National Center for Public Policy Research have begun submitting competing proposals, seeking to undermine ESG initiatives and urging a return of corporate focus to profits.[19]

Caught in the crossfire are America's largest businesses.[20] Corporate leaders complain that these divisive proposals are costly distractions, consuming valuable board time, driving up legal fees, and bringing unwanted media attention.[21] Meanwhile, the average investor has shown little enthusiasm for backing activists' politically charged initiatives.[22] The vast majority of both pro-ESG and anti-ESG proposals fail to garner majority shareholder support, and those already low levels of support seem to be eroding further.[23]

Yet, despite the lack of interest among most shareholders, the Securities & Exchange Commission (the "SEC") has only exacerbated the situation. Before 2022, companies could exclude any proposal concerning an environmental, social, or political issue if it lacked a "sufficient nexus" to a company's business.[24] But under the Biden administration, the SEC abandoned this longstanding interpretation of the Rule.[25] The result has been an ever-growing number of environmental, social, and political proposals being put to a shareholder vote each year.[26] As a consequence, corporate democracy has come to increasingly resemble

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18. *See* Richard Vanderford, *Shareholder Voices Poised to Grow Louder with SEC's Help*, WALL ST. J. (Feb. 11, 2022), https://www.wsj.com/articles/shareholder-voices-poised-to-grow-louder-with-secs-help-11644575402 (on file with *the Journal of Corporation*) (reporting on the recent rise of anti-ESG proposals by conservative organizations).

19. *See* Heidi Welsh, *Anti-ESG Proposals Surged in 2024 But Earned Less Support*, HARV. L.SCH. F. ON CORP. GOVERNANCE (July 31, 2024), https://corpgov.law.harvard.edu/2024/07/31/anti-esg-proposal-surged-in-2024-but-earned-less-support/?utm_source=rss&utm_medium=rss&utm_campaign=anti-esg-proposal-surged-in-2024-but-earned-less-support [https://perma.cc/C3J7-E67A] (detailing the rise of anti-ESG proposals).

20. *See* SPIERINGS, *supra* note 7, at 5 ("Companies are . . . tired of being used as pawns in the political debate, especially in cases where the proponent is merely seeking publicity, or the proposal is asking for something other than the proponent is actually trying to accomplish."); CTR. FOR CAP. MKTS. COMPETITIVENESS, *supra* note 6 ("No company wants to go public only to find itself subject to endless politically driven campaigns intended to embarrass an enterprise that was built from scratch by its founders.").

21. *See* SPIERINGS, *supra* note 7, at 5 ("The shareholder proposal process is taking up more resources than ever before, whether in negotiating with proponents, seeking no-action letters from the SEC, or developing a comprehensive response to be included in the proxy statement."); Dieter Holger, *More ESG Shareholder Proposals Could Reach Ballots Under New SEC Leadership*, WALL ST. J. (Mar. 9, 2021), https://www.wsj.com/articles/more-esg-shareholder-proposals-could-reach-ballots-under-new-sec-leadership-11615285800 (on file with *the Journal of Corporation Law*) ("The resolutions also can present risks to a company's reputation because they force management to publicly respond to requests for action on hot-button topics, such as climate change and how they treat minorities and women."); Vanderford, *supra* note 9 ("Many boards try to avoid alienating customers and shareholders and thus tend not to take sides, advising that every proposal be voted down. . . . But studying these proposals eats up board time and exposes the companies to potentially unwelcome media attention.").

22. *See* Chuck Callan & Mike Donowitz, *Highlights from the 2023 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 13, 2023), https://corpgov.law.harvard.edu/2023/10/13/2023-proxy-season-review/ [https://perma.cc/F9PS-WY73] ("There continues to be a gap in voting sentiment between retail investors . . . and institutional investors. For example, when it comes to environmental and social proposals, retail investors cast 16% of their votes in favor, while by contrast, institutions cast 25.5% of their votes in favor.").

23. *See infra* Figure 3.

24. *See infra* notes 104–09 and accompanying text.

25. *See infra* notes 110–15 and accompanying text.

26. *See infra* Figure 1.

our national democracy—ideological, fractious, and divisive.[27] And unless something changes, the problem is expected to worsen.[28]

This Article offers corporate America a path out of this morass. Under Delaware law, which governs most public companies,[29] a corporation's charter and bylaws represent a binding "contract" between the corporation and its shareholders.[30] Moreover, Delaware law affords broad freedom in the corporate contract to regulate shareholders' governance rights, including the right to make or vote upon a proposal at a shareholder meeting.[31] And because a shareholder's access to the Rule is itself dependent on these state-law rights, a provision in the corporate contract restricting shareholder proposals is not preempted by the Rule or the Exchange Act.[32]

While the Rule's skeptics have long questioned the SEC's authority under the Exchange Act, both skeptics and proponents alike have largely failed to recognize that shareholder proposals made under the Rule are subject to private ordering. Instead, relying exclusively on the *dicta* of a 75-year-old lower court precedent, *SEC v. Transamerica Corp.*,[33] most have assumed that the Rule imposes an unbending federal mandate on all public companies to hold a shareholder referendum on any qualifying proposal.[34] But a close read of *Transamerica* belies this assumption.[35]

Beyond pragmatic implications, the private ordering of shareholder proposals has immediate constitutional and policy ramifications. The ability of corporations to limit or eliminate proposals made under the Rule complicates the arguments recently made by skeptics in pending litigation that the Rule violates the First Amendment guarantee against compelled speech.[36] Corporations do, in fact, have a choice. Because each company may, through the terms of its governing documents, choose what kinds of proposals to include

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27. *See* SULLIVAN & CROMWELL LLP, *supra* note 7, at 1 ("The polarization in the dialog on [environmental, social, and political] topics, which is intensifying on the broader national stage, also is reflected in Rule 14a-8 proposals this year."); Vanderford, *supra* note 9 ("Companies are facing proposals from both sides of the political spectrum, dragging them into the increasingly fractious conversations over environmental, social and governance issues.").

28. *See* SPIERINGS, *supra* note 7, at 1 ("Despite [a] decline in average support for shareholder proposals, companies should prepare for more politically motivated ones next proxy season heading into a federal election year."); Vanderford, *supra* note 9 (stating "[t]he current political climate means companies can expect more proposals next year" and quoting a prominent lawyer saying that "[t]hese proposals are not going away . . . I can guarantee you that next year we will have another record number").

29. *See, e.g.*, DEL. DIV. CORPS., 2022 ANNUAL REPORT (2022), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf [https://perma.cc/HH5P-ES6C] (reporting that 68% of the Fortune 500 are domiciled in Delaware); Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2113 (2018) (citing data showing that 3,964 of 7,061 public companies are incorporated in Delaware).

30. *See infra* note 185 and accompanying text.

31. *See infra* Part IV.A.

32. *See infra* Part IV.B.1.

33. SEC v. Transamerica Corp.,163 F.2d 511 (3d Cir. 1947).

34. *See infra* notes 298–99 and accompanying text.

35. *See infra* Part IV.B.2.

36. *See* Brief of Intervenor Nat'l Ass'n of Mfrs. at 20, Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2023 WL 4763951, at *20 (5th Cir. July 21, 2023); Brief for Professor Sean J. Griffith as Amicus Curiae Supporting Intervenor at 20, Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2023 WL 7040187, at *20 (5th Cir. Oct. 18, 2023); *see also* GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2023 PROXY SEASON 26–27 (2023), https://www.gibsondunn.com/wp-content/uploads/2023/07/shareholder-proposal-developments-during-the-2023-proxy-season.pdf [https://perma.cc/4JFY-PFPZ] (describing the pending litigation).

in its proxy statement, no company is forced to carry a proposal due solely to government mandate. Access to private ordering may also allay the recent clamor among congressional Republicans eager to reform the Rule.[37] If left-leaning activists have hijacked the Rule for partisan ends, as conservatives claim, then public companies already possess the tools necessary to push back.

Importantly, simply because public companies may, through private ordering, regulate shareholder proposals does not mean that every company will choose to do so. The risk of political backlash, resistance among investors, and other practical considerations may lead some, perhaps most, public companies, to leave shareholder proposal rights untouched.[38] At the same time, the opportunity to escape the SEC's unpredictable no-action process, in favor of adjudicating shareholder-proposal disputes before the sophisticated and politically-insulated courts of Delaware, could prove tempting.[39] Different companies will weigh these considerations differently—just as economic efficiency would dictate.[40] Through private ordering, each company may tailor shareholder proposal rights to best meet its needs, and securities markets may efficiently price those rights for the benefit of investors.

The remainder of this Article proceeds in five parts. Part II canvasses the Rule and its costs, the lawless SEC process by which the Rule is implemented, as well as the growing platform that the Rule has allowed environmental, social, and political activists. In response, Part III explores how private ordering in the corporate contract might be used to regulate shareholder proposal rights and reassert some control over the proposal process. Part IV then turns to legal considerations, showing that the private ordering of shareholder proposal rights is lawful under both Delaware corporate law and federal securities law. Part V considers the practical and policy implications of private ordering. Finally, Part VI offers a brief conclusion.

II. RULE 14A-8 AND ITS DISCONTENTS

Each year, every public company conducts a shareholder meeting to elect its board of directors and hold votes on whatever other matters that may be properly presented to the shareholders.[41] Rather than attend this annual meeting, however, most shareholders

37. *See* Memorandum from the ESG Working Grp. of the House Comm. on Fin. Servs. to the Republican Members of the House Comm. on Fin. Servs. (June 23, 2023), https://financialservices.house.gov/uploadedfiles/hfsc_esg_working_group_memo_final.pdf [https://perma.cc/V9HT-UY7T] (criticizing the current shareholder proposal process and outlining several potential reforms); GIBSON DUNN, *supra* note 36, at 25–26 (contextualizing and summarizing the same); Cydney S. Posner, *House ESG Working Group Takes on Shareholder Proposal Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 29, 2023), https://corpgov.law.harvard.edu/2023/07/29/house-esg-working-group-takes-on-shareholder-proposal-process/ [https://perma.cc/E5U2-69SK] (contextualizing and summarizing the same).

38. *See infra* Part V.A.

39. *See infra* Part V.B.

40. *See infra* Part V.C.

41. *See* DEL. CODE ANN. tit. 8, § 211(b) (West 2009) (requiring an annual meeting of shareholders for "the election of directors" and for consideration of "[a]ny other proper business may be transacted at the annual meeting").

participate by proxy.[42] To facilitate proxy voting, companies solicit their shareholders for instructions on how to vote their shares.[43]

Section 14(a) of the Exchange Act authorizes the SEC to regulate the solicitation of proxy votes from public company shareholders.[44] Pursuant to this authority, the SEC has extensively regulated all facets of the proxy solicitation process,[45] ranging from the substantive contents of the proxy statement that must be provided to each solicited shareholder,[46] to the format of the proxy ballot that accompanies the statement.[47] Among the SEC's proxy regulations is Rule 14a-8.[48]

This Part describes the Rule and its discontents. Section A lays out the Rule's basic parameters, while Section B highlights the costs that the Rule imposes on public companies and their shareholders. Section C turns to the unpredictable SEC no-action process by which the Rule is implemented. Section D describes how, under the Biden administration, the SEC has reinterpreted the Rule, expanding the platform it provides to environmental, social, and political activists. Finally, Section E documents the consequences.

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42. *See* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 881 (S.D.N.Y. 1993) ("A proxy is a means by which a shareholder authorizes another person to represent her and vote her shares at a shareholders' meeting in accordance with the shareholder's instructions on the proxy card."); *see also* Universal Proxy, Sec. and Exch. Act Release No. 34-93596, 86 Fed. Reg. 68330, 68331 n.4 (proposed Dec. 1, 2021) ("Although virtual shareholder meetings have become more prevalent . . . voting at a virtual shareholder meeting still requires attendance by a shareholder [and] most shareholders are likely to continue to rely on the proxy voting system to exercise their vote.").

43. *See* Procedural Requirements and Resubmission Thresholds Under Exch. Act Rule 14a-8, Sec. and Exch. Act Release No. 34-87458, 84 Fed. Reg. 66458 (proposed Dec. 4, 2019) [hereinafter 2019 Proposing Release] ("Because most shareholders do not attend public company shareholder meetings in person and, instead, vote their shares by the use of proxies that are solicited before the shareholder meeting takes place, the proxy solicitation process rather than the shareholder meeting itself has become the 'forum for shareholder suffrage.'"); Facilitating S'holder Dir. Nominations, Sec. and Exch. Act Release No. 34-62764, 75 Fed. Reg. 56668, 56669 (proposed Sept. 16, 2010) [hereinafter 2010 Adopting Release] ("[A] federally-regulated corporate proxy solicitation is the primary way for public company shareholders to learn about the matters to be decided by the shareholders and to make their views known to company management."); S'holder Proposals, Sec. and Exch. Act Release No. 34-56160, 72 Fed. Reg. 43466, 43467 (proposed Aug. 3, 2007) [hereinafter 2007 Proposing Release] ("Most shareholders . . . vote through the grant of a proxy before the meeting instead of attending the meeting to vote in person. Therefore, an important function of the proxy rules is to provide a mechanism for shareholders to present their proposals to other shareholders, and to permit shareholders to instruct their proxy how to vote on these proposals."); *see also Amalgamated Clothing*, 821 F. Supp. at 881 ("Proxies have become an indispensable part of corporate governance because the 'realities of modern corporate life have all but gutted the myth that shareholders in large publicly held companies personally attend annual meetings.'" (quoting Stroud v. Grace, 606 A.2d 75, 86 (Del. 1992)).

44. 15 U.S.C. § 78n(a)(1) (2024) ("It shall be unlawful for any person, . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit . . . any proxy or consent or authorization in respect of any security . . . .").

45. *See* 17 C.F.R. § 240.14a-1 (2024).

46. *See, e.g.*, *id.* §§ 240.14a-3, 14a-4, 14a-5.

47. *See id.* § 240.14a-4(b).

48. *See id.* § 240.14a-8.

A. The Rule

Originally adopted in 1942,[49] the Rule enables a public company shareholder to submit a proposal, alongside a brief supporting statement, to be included on the annual proxy statement that the company sends to all shareholders.[50] Granting shareholders access to the company's proxy statement is critical.[51] In the absence of the Rule, a shareholder seeking to solicit support from their fellow shareholders for a proposal would be forced to undertake the expense of preparing and distributing their own proxy statement.[52] Access to the Rule enables a shareholder to force a shareholder referendum on their proposal and solicit proxies at the company's expense.[53]

Eligibility to submit a proposal is quite modest.[54] Any shareholder with as little as $2000 of stock in a public company may submit a proposal under the Rule.[55] For instance, a person holding as few as 6 shares of Microsoft—less than one-billionth of the company—qualifies.[56]

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49. *See* Solicitation of Proxies Under the Act, Sec. and Exch. Act Release No. 3347, 7 Fed. Reg. 10655, 10656 (proposed Dec. 22, 1942).

50. *See* 17 C.F.R. § 240.14a-8(a) (2024).

51. *See SEC Proxy Rules: Hearing Before the H. Comm. on Interstate and Foreign Com.*, 78th Cong. 174 (1943) (statement of Chairman Purcell) ("[In the era of in-person meetings,] a stockholder might appear at the meeting and address his fellow stockholders. Today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has today of expressing his judgment comes at the time when he considers the execution of the proxy form.") [hereinafter Chairman Purcell Testimony]; *see also* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 881 (S.D.N.Y. 1993) ("Unless the shareholders' proposed resolution is included in the [company's] proxy material . . . , other shareholders would not have advance notice of . . . the proposal or have the ability to vote on the proposal via the proxy.").

52. *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 335–36 (3d Cir. 2015) (explaining that, without the Rule, the only way "[a] shareholder can garner support" for their proposal is to "pay [for] a separate proxy statement, which must satisfy all the disclosure requirements applicable to management's proxy statement"); Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 708–09 (2016) ("Absent Rule 14a-8, . . . [s]hareholders' only practicable alternative would be to conduct a proxy contest in favor of whatever proposal they wished to put forward . . . .").

53. *See Trinity Wall St.*, 792 F.3d at 335 ("The [R]ule mandates subsidized shareholder access to a company's proxy materials, requiring reporting companies . . . to print and mail with management's proxy statement, and to place on management's proxy ballot, any 'proper' proposal submitted by a qualifying shareholder."); Procedural Requirements and Resubmission Thresholds under Exch. Act Rule 14a-8, Sec. and Exch. Act Release No. 34-89964, 85 Fed. Reg. 70240, 70240 (Nov. 4, 2020) [hereinafter 2020 Adopting Release] ("By giving any shareholder-proponent the ability to have a proposal included in the company's proxy statement to all shareholders, Rule 14a-8 enables eligible shareholder-proponents to easily present their proposals to all other shareholders, and to have proxies solicited for their proposals, at little or no expense to themselves."); Bainbridge, *supra* note 52, at 734 ("[T]he Rule forces shareholders to subsidize speech that may reduce the value of their investments.").

54. *See generally* 17 C.F.R. § 240.14a-8(b) (2024) (requiring that shareholders must meet minimal stock ownership requirements, have held the stock for a minimum period, and provide a written statement showing an intent to maintain ownership).

55. *See id.* § 240.14a-8(b)(1)(i) (limiting eligibility to shareholders who have "continuously held" at least (i) $2000 of a company's stock for at least three years; (ii) $15,000 of a company's stock for at least two years; or (iii) $25,000 of a company's stock for at least one year).

56. *See Microsoft Corporation (MSFT)*, YAHOO! FIN., https://finance.yahoo.com/quote/MSFT/key-statistics/?p=MSFT [https://web.archive.org/web/20231214082137/https://finance.yahoo.com/quote/MSFT/key-statistics/?p=MSFT] (reporting that, as of December 2023, shares of Microsoft common stock trade at approximately $370 per share and 7.43 billion shares are outstanding).

Once a shareholder proposal is submitted, the company may seek to exclude the proposal from its proxy statement. The Rule articulates various procedural[57] and substantive[58] grounds for exclusion. When a company believes it has grounds to exclude a proposal, the company must notify the SEC[59] and will typically request a no-action letter.[60] If the agency's staff concurs with the company, then the staff will grant a no-action letter, and the proposal may be safely excluded from the company's proxy statement. If, however, the SEC staff denies no-action relief, then the company is compelled to include the proposal in its proxy statement[61] or, otherwise, try to negotiate a settlement with the proposal's proponent to avoid a shareholder referendum.[62]

B. The Costs

The SEC has long considered the Rule a "cornerstone of shareholder engagement," facilitating a process whereby public company shareholders may, through votes on sundry matters, communicate their priorities to directors.[63] But whatever gains the Rule makes through shareholder engagement, it also imposes costs.[64]

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57. *See, e.g.*, 17 C.F.R. § 240.14a-8(c) (2024) (limiting eligible shareholders to one proposal per shareholder meeting); *id*. § 240.14a-8(d) (limiting a proposal and any accompanying supporting statement to 500 words); *id.* § 240.14a-8(e) (imposing a deadline by which a proposal must be submitted).

58. *See id.* § 240.14a-8(i) (identifying 13 substantive grounds for exclusion).

59. *See id.* § 240.14a-8(j) (stating companies must file with the SEC within 80 days after excluding a proposal from its proxy materials).

60. *See* Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Release No. 34-95267, 87 Fed. Reg. 45052, 45062 n.88 (July 27, 2022) [hereinafter 2022 Proposing Release] ("[A] company may give notice to the Commission that it will exclude the proposal without submitting a no-action request, perhaps if it intends to seek a determination by a court. However, this practice is rare and virtually all proposal exclusion notifications come in the form of no-action requests.").

61. Although the company (or the shareholder-proponent) may challenge the SEC's decision to deny (or grant) no-action relief in federal court, see Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 423–24 (D.C. Cir. 1992), such challenges are infrequent. *See* THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION 384 (8th ed. 2021) ("There are relatively few judicial decisions dealing with the shareholder proposal rule."); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 881 (1994) ("Rarely do disappointed proponents seek judicial review.").

62. *See generally* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE. L.J. 262 (2016) ("Because shareholder proposals can be negotiated away behind closed doors, they give both shareholders and managers incentives to act opportunistically, generating agency costs.").

63. *See* 2022 Proposing Release, *supra* note 60, at 45053 ("The shareholder proposal process has become a cornerstone of engagement between shareholders and company management. Shareholder proposals provide an important mechanism for investors to express their views, provide feedback to companies, exercise oversight of management, and raise important issues for the consideration of their fellow shareholders in the company's proxy statement."); *see also* Amendments to Rules on Shareholder Proposals, Exch. Act Release No. 34-40018, 63 Fed. Reg. 29106, 29116 (May 28, 1998) [hereinafter 1998 Adopting Release] ("[T]he [R]ule enhances investor confidence in the securities markets by providing a means for shareholders to communicate with management and among themselves on significant matters.").

64. *See* 2022 Proposing Release, *supra* note 60, at 45067 ("The value of including a shareholder proposal in a company's proxy statement . . . depends fundamentally on the tradeoff between the potential for improving a company's future performance and the costs associated with the submission and consideration of a shareholder proposal borne by the company and its non-proponent shareholders.").

For one, a company receiving a shareholder proposal will incur legal and administrative costs in processing the proposal and, if necessary, seeking an SEC no-action letter.[65] In 2020, the SEC estimated a single proposal can cost a company as much as $150,000 to process.[66] Add to that the opportunity costs the receiving company bears as its board of directors must divert attention away from other, value-creating activities in order to evaluate a proposal, formulate a response, and engage its shareholder base about the proposal's merits.[67]

Ultimately, these costs are borne by the company's shareholders.[68] But each shareholder faces a further opportunity cost in having to consider the proposal and vote on it.[69] When spread across all public company shareholders, these costs are substantial.[70] Indeed, many institutional investors prefer to expense it by engaging the services of a proxy advisor to assess shareholder proposals and provide voting recommendations.[71]

Moreover, there is no upper bound to these costs. The Rule places no limit on the number of shareholder proposals that a company must carry on its proxy statement each year.[72] And proposals that fail to receive majority shareholder support may be resubmitted

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65. These include "the costs to: (i) review the proposal and address issues raised in the proposal; (ii) engage in discussions with the shareholder-proponent(s); (iii) print and distribute proxy materials, and tabulate votes on the proposal; (iv) communicate with proxy advisory firms and shareholders (e.g., proxy solicitation costs); (v) if they intend to exclude the proposal, file a notice with the Commission; and (vi) prepare a rebuttal to the submission to the Commission." *See* 2022 Proposing Release, *supra* note 60, at 45067, n.126. *See also* 2020 Adopting Release, *supra* note 53, at 70272–75, for a detailed discussion of these costs.

66. *See* 2020 Adopting Release, *supra* note 53, at 70274 (discussing the downsides of the overhead costs of discussing shareholder proposals); *see also* 2010 Adopting Release, *supra* note 43, at 56679 (citing a 2009 survey of Business Roundtable members indicating that the average burden of preparing and submitting a no-action request, alone, is approximately 47 hours and associated costs of $47,784).

67. *See* 2019 Proposing Release, *supra* note 43, at 66496 ("Shareholder proposals also impose opportunity costs on companies and their shareholders because management, the board, and the voting shareholders could spend the time spent on processing a shareholder proposal and voting on the proposal to engage in other value-enhancing activities."); Mary Jo White, Chair, SEC, Speech at the 69th Nat'l Conf. of the Soc'y of Corp. Secretaries and Governance Professionals: Building Meaningful Communication and Engagement with Shareholders (June 25, 2015), https://www.sec.gov/newsroom/speeches-statements/building-meaningful-communication-engagement-shareholde [https://perma.cc/NQ8C-NRRE] ("Briefing boards [on shareholder proposals], analyzing issues and determining how to communicate the company's views to shareholders and markets take time and resources, as does hiring lawyers to analyze the proper interpretation of the Commission's grounds for exclusion and preparing communications with the staff.").

68. *See* 2022 Proposing Release, *supra* note 60, at 45067 ("[C]ompanies may bear both direct costs and opportunity costs associated with the submission of a shareholder proposal, and these costs may be passed on to shareholders."); 2020 Adopting Release, *supra* note 53, at 70267 ("[A]ll shareholders may incur passed-through costs associated with companies' consideration and processing of shareholder proposals and experience the economic impact of shareholder proposals that are implemented").

69. *See* 2020 Adopting Release, *supra* note 53, at 70277 ("[T]he costs to non-proponent shareholders of analyzing and voting on shareholder proposals are significant.").

70. *See id.* at 70267 ("[S]hareholders, particularly when considered in the aggregate, may incur significant costs to consider and vote on these proposals.").

71. *See id.* at 70276–77 ("[M]any investment advisers . . . retain proxy voting advice businesses to perform a variety of services to reduce the burdens associated with proxy voting determinations . . . on shareholder proposals.").

72. Although the Rule limits each shareholder to only one proposal to be considered at a particular company's shareholder meeting, a shareholder may submit the same (or different) proposal to other companies, and each company must carry every qualifying proposal that it receives on its proxy statement. *See* 17 C.F.R. § 240.14a-8(c) (2024).

year after year, provided they receive only a modest percentage of votes in their favor.[73] Thus, in 2023, Amazon's shareholders faced 18 separate proposals, addressing topics ranging from climate change, plastic waste, labor rights, and government censorship,[74] many of them repeats from the previous year when the company carried 15 proposals in its proxy statement.[75] The company's beleaguered shareholders rejected all 33 proposals over this two-year period.[76]

C. The No-Action Process

Given the costs that shareholder proposals impose on public company shareholders, it is unsurprising that market prices tend to react positively whenever a proposal is precluded through the SEC's no-action process.[77] Unfortunately, that process is itself opaque, unpredictable, and lawless.[78]

When granting or denying no-action relief, the SEC's staff provides no explanation for its decisions.[79] Instead, the staff issues a terse letter stating simply that it either agrees or disagrees that a particular proposal may be properly excluded.[80]

This lack of transparency is compounded by the frequent inconsistencies that result from the no-action process. Routinely, the SEC will rule that a given proposal may be excluded in one year, only to later deny no-action relief for a substantially similar

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73. *See id.* § 240.14a-8(i)(12) (providing that the same or substantially similar proposal may be indefinitely resubmitted if it received at least 25% shareholder support).

74. *See* Amazon.com, Inc., *supra* note 11, at 26–87.

75. *See* Amazon.com, Inc., 2022 Definitive Proxy Statement (Form 14A) 26–86 (May 25, 2022).

76. *See* Amazon.com, Inc., Current Report (Form 8-K) (May 24, 2023) (showing majority shareholder votes against all 18 proposals in 2023); Amazon.com, Inc., Current Report (Form 8-K) (May 25, 2022) (showing majority shareholder votes against all 15 proposals in 2022).

77. *See* John G. Matsusaka, Oguzhan Ozbas & Irene Yi, *Can Shareholder Proposals Hurt Shareholders? Evidence from Securities and Exchange Commission No-Action Letter Decisions*, 64 J.L. & ECON. 107 (2021).

78. *See, e.g.*, Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 346 (3d. Cir. 2015) ("[T]he Commission has adopted what can only be described as a "we-know-it-when-we-see-it" approach . . ."); 2022 Proposing Release, *supra* note 60, at 45062 ("[C]ompanies and shareholders may find it difficult to apply past staff no-action positions to predict whether a proposal should be included in a company's proxy statement . . . [S]everal commenters have expressed concerns around the variation and potential unpredictability of staff positions . . ."); 2020 Adopting Release, *supra* note 53, at 70262 (noting criticisms that "frequent changes in staff positions can increase uncertainty and costs for issuers and proponents" and the no-action process is not administered in a "consistent and transparent manner"); *Briefing Paper: Roundtable on the Federal Proxy Rules and State Corporation Law*, SEC (May 7, 2007), https://www.sec.gov/spotlight/proxyprocess/proxy-briefing050707.htm [https://perma.cc/N3JT-MLLP] ("[W]hether [a] proposals falls within one of the [Rule's] thirteen substantive categories is often subjective . . . contribut[ing] to a lack of predictability and transparency [and] result[ing] in frequent criticism."); Palmiter, *supra* note 61, at 882 ("[T]he agency's interpretive flip-flops in no-action letters have become legion.").

79. *See, e.g.*, J. Robert Brown, Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and the Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501, 504 (2012) ("[No-action] letters rarely contain meaningful analysis of the legal positions taken by the staff. They can, as a result, be changed or abandoned with little explanation."); Palmiter, *supra* note 61, at 908 ("Even more troubling than the number of policy shifts has been the agency's terse and desultory explanations for its new positions . . . .").

80. *See, e.g.*, *infra* notes 87, 89, 268 (citing various no-action letters).

proposal.[81] Such reversals are unsurprising for two reasons. First, the SEC's no-action decisions have no precedential value and are not binding on the agency.[82] Second, many of the Rule's grounds for exclusion rely on inherently subjective standards,[83] meaning the Rule may be interpreted differently each time control of the agency alternates between the political parties in Washington.[84]

But even in the absence of any official change in the SEC's interpretation of the Rule, the results of the no-action process have been uneven,[85] opening the agency to charges of political bias and unconstitutional viewpoint discrimination.[86] Consider, for example, the

81. *See, e.g.*, 1998 Adopting Release, *supra* note 63, at 29108 ("Over the years, the Division has 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."); Palmiter, *supra* note 61 at 906–07 ("The list of recent Rule 14a-8 policy shifts impresses even a casual observer. Matters once treated as excludable 'ordinary business' are now includable as 'significant issues of public policy' . . . [M]atters once considered 'significantly related' and 'extraordinary' are now excludable as 'ordinary business matters' . . . ."); Marc S. Gerber & Ryan J. Adams, *SEC Increases the Unpredictability of the Shareholder Proposal No-Action Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2022), https://corpgov.law.harvard.edu/2022/07/20/sec-increases-the-unpredictability-of-the-shareholder-proposal-no-action-process [https://perma.cc/T7BT-LAMA] (citing more recent examples of SEC reversals).

82. *See* Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 423 (D.C. Cir. 1992) (explaining that no-action letters are "nonbinding for all concerned"); Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals Exch. Act, Release No. 9344 (July 7, 1976) [hereinafter "1976 Release"] ("Because the staff's advice on contested proposals is informal and nonjudicial in nature, it does not have precedential value with respect to identical or similar proposals submitted to other issuers in the future."); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 923–24 (1998) (explaining that no-action letters are not considered legally binding on any party, including the SEC).

83. *See* Palmiter, *supra* note 61, at 892 ("The [Rule's substantive grounds for] exclusion[] supply the SEC with sufficient textual ambiguity to construct a regime of censorship in which the agency has virtually complete administrative freedom."). *Compare*, *e.g.*, Gerber & Adams, *supra* note 81 (complaining, from the perspective of companies, that the SEC's interpretation of the "ordinary business" exclusion relies on an "inherently subjective standard . . . that may be unlikely to remain static over time"), *with* Sanford Lewis, *SEC Resets the Shareholder Proposal Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 23, 2021), https://corpgov.law.harvard.edu/2021/12/23/sec-resets-the-shareholder-proposal-process [https://perma.cc/YT2E-B59K] (complaining, from the perspective of a shareholder-proponent, the SEC's interpretation of the "ordinary business" exclusion relies on a "highly subjective" standard).

84. *See* Brown, Jr., *supra* note 79, at 504 ("An examination of staff interpretations [of the Rule] show that they shift significantly from administration to administration, particularly with changes in the political makeup of the agency."); Holger, *supra* note 21 (describing a shift in the SEC's willingness to grant no-action relief from one presidential administration to the next); Mark T. Uyeda, Comm'r, SEC, Remarks at the Soc'y for Corp. Governance 2023 National Conference (June 21, 2023) (noting that the SEC's formulation and interpretation of the Rule "no matter how recently adopted, is at risk" of being changed "based on who is leading the Commission.").

85. *See* Brown, Jr., *supra* note 79, at 511 ("Staff interpretations of the 'ordinary business' exclusion under Rule 14a-8 change regularly. These shifts often do not reflect a substantive revision in the meaning or breadth of the exclusion; rather, they more likely arise from the need to conform to the views of a majority of those sitting on the Commission."); Palmiter, *supra* note 61, at 882 ("Over the last decade, with the most minimal of explanations and without any formal rulemaking, the agency has openly reversed itself on the propriety of proposals raising such matters as executive compensation, tobacco production, board composition, and employment policies.").

86. *See* Brief for Petitioner at 4, Nat'l Ctr. for Pub. Pol'y Research v. SEC, No. 23-60230, 2023 WL 4687025 (5th Cir. July 14, 2023); *see also* Palmiter, *supra* note 61, at 905 ("[T]he SEC's attempts to pass on the propriety

SEC's recent take on a pair of gun-related proposals submitted to the credit card companies Mastercard and American Express.

In 2022, the SEC *denied* Mastercard no-action relief for an *anti*-gun shareholder proposal requesting that the company issue a report describing if and how it "intends to reduce the risk associated with . . . the sale and purchase of *untraceable* firearms.'"[87] The agency reasoned that the anti-gun proposal was permitted because it "transcends ordinary business matters."[88]

Less than twelve months later, however, the SEC *granted* no-action relief to exclude a similarly worded *pro*-gun proposal submitted to American Express.[89] The agency reasoned that the proposal—which requested that the company issue a report concerning "the risks associated with *tracking* . . . the sale and purchase of firearms"—could be excluded because it "relates to, and does not transcend, ordinary business matters."[90] Thus, the *pro*-gun proposal was excluded, though a similarly worded *anti*-gun proposal was permitted.[91] According to the agency's critics, this kind of apparent partisanship is not an isolated incident.[92]

D. The Platform for Social Activists

Over its eight-decade history, the Rule has been used successfully by shareholders to usher in many important corporate governance reforms.[93] Board declassification, majority voting for directors, and shareholder proxy access to make director nominations have each become commonplace thanks to proposals made under the Rule.[94]

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of shareholder proposals illustrate the intractable problems of administrative licensing of speech based on its merits.").

87. *See* Mastercard Inc., SEC Staff No-Action Letter, 2022 WL 392206 (Apr. 22, 2022) (in reference to processing the sale of Ghost Guns banned in some jurisdictions).

88. *Id.*

89. *See* American Express Co., SEC Staff No-Action Letter, 2023 WL 2524429 (Mar. 9, 2023).

90. *Id.*

91. Similarly, under the Rule's "ordinary business" exclusion, the SEC staff permitted the exclusion of a proposal that expressed concern that a company did *too much* to combat "misinformation," but not a proposal that expressed concern that a company did *too little* to combat "misinformation." *Compare* Alphabet Inc., SEC Staff No-Action Letter, 2022 WL 392221 (Apr. 12, 2022), *with* AT&T Inc., SEC Staff No-Action Letter, 2023 WL 108213 (Mar. 15, 2023).

92. *See* SULLIVAN & CROMWELL, *supra* note 7, at 27 (noting that during the first half of 2023, companies succeeded in obtaining SEC no-action relief against 76% (19 or 25) of anti-ESG proposals for which such relief was requested as compared to a 49% success rate for other types of proposals.); Memorandum from the ESG Working Grp. of the H. Comm. on Fin. Servs., *supra* note 37, at 3 ("The no-action letter process has become a mechanism for SEC staff to project its views about the 'significance' of non-securities issues . . . .").

93. *See* Kosmas Papadopoulos, *The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-long-view-the-role-of-shareholder-proposals-in-shaping-u-s-corporate-governance-2000-2018 [https://perma.cc/E7DV-NDYV] (reviewing the recent history of shareholder proposals in corporate governance reform).

94. *See* Kastiel & Nili, *supra* note 6, at 586–88 (discussing the history of shareholder proposals).

These successes are the exception, however. The vast majority of proposals are rejected by shareholders.[95] But for a social activist using the Rule, getting majority shareholder support is seldom the goal. Instead, the goal is to spotlight the activist's cause.[96]

Nearly as long as the Rule has existed, it has been exploited by environmental, social, and political activists.[97] In 1951, a civil rights advocate used the Rule to champion desegregation on Greyhound buses.[98] In 1969, a human rights group forced a shareholder vote on a proposal urging Dow Chemical to stop making napalm for the Vietnam War.[99] And in another well-known case, in 1985, an animal rights activist prevailed in forcing a food supplier to include in its proxy statement a proposal highlighting the inhumane treatment of geese in the production of foie gras.[100]

Ironically, when the SEC first adopted the Rule, the agency did not intend that it would be used as a "publicity mechanism" for personal or partisan interests unrelated to the interests of a company's shareholders.[101] As the SEC's chairman explained around the time the Rule was originally adopted, "[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 [the Rule] . . . ."[102] To curb such abuses, an early version of the Rule

95. *See* 2019 Proposing Release, *supra* note 43, at 66485–86 (showing a statistically significant decrease in the percent of proposals receiving majority support during the years 2004–2018, ranging from a high of 27.7% in 2009 to a low of 11.9% in 2018); *see also infra* Figure 3 (reporting more recent data through 2023). To be sure, "[e]ven if a proposal does not obtain shareholder approval . . . it may nonetheless influence management, especially if it receives substantial shareholder support." See 1998 Adopting Release, *supra* note 63, at 29116 n.112. Moreover, "[a] proposal may also influence management even if it is not put to a shareholder vote" to the extent that "management has made concessions to shareholders in return for the withdrawal of a proposal." *Id.*

96. *See* Brown, Jr., *supra* note 79, at 512 ("[Social] proposals are in reality mostly efforts by shareholders to bring public attention to potentially embarrassing corporate practices."); George W. Dent, Jr., *SEC Rule 14a-8: A Study in Regulatory Failure*, 30 N.Y.L. SCH. L. REV. 1, 22 (1985) ("There is some evidence that publicity, either for its own sake or to pressure management to change its policies, is the primary motive for most shareholder proposals."); Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 425–26 (1984) ("By purchasing one or more shares of corporate stock . . . [proposal proponents are] able to distribute their views to millions of investors . . . [but] bear little or none of the cost of this advertising."); Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 493 (1972) ("[V]ictories and defeats are measured by the amount of hostile or unflattering publicity one side scores against the other. Only in this sense do the issues of shareholder social proposals or corporate social responsibility seem important. Taken alone they cannot be said to have created any fundamental change in the corporate system.").

97. *See, e.g.*, Sarah C. Haan, *Civil Rights and Shareholder Activism*: SEC v. Medical Committee for Human Rights, 76 WASH. & LEE L. REV. 1167, 1211–19 (2019); Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1083–85 (2015).

98. Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951) (Plaintiff proposed "[a] Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South"); *see generally* Haan, *supra* note 97, at 1214–15 (providing context).

99. Medical Comm. For Human Rights v. SEC, 432 F.2d 659, 666 (D.C. Cir. 1970) ("This product is also bad for our company's business as it is being used in the Vietnamese War."); *see generally* Haan, *supra* note 97 (providing context).

100. Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 555 (D.D.C. 1985).

101. *See, e.g.*, Proposed Amendments to Rule 14a–8 Under the Securities Exch. Act of 1934 Relating to Proposals by Security Holders, Release No. 34-19135, 47 Fed. Reg. 47420, 47422 n.8 (Oct. 26, 1982) [hereinafter 1982 Proposing Release] (explaining that "the rule was not designed to burden the proxy solicitation process by requiring the inclusion" proposals submitted by activists "us[ing] the rule as a publicity mechanism to further personal interests that are unrelated to the interests of security holders as security holders").

102. *See* Chairman Purcell Testimony, *supra* note 51, at 163.

expressly precluded any proposal made "primarily for the purpose of promoting general economic, political, racial, social, or similar causes."[103]

More recently, such proposals have been precluded under the Rule's "ordinary business" exclusion.[104] Under the SEC's longstanding interpretation of this exclusion—which precludes any proposal that "deals with a matter relating to the company's ordinary business operations"[105]—the agency recognized that some issues, no matter how significant as a general matter, may not be significant to the business of a particular company.[106] Accordingly, the SEC interpreted the "ordinary business" exclusion to preclude any proposal concerning an environmental, social, or political issue that lacked a "sufficient nexus" to the business of the company. [107] Moreover, even if a "sufficient nexus" were found to exist, the SEC interpreted the exclusion to preclude any proposal that sought to impermissibly "micromanage" the company[108] by "seek[ing] intricate detail or impos[ing] a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board."[109]

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103. *See* Solicitation of Proxies, Exch. Act Release No. 4775, 17 Fed. Reg. 11431, 11433 (Dec. 18, 1952). This amendment was itself a codification of an earlier SEC staff interpretation of the Rule. *See* 11 Fed. Reg. 10990, 10995 (Sep. 27, 1946).

104. *See* 17 C.F.R. § 240.14a-8(i)(7) (2024); 1998 Adopting Release, *supra* note 63, at 29108 ("The general underlying policy of [the 'ordinary business' exclusion] is consistent with the policy of most state corporate laws: to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.").

105. 17 C.F.R. § 240.14a-8(i)(7) (2024).

106. *See* SEC Staff Legal Bulletin No. 14K (Oct. 16, 2019), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/staff-legal-bulletin-14k-shareholder-proposals [https://perma.cc/GL43-3VQK] ("The staff takes a company-specific approach in evaluating significance, rather than recognizing particular issues or categories of issues as universally 'significant.' Accordingly, a policy issue that is significant to one company may not be significant to another."); SEC Staff Legal Bulletin No. 14E (Oct. 27, 2009), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14e-cf [https://perma.cc/J2X9-XMUC] ("The determination as to whether a proposal deals with a matter relating to a company's ordinary business operations is made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.").

107. *See* SEC Staff Legal Bulletin No. 14E, *supra* note 106 ("[If] a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) *as long as a sufficient nexus exists* between the nature of the proposal and the company." (emphasis added)); *accord* Staff Legal Bulletins No. 14I (Nov. 1, 2017), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14i-cf [https://perma.cc/MYN6-HJAH] ("Whether [a proposal raising an issue of significant environment, social, or political policy is subject to the 'ordinary business' exclusion] depends, in part, on *the connection between* the significant policy issue and the company's business operations." (emphasis added)).

108. *See* SEC Staff Legal Bulletin No. 14E, *supra* note 106 ("[A] proposal could be excluded under Rule 14a-8(i)(7) . . . 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. 14I, *supra* note 107 ("The Commission has stated that the policy underlying the 'ordinary business' exception rests on two central considerations. The first relates to the proposal's subject matter; the second, the degree to which the proposal 'micromanages' the company.").

109. *See* SEC Staff Legal Bulletin No. 14K, *supra* note 106; *accord* SEC Staff Legal Bulletin No. 14J (Oct. 23, 2018), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14j-cf [https://perma.cc/HF2T-ZPJF] ("The Commission has explained that [micromanagement] 'may come into play in a number of circumstances, such as where the proposal involves intricate detail,

Ahead of the 2022 proxy season, however, the SEC expressly "rescinded" this earlier interpretation of the Rule.[110] Under the agency's new interpretative guidance, a proposal is no longer subject to the "ordinary business" exclusion so long as the proposal "raises issues with a broad societal impact."[111] The exclusion is unavailable even if those issues are not significant or especially relevant to the business of a particular company,[112] and even if the proposal "seek[s] detail or . . . promote[s] timeframes or methods" that under the SEC's pre-2022 interpretation would have been considered impermissible micromanagement.[113]

This new interpretation has significantly narrowed what was historically the most cited grounds for no-action relief,[114] permitting all manner of environmental, social, or political ("ESP") proposals under the Rule.[115]

E. The Recent Surge

Figure 1 illustrates the consequences of the SEC's recent interpretative shift.[116] The last two years have witnessed a significant increase in the number of proposals put to a shareholder vote. In 2023, public company shareholders were asked to vote on more proposals than any time since 2011. Moreover, an increasing number of these proposals

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or seeks to impose specific time-frames or methods for implementing complex policies . . . .' For example, a proposal that seeks an intricately detailed study or report may be excluded on micromanagement grounds.").

110. *See* SEC Staff Legal Bulletin No. 14L (Nov. 3, 2021), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14l-cf [https://perma.cc/4ZCG-2KJT].

111. *Id.*

112. *See id.* ("[SEC] 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. . . .[T]he staff is no longer taking a company-specific approach to evaluating the significance of a policy issue . . . .").

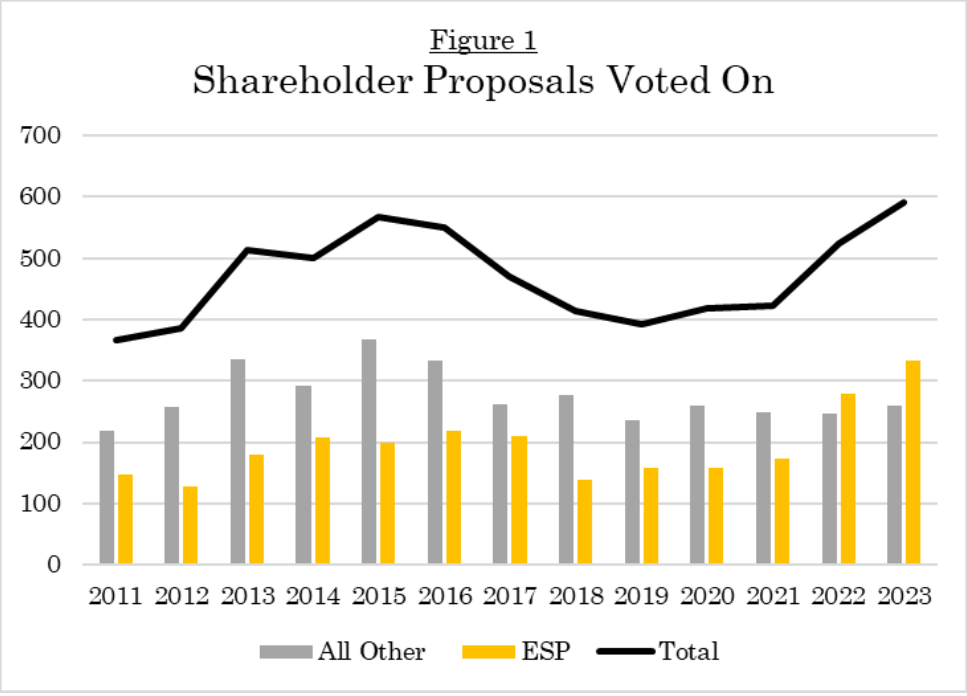
113. *See id*. ("[M]any of the proposals [excluded under] the rescinded [prior interpretation of the Rule] requested companies adopt timeframes or targets to address climate change . . . . Going forward we would not concur in the exclusion of similar proposals that suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals.")

114. *See* Matsusaka, Ozbas & Yi, *supra* note 77, at 122 (showing that the "ordinary business" exclusion is the most commonly cited reason for both companies claiming, and the SEC granting, no-action relief).

115. *See, e.g.*, GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2022 PROXY SEASON 2 (2022), https://www.gibsondunn.com/wp-content/uploads/2022/07/shareholder-proposal-developments-during-the-2022-proxy-season.pdf [https://perma.cc/7RSQ-QEEG] ("The change of administration at the SEC and the issuance of SLB 14L appear to have served as an open season call for shareholder proponents: the number of proposals submitted surged . . . and the number of proposals excluded through the no-action process plummeted."); SULLIVAN & CROMWELL, LLP, 2022 PROXY SEASON REVIEW: RULE 14A-8 SHAREHOLDER PROPOSALS 32–33 (2022), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf [https://perma.cc/3DNU-FE95] (noting that in the six months following SLB 14L, SEC staff granted no-action relief to only 37% requests, down from 69% during the same period one year earlier, with the decline in the rate of no-action relief for ESP proposals being particularly precipitous); SULLIVAN & CROMWELL, *supra* note 7, at 26 (noting that the "sharp decline in the likelihood of no-action relief" following SLB 14L "deterred many companies from submitting substantive no-action requests [during the 2023 proxy] season" resulting in 26% fewer no-action requests during the first half of 2023 as compared to the same period a year earlier).

116. All data for Figures 1, 2 and 3 were compiled using the Annual Proxy Review published by Sullivan & Cromwell LLP for proxy seasons 2012 through 2024 (on file with author). All data is based on shareholder proposals submitted to U.S. companies that are members of the S&P 1500 index. *See* SULLIVAN & CROMWELL, *supra* note 7.

concern ESP topics. Indeed, since 2022, the number of ESP proposals has outnumbered all other proposals, including those addressing traditional corporate governance topics.[117]



Even as the number of proposals has increased, use of the Rule continues to be dominated by a small cadre of repeat players.[118] Only 11 activists accounted for 66% of proposals submitted during the first half of 2023.[119] While the proposals of well-known gadflies[120]—notably John Chevedden, Kenneth Steiner, James McRitchie, and Myra Young—focus on issues of corporate governance and executive compensation,[121] ESP proposals are dominated by a handful of ideologically oriented organizations with competing ESG and

117. "The academic literature generally divides shareholder proposals into a corporate governance category and a social and environmental category." Haan, *supra* note 62, at 272. "While historically, proposals have been governance dominated, recently investors have shifted their attention towards social and environmental proposals." Kastiel & Nili, *supra* note 6, at 583.

118. *See* Kastiel & Nili, *supra* note 6, at 591–93 (showing that a significant portion of all proposals are submitted by a handful of so-called gadflies).

119. *See* SULLIVAN & CROMWELL, *supra* note 7, at 4 (showing that 11 proponents submitted a total of 538 proposals during the first half of 2023).

120. *See* Kastiel & Nili, *supra* note 6, at 590–91 (identifying six well-known "gadflies" who collectively submit a plurality of all shareholder proposals).

121. *See* SULLIVAN & CROMWELL, *supra* note 7, at 6 ("These individuals remained focused on governance issues, with governance proposals comprising 64% of their total submissions.").

anti-ESG agendas.[122] On the left, As You Sow, the leading ESG proponent,[123] submitted 89 ESP proposals during the first half of 2023.[124] Meanwhile, two right-leaning anti-ESG organizations, the National Center for Public Policy Research[125] and the National Legal and Policy Center,[126] combined for a total of 57 ESP proposals during the same period.[127]

Despite the growing numbers of ESP proposals submitted by these battling partisan outfits, they continue to be less popular than more traditional proposals concerning corporate governance. As Figure 2 illustrates, average shareholder support for ESP proposals peaked in 2021 at 33% of votes cast and has waned since. Experiencing "proposal fatigue,"[128] average shareholder support for ESP proposals dwindled to just 19% in 2023. Notably, support appears to be even weaker among retail investors, who vote against ESP proposals at much higher rates than their institutional counterparts.[129]

122. *See id.* at 4–5 ("For the first time, an 'anti-ESG' proponent is represented in the top five proponents and proposals from these proponents accounted for over 10% of overall submissions.").

123. *See* AS YOU SOW, https://www.asyousow.org/ [https://perma.cc/E56Y-42DX] ("We harness shareholder power to create lasting change [on issues including] gender inequalities, workplace equity, environmental health, and more.").

124. SULLIVAN & CROMWELL, *supra* note 7, at 4.

125. *See* Stefan Padfield, *Do Asset Managers Hate Their Conservative Clients?*, NAT'L CTR. PUB. POL'Y RSCH. (Oct. 7, 2023), https://nationalcenter.org/ncppr/2023/10/07/stefan-padfield-do-asset-managers-hate-their-conservative-clients/ [https://perma.cc/49G9-9DX2] (describing the organization as the "original and premier opponent of the woke takeover of American corporate life and defender of true capitalism").

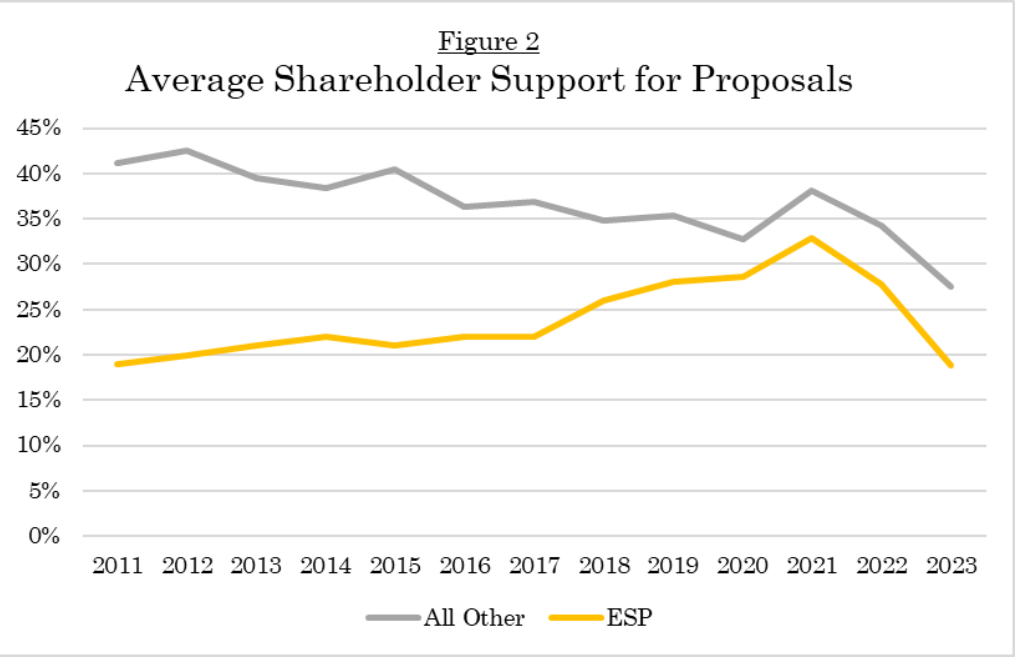
126. *See Corporate Integrity Project*, NAT'L LEGAL & POL'Y CTR., https://nlpc.org/corporate-integrity-project/ [https://perma.cc/RBB9-7DZC] (asserting that the social responsibility of the corporation is to defend and advance the interests of the people who own the company, the shareholders").

127. SULLIVAN & CROMWELL, *supra* note 7, at 4.

128. SPIERINGS, *supra* note 7, at 1, 5.

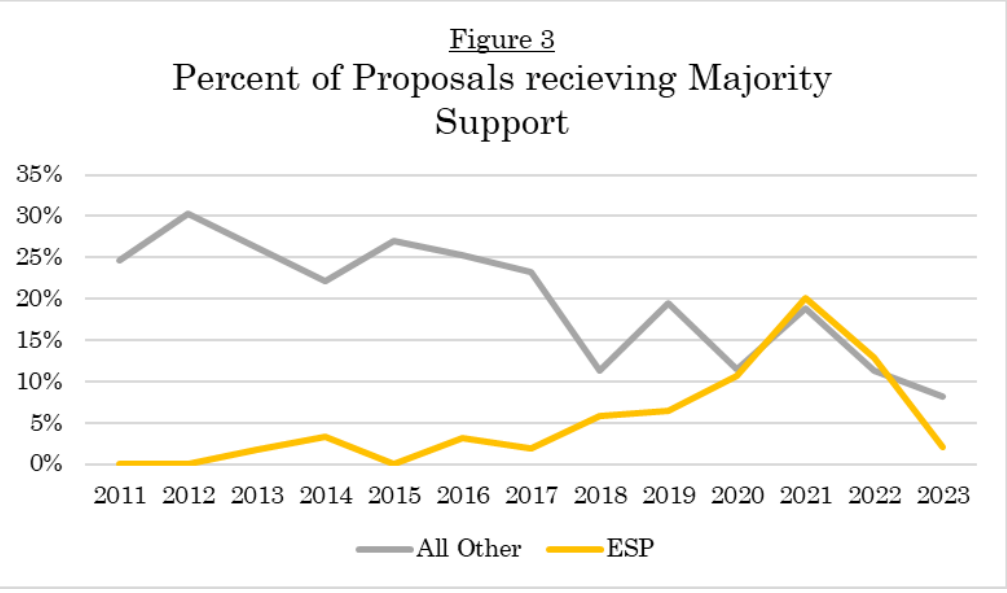
129. *See* Callan & Donowitz, *supra* note 22 ("Institutional investor support declined to 25.7% this past season from 36.2% in 2022, and retail support declined from 20% in 2022 to 17.6% in 2023, the lowest level in five years. There continues to be a significant voting divergence among these segments of investors.").

Figure 2



These low levels of shareholder support mean that the vast majority of proposals submitted under the Rule are rejected by public company shareholders. Indeed, as Figure 3 highlights, in 2023, only 7 of the 332 ESP proposals put to a vote—just 2%—received majority support from shareholders.

Figure 3



In light of this data, some companies might reasonably conclude the costs that the Rule enables a single activist to impose on the company and its shareholders outweigh the potential benefits. For those companies, regulating shareholder proposals through private ordering may be an appealing prospect.

III. REGULATING PROPOSALS THROUGH PRIVATE ORDERING

A corporation seeking to adopt in its governing documents a provision regulating shareholder proposals would need to consider both (A) how to impose such regulations as well as (B) the substance of such regulations. To imagine what a "proposal provision" in the corporate contract might look like, this part addresses both considerations in turn.

A. Rule 14a-8 Invites Private Ordering

The express language of the Rule invites private ordering through two avenues. First, the Rule limits shareholder eligibility to submit a proposal to only those shareholders "holding securities entitled to vote" on the proposal.[130] Second, the Rule permits the exclusion of any proposal that is "not proper for shareholder action" under governing state law.[131]

1. Private Ordering of Voting Rights

By limiting eligibility to submit a proposal to only those shareholders "holding securities entitled to vote" on the proposal, the Rule expressly ties the right to submit a proposal to a shareholder's voting rights.[132] If a shareholder is "entitled to vote" on a proposal, then they are eligible to submit the proposal under the Rule. And if a shareholder is *not* "entitled to vote" on the proposal, they are *in*eligible under the Rule.[133]

Noticeably, however, neither the Rule nor any other SEC regulation defines which securities are "entitled to vote."[134] As the Supreme Court has explained, "such silence [is] to be expected."[135] Federal securities law "is generally enacted against the background of existing state law."[136] By omitting an explanation of which securities are "entitled to vote," the Rule recognizes that a shareholder's voting rights are defined by state law.[137] And state

130. 17 C.F.R. § 240.14a-8(b)(1)(i) (2024).

131. *Id.* § 240.14a-8(i)(1).

132. *Id.* § 240.14a-8(b)(1)(i).

133. *See, e.g.*, SEC Staff Legal Bulletin No. 14 (July 13, 2001), https://www.sec.gov/interps/legal/cfslb14.htm [https://perma.cc/7S4Q-B8NJ] (explaining that where a proposing shareholder owns class B common stock, which is entitled to vote only on the election of directors, the corporation may exclude that shareholder's proposal about executive compensation under Rule 14a-8(b) because the proposing shareholder did not "own securities entitled to vote on the proposal").

134. *See* 17 C.F.R. § 240.14a-8(b)(1) (2024) (lacking a definition of "entitled to vote").

135. Burks v. Lasker, 441 U.S. 471, 478 (1979).

136. *Id.*; *see also* Kamen v. Kemper Fin. Servs., 500 U.S. 90, 99 (1991) ("[G]aps in [federal securities] statutes bearing on the allocation of governing power within the corporation should be filled with state law.").

137. *See* 2020 Adopting Release, *supra* note 53, at 70262 ("[W]e note that shareholder voting rights are governed by state rather than federal law and that shareholder-proponents must own shares entitled to vote on their proposals."); HAZEN, *supra* note 61, at 366–68 ("Of course, state corporate law determines substantive voting rights. . . . [T]he primary source of shareholder voting rights remains the law of the state of incorporation.").

law allows for those rights to be varied by a corporation's charter.[138] Consequently, a charter provision limiting a shareholder's voting rights also limits a shareholder's access to the Rule.

Indeed, many public companies have already eliminated shareholder eligibility to make proposals entirely by authorizing and issuing nonvoting shares.[139] These shares are nonvoting solely by virtue of provisions that each of these public companies have adopted in their corporate charters.[140] And because these charter provisions are valid and enforceable under state corporate law, the holders of these shares have no right to submit a proposal under the Rule.[141]

Rather than eliminating shareholders' right to make a proposal entirely, however, a corporation may want to place some reasonable restrictions on that right. A company could readily do so by including a provision in its corporate charter expressly restricting the types of proposals that shareholders may vote upon. By restricting the *right to vote* on certain types of proposals, such a provision would also restrict a shareholder's *eligibility to submit* such proposals under the Rule.

However, a significant drawback to regulating proposals indirectly through shareholders' voting rights is that any provision regulating the latter must be set forth in a corporation's charter, rather than its bylaws.[142] Unlike bylaw amendments,[143] charter amendments require approval by both the corporation's board and its shareholders.[144] Where obtaining shareholder approval might be time-consuming, contentious, or unfeasible, the Rule offers a second, more direct avenue to private ordering.

2. Private Ordering of Proposal Rights

Rather than indirectly regulating shareholder proposals through the regulation of shareholders' voting rights, the Rule also permits companies to regulate shareholders' proposal rights directly. Specifically, the Rule allows for the exclusion of any proposal that is "not a proper subject" for shareholder action under state law.[145] Thus, like eligibility to

138. *See* DEL. CODE ANN. tit. 8, § 151(a) (West 2017) (authorizing a corporation's charter to specify the voting powers associated the corporation's shares).

139. *See* COUNCIL INSTITUTIONAL INVS., DUAL CLASS COMPANIES LIST (2022) (providing a list of public companies that have dual-class voting structures, including those with nonvoting shares).

140. *See* DEL. CODE ANN. tit. 8, § 212(a) (West 2020) ("Unless otherwise provided in the certificate of incorporation . . . each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder.").

141. *See* Steven M. Haas & Charles L. Brewer, *Nonvoting Common Stock: A Legal Overview*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 30, 2017), https://corpgov.law.harvard.edu/2017/11/30/nonvoting-common-stock-a-legal-overview [https://perma.cc/3QED-ZHQH] ("Thus, nonvoting stockholders cannot submit proposals under Rule 14a-8.").

142. *See* DEL. CODE ANN. tit. 8, § 151(a) (West 2017) (requiring that provisions regulating the voting rights of shareholders be located in the charter); *id.* §212(a) (West 2020) (same).

143. *See id.* § 109(a) (West 2015).

144. *See id.* § 242(b) (West 2023).

145. 17 C.F.R. § 240.14a-8(i)(1) (2024).

submit a proposal, the exclusion of a proposal as improper is premised on shareholders' state law rights.[146]

Whether a proposal is a "proper subject" for shareholder action under state law depends, in part, on whether the proposal would "bind[] the company" to a particular action or course of business.[147] In most cases, a binding proposal could be excluded as improper because it would impinge upon the directors' state-law authority to manage the business and affairs of the corporation.[148] Thus, to avoid exclusion, the Rule advises shareholders to cast proposals as nonbinding "recommendations or requests that the board of directors take specified action,"[149] leaving the board's managerial authority under state law untrammeled.

The binding nature of a proposal, however, is not the only reason why a proposal may be improper for shareholder action under state law.[150] State law also governs the conduct of shareholder meetings,[151] including the right of any shareholder at the meeting to make a proposal for consideration by their fellow shareholders.[152] If a shareholder lacks the right to make a proposal, then the proposal would be "not a proper subject" for shareholder action under state law.[153]

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146. *See* Facilitating Shareholder Director Nominations, Exchange Act Release No. 34-60089, 74 Fed. Reg. 29024, 29025 (June 18, 2009) ("[T]he Commission has been mindful of the traditional role of the states in regulating corporate governance. For example, Rule 14a-8 . . . explicitly provides that a company is permitted to exclude a shareholder proposal if it 'is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization.'"); Amendments to Rules on Shareholder Proposals, Release No. 34-39093, 62 Fed. Reg. 50682, 50683 (Sept. 26, 1997) [hereinafter 1997 Proposing Release] ("In its current form, rule 14a-8 in fact defers to state law on the central question of whether a proposal is a proper matter for shareholder action").

147. *See* 17 C.F.R. § 240.14a-8(i)(1) (2024).

148. *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2024).

149. 17 C.F.R. § 240.14a-8(i)(1) (2024).

150. *See, e.g.*, J.P. Morgan & Co. Inc., SEC Staff No-Action Letter, 2000 WL 1877573 (Dec. 22, 2000) (agreeing that a where special shareholder meeting has been called to conduct specified business, a proposal concerning unrelated matters would be "not a proper subject" for shareholder action at such meeting under Delaware law).

151. *See, e.g.*, DEL. CODE ANN. tit. 8, § 211 (West 2009) (governing meetings of shareholders generally); *id.* § 212 (West 2020) (governing the right to vote and proxy voting at a meeting of shareholders); *id.* § 213 (West 2020) (governing eligibility to receive notice of and vote at a meeting of shareholders); *id.* § 216 (West 2007) (governing the quorum required at a meeting of shareholders); *id.* § 219 (West 2022) (requiring a list of the shareholders entitled to vote at a meeting of shareholders); DEL. CODE ANN. tit. 8, § 222 (West 2022) (requiring the notice for a meeting of shareholders); *id.* § 231 (West 2000) (governing the voting procedures for a meeting of shareholders).

152. *See* 1976 Release, *supra* note 82 ("[T]he right of security holders to present proposals at the meeting, as distinguished from the right to include such proposals in management's proxy materials, turns upon state law."); 2020 Adopting Release, *supra* note 53, at 70256 ("The conduct of shareholder meetings, including how proposals are presented, is generally governed by state law, and does not raise the same concerns that are raised by a proponent's use of a company's proxy statement under the federal proxy rules."); 2007 Proposing Release, *supra* note 43, at 43468 ("In order to reinforce the state law rights and responsibilities of shareholders . . . the proxy rules should be neutral with respect to the manner in which meetings of shareholders are conducted, and should not interfere with . . . the requirements of state law and the corporation's governing documents.").

153. *See* 2007 Proposing Release, *supra* note 43, at 43467–68 ("To the extent a company had in place a bylaw under which non-binding shareholder proposals were not permitted to be raised at meetings of shareholders, a company may be able to look to Rule 14a-8(i)(1) with regard to the exclusion of such proposals."); HAZEN, *supra* note 61, at 387 ("The corporate law of the state of incorporation is the ultimate source for the answer to the question of whether a proposal is a proper matter for shareholder consideration.").

Indeed, most public companies have long restricted shareholders' right to make a proposal at a shareholder meeting through advance notice bylaws.[154] Such bylaws require a shareholder to provide the company with advance notice of their intention to make a proposal or to nominate a director at an upcoming shareholder meeting.[155] Failure to comply with the bylaw means that a shareholder's proposal or nominee is not properly brought before the shareholder meeting and, therefore, cannot be voted upon.[156]

Although advance notice bylaws target only those shareholder proposals for which the proponent is soliciting their own proxies,[157] a similar bylaw could be deployed to target shareholder proposals made under the Rule. Because any proposal failing to meet the terms of this bylaw could not be properly brought before a shareholder meeting, the proposal would be "not a proper subject" for shareholder action as a matter of state law and, therefore, excludable under the Rule.[158]

A key advantage to regulating shareholders' proposal rights directly, rather than indirectly through the regulation of shareholders' voting rights, is that a restriction on the former does not require an amendment to the corporation's charter. Unlike shareholders' voting rights, which may be restricted only through a charter provision,[159] the right of shareholders to bring a proposal before a shareholder meeting may be restricted in a corporation's bylaws.[160] Thus, any such restriction may be enacted unilaterally by the board, without a shareholder vote.[161]

B. Regulating Shareholder Proposals

Using either of the avenues described above, a public company may impose any manner of restrictions on shareholder proposals.[162] Despite the range of possibilities, the most

154. *See* BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, 224 A.3d 964, 980 (Del. 2020) ("[A]dvance notice bylaws[] are commonplace . . ."); 2007 Proposing Release, *supra* note 43, at 43467 n.17 ("In order to provide for an orderly period of solicitation before a meeting, many corporations have included provisions in their charter or bylaws to require advance notice of any shareholder resolutions . . . to be presented at a meeting.").

155. Sternlicht v. Hernandez, No. 2023-0477, 2023 WL 3991642, at *14 (Del. Ch. June 14, 2023); *see also* PRACTICAL LAW CORPORATE & SECURITIES, BY-LAWS (DE PUBLIC CORPORATION): ADVANCE NOTICE § 2.01(a), (c) (requiring compliance with the advance notice bylaw for any "business other than director nominations" to be "properly brought before" for a shareholder meeting).

156. *See* PRACTICAL LAW CORPORATE & SECURITIES, *supra* note 155, at § 2.01(e) (providing any proposal made in violation of the advance notice bylaw cannot be "properly brought before" the shareholder meeting).

157. *See id*. § 2.1(f) (providing that the advance notice bylaw "shall not apply to a proposal . . . made . . . pursuant to and in compliance with Rule 14a-8."). *But see* JANA Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335, 340–44 (Del. Ch. 2008) (interpreting an ambiguously drafted advance notice bylaw to apply *only* to proposals made under the Rule).

158. *See supra* note 153 and accompanying text.

159. *See supra* notes 142, 144 and accompanying text.

160. *See* Strategic Inv. Opportunities LLC v. Lee Enters., No. 2021-1089, 2022 WL 453607, at *8 (Del. Ch. Feb. 14, 2022) (noting that in the absence of express statutory language governing shareholders' rights to participate in a shareholder meeting "[c]orporations have come to fill th[e] gap through their bylaws").

161. *See* DEL. CODE ANN. tit. 8, § 109(a) (West 2015) (providing that a corporation's charter may authorize its board of directors to amend the corporation's bylaws).

162. *See* Uyeda, *supra* note 84 ("For example, a company could adopt submission deadlines for shareholder proposals that align with its proxy access deadlines and thereby simplify annual meeting and proxy statement preparations.").

contentious restrictions are likely to be those that (1) limit shareholder eligibility to make a proposal or (2) enhance the grounds upon which a proposal may be excluded from a company's proxy statement.

1. Tightening Shareholder Eligibility

In 2010, the SEC proposed a proxy access rule that, much like Rule 14a-8, aimed to enhance shareholder power in corporate governance.[163] That 2010 rule enabled any qualifying shareholder to piggyback off a public company's proxy, by nominating individuals for the company's board and having those nominees included in the company's proxy solicitation.[164] Notably, a shareholder qualified to make nominations under the SEC's proxy access rule only if they held at least 3% of a public company's outstanding shares for at least three years.[165] Although the rule was ultimately struck down in court on procedural grounds,[166] many public companies subsequently adopted proxy access through private ordering, with the qualifying ownership threshold of "3% for three years" becoming the market standard.[167]

By contrast, the proxy access granted by Rule 14a-8 for shareholder proposals is far more permissive. As already noted,[168] under the Rule's modest ownership thresholds, a shareholder with only a nominal stake in a public corporation is eligible to place their proposal on the company's proxy statement.[169]

In 2020, when the SEC increased the ownership threshold under the Rule to its current levels, the SEC reiterated its "longstanding" view that:

> Because Rule 14a-8 enables individual shareholders to shift to the company and other shareholders the significant cost of processing, analyzing, and voting their proposals . . . ownership thresholds should be calibrated so that a shareholder-proponent's economic stake or investment interest in the company is more likely to demonstrate an alignment of interest with the company's other shareholders . . . .[170]

Weighing these same considerations, individual companies might reasonably conclude that the ownership threshold espoused by the SEC in its vacated 2010 proxy access rule struck a more appropriate balance. After all, that threshold—3% for three years—has been widely endorsed in recent years as the appropriate benchmark for shareholder proxy

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163. *See* 2010 Adopting Release, *supra* note 43, at 56673 ("The rules we adopt today provide individual shareholders the ability to have director nominees included in the corporate proxy materials if State law and governing corporate documents permit a shareholder to nominate directors at the shareholder meeting.").

164. *See id*. at 56674–75 (summarizing the proxy access rule).

165. *See id*. at 56688–89 (explaining that these ownership thresholds limit proxy access to "shareholders that hold a significant, long-term interest in the company").

166. *See generally* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

167. *See* Holly J. Gregory, Rebecca Grapsas & Claire Holland, *Proxy Access: A Five-Year Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 4, 2020), https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review [https://perma.cc/DPM6-2ZDY] (discussing proxy access changes).

168. *See supra* notes 54–56 and accompanying text.

169. *See* 2020 Adopting Release, *supra* note 53, at 70246 (providing data regarding percent of market value represented by $2000 of stock for various size companies).

170. *See* 2020 Adopting Release, *supra* note 53, at 70245.

access to make director nominations.[171] To be sure, increasing the ownership threshold required for proxy access to make a shareholder proposal to the same levels as those required for director nominations will mean that only a very few public company shareholders would be eligible to submit a proposal under the Rule.[172] Perhaps, for that reason, the Business Roundtable has suggested a sliding scale between 0.15% and 1% as the appropriate ownership threshold.[173] Whatever the right number may be, through private ordering, market participants can decide for themselves the appropriate ownership threshold to make a shareholder proposal, while retaining the flexibility to vary that threshold from one corporation to another.[174]

2. Enhancing the Grounds for Exclusion

Aside from tightening shareholder eligibility to submit a proposal, public companies may also seek to regulate the types of proposals that may be put to a shareholder vote. Such regulations may either be more restrictive or provide more clarity than the grounds for exclusion already set forth in the Rule.

For example, some companies may reasonably want to revert to the SEC's now-rescinded interpretation of the Rule's "ordinary business" exclusion.[175] In particular, a company might reasonably believe that the question of whether a proposal addresses an "ordinary business" matter is "often [a] difficult judgment call[]" that is best left to its board to decide.[176] As the SEC explained in its now-rescinded guidance:

> A board acting [in its fiduciary] capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.[177]

Applying this rationale, a company may want to adopt provisions empowering its board to decide whether a proposal is inappropriate for a shareholder vote because it lacks a "sufficient nexus" to the corporation or attempts to improperly "micromanage" its business.[178] Doing so would effectively revive the SEC's pre-2021 interpretation of the "ordinary business" exclusion, while placing ultimate authority with the company's board, rather than the SEC, to make the "judgment call."

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171. *See* Gregory, Grapsas & Holland, *supra* note 167.

172. *See* 2019 Proposing Release, *supra* note 43, at 66507 (estimating that an increase in the ownership threshold to only 1% would result in the exclusion of 99% of shareholder proposals).

173. *See* BUS. ROUNDTABLE, RESPONSIBLE SHAREHOLDER ENGAGEMENT & LONG-TERM VALUE CREATION (2016), https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Shareholder%20proposal%20paper-final.pdf [https://perma.cc/6QJD-6644].

174. *See* Uyeda, *supra* note 84 ("For example, a controlled company may implement lower share ownership requirements for submitting a proposal compared to a company with dispersed ownership.").

175. *See supra* notes 104–15 and accompanying text.

176. *See* SEC Staff Legal Bulletin No. 14I, *supra* note 107; *accord* SEC Staff Legal Bulletin No. 14J, *supra* note 109 (explaining the ordinary business exclusion for shareholders).

177. SEC Staff Legal Bulletin No. 14I, *supra* note 107.

178. *See supra* notes 105–09 and accompanying text (describing the ordinary business exclusion).

A company may likewise want to empower its board to determine whether a proposal is inappropriate for a shareholder vote on other grounds. For example, the Rule currently provides that a shareholder proposal may be excluded because the proposal either (i) has been already substantially implemented by the company;[179] (ii) substantially duplicates another shareholder's proposal that will appear on the company's proxy;[180] or (iii) is substantially similar to a proposal that was previously put to a shareholder vote and failed generate meaningful shareholder support.[181] Historically, after the "ordinary business" exclusion, these have ranked as three of the most commonly granted grounds for exclusion.[182] But in 2022, the SEC proposed amending the Rule to significantly diminish the scope of these three exclusions.[183] Doing so, would presumably exacerbate the onslaught of ESG and anti-ESG proposals.[184]

Anticipating these potential changes, a company may reasonably want to preserve these three exclusions as they are currently codified under the Rule. To do so, a company might adopt provisions empowering its board to determine whether a proposal has been already "substantially implemented," "substantially duplicates" another proposal, or is "substantially similar" to previous proposals that failed to gain significant shareholder support.

IV. ENFORCEABILITY OF PROPOSAL PROVISIONS

Whatever restrictions a company might seek to impose on shareholder proposals through a provision in its governing documents, the enforceability of that provision would raise questions of both state corporate law and federal securities law. This Part considers each in turn.

Focusing specifically on the corporate law of Delaware, Section A explains that a proposal provision in the corporate contract is both valid and enforceable, subject to limited exceptions. Section B then turns to federal securities law and demonstrates that neither the Rule nor the Exchange Act precludes the private ordering of shareholders' proposal rights.

A. Enforceability under Delaware Corporate Law

Under Delaware law, a corporation's charter and bylaws are a binding "contract" between the corporation and its shareholders.[185] Within this contract, the parties enjoy broad

179. *See* 17 C.F.R. § 240.14a-8(i)(10) (2024) (explaining that a reason for determining a proposal is inappropriate for a shareholder vote).

180. *See id.* § 240.14a-8(i)(11).

181. *See id.* § 240.14a-8(i)(12).

182. *See* Matsusaka, Ozbas & Yi, *supra* note 77, at 122 (describing why these are the most granted grounds for exclusion).

183. *See generally* 2022 Proposing Release, *supra* note 60.

184. *See* GIBSON DUNN, *supra* note 36, at 23 ("[T]he 2022 Proposed Amendments would have the effect of further limiting the availability of these grounds for exclusion, likely leading to more shareholder proposals going to a vote.").

185. *See, e.g.*, Salzberg v. Sciabacucchi, 227 A.3d 102, 135 (Del. 2020) (ruling that because "corporate charters are contracts among a corporation's stockholders," stockholders are bound by a forum selection provision in a corporation's charter); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014) (ruling that "[b]ecause corporate bylaws are 'contracts among a corporation's shareholders," shareholders are bound by a fee-

freedom to privately order the rules of internal corporate governance. While contractual freedom in corporate law is not unlimited, it includes the freedom to regulate shareholders' right to vote or make a proposal at a shareholder meeting.

1. Contractual Freedom in Corporate Law

Delaware corporate law reflects a policy strongly favoring the freedom of contract.[186] Like the corporate statutes of other states, the Delaware General Corporation Law (DGCL) provides largely default rules of internal corporate governance, thereby granting a corporation, its directors, and shareholders the ability to tailor those rules through the terms of the corporation's charter and bylaws.[187] As the Delaware Supreme Court recently explained:

> At its core, the DGCL is a broad enabling act that allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise provided the statutory parameters and judicially imposed principles of fiduciary duty are honored. In fact, Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves parties to the corporate contract (managers and stockholders) with great leeway to structure their relationships, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review.[188]

Evincing this general policy favoring contractual freedom, DGCL Section 102(b) permits a corporation's charter to contain "*[a]ny provision* for the management of the business and . . . affairs of the corporation . . . and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are *not contrary to the laws of this State*."[189] In similarly broad language, DGCL Section 109(b) permits a corporation's bylaws to include "*any provision*, *not inconsistent with law* . . . , relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[190]

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shifting bylaw) (internal quotations omitted); Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939–40 (Del. Ch. 2013) (ruling that because "bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders . . . stockholders who invest in [a] corporation[] assent to be bound by [that corporation's] bylaws when they buy stock").

186. *See* Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 531–33 (2021) (explaining how Delaware corporate law allows for a high degree of freedom of contracting).

187. *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 379–80 (2018) (describing the scope of potential governance bylaws Delaware corporations can elect to pass and abide by); Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 847–55 (2008).

188. Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199, 1217 (Del. 2021) (internal quotations omitted).

189. DEL. CODE ANN. tit. 8, § 102(b) (West 2022) (emphasis added); *see also Manti Holdings*, 261 A.3d at 1217 ("Th[e] public policy favoring private ordering is reflected in [DGCL] Section 102(b)(1), which allows a corporate charter to contain virtually any provision that is related to the corporation's governance and not 'contrary to the laws of this State.'").

190. DEL. CODE ANN. tit. 8, § 109(b) (West 2015) (emphasis added); *Manti Holdings*, 261 A.3d at 1217 (explaining that like the broad authority for freedom of contract under DGCL Section 102(b) for provisions in the corporate charter "DGCL Section 109(b) provides similarly broad authorization for bylaws").

Inarguably, a provision restricting shareholders' rights to vote or make a proposal at a shareholder meeting would relate to the "business" and "affairs" of the corporation" and regulate the "rights" or "powers" of its shareholders. Nonetheless, as the statutory language above indicates, there are limits to contractual freedom in Delaware corporate law. Specifically, a proposal provision would be facially invalid if it were "contrary to" or "inconsistent with" the laws of Delaware.[191] And even a facially valid proposal provision would be judicially unenforceable if it would be inequitable as applied to shareholders. The next sections consider these limitations in turn.

2. Legal Limits

DGCL Sections 102(b) and 109(b), respectively, are explicit that a provision in the corporate contract regulating shareholder proposals would be facially invalid if it were "contrary to" or "inconsistent with" the laws of Delaware.[192] As the Delaware Supreme Court has explained, these statutory limitations on contractual freedom bar any provision in the corporate contract that would "transgress a statutory enactment *or* a public policy settled by the common law or implicit in the [DGCL] itself."[193]

In deference to private ordering, however, Delaware courts "do[] not lightly find that [charter or bylaw] provisions are unlawful."[194] Instead, the state's courts "start with the presumption that [a charter or bylaw provision] is valid and, if possible, construe it in a manner consistent with the law."[195] As a result, a Delaware court would not invalidate an otherwise valid provision *ab initio* based simply on some potential abuse or "hypothetical injuries" to shareholders that could result from the use of that provision at some future point.[196] After all, "every valid [bylaw or charter provision] is always susceptible to potential misuse."[197] Thus a provision is facially invalid only if it "cannot operate lawfully or equitably *under any circumstances*."[198]

Applying these standards, a charter or bylaw provision restricting shareholder proposals would be presumptively valid. For one, nothing in the DGCL expressly prohibits such a provision. To the contrary, to the extent shareholder proposals are indirectly restricted through a provision regulating shareholders' voting rights, the DGCL expressly

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191. *See supra* notes 189–90 and accompanying text.

192. *See id*.

193. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 114–15 (Del. 2020) (emphasis added); *accord* Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199, 1217 (Del. 2021).

194. Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845–46 (Del. Ch. 2004) (Strine, V.C.).

195. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 238 (Del. 2008) ("Were this issue being presented in the course of litigation involving the application of the Bylaw to a specific set of facts, we would start with the presumption that the Bylaw is valid and, if possible, construe it in a manner consistent with the law."); *accord* Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985).

196. Stroud v. Grace, 606 A.2d 75, 95–96 (Del. 1992) (holding that there is "no basis to invalidate [a challenged bylaw] upon some hypothetical abuse" because "[t]he validity of corporate action under [the challenged bylaw] must await its actual use"); Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 240 (Del. Ch. 2007) ("Delaware law does not permit challenges to bylaws based on hypothetical abuses . . . .").

197. *Stroud*, 606 A.2d at 96.

198. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 113 (applying this principle to a corporate charter provision); *accord* Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 948 (Del. Ch. 2013) (applying this principle to a corporate-bylaw provision).

invites private ordering of the latter.[199] And to the extent the shareholders' right to make proposals is restricted directly, nothing in the DGCL expressly prohibits a charter or bylaws from doing so. Indeed, the DGCL is entirely silent as to if and when a shareholder is entitled to make a proposal at a shareholder meeting.[200] Thus, in the absence of an express statutory prohibition, a charter or bylaw provision regulating shareholder proposals rights is presumptively lawful.

Still, one might argue that such a provision would be facially invalid because it would "transgress . . . a public policy settled by the common law or implicit in the [DGCL] itself."[201] But such an argument faces several problems. For one, there is nothing in Delaware's statute or caselaw establishing as "settled" public policy the right of shareholders to make or vote on a proposal at a shareholder meeting.[202] As previously noted, the statutory text of the DGCL makes no reference to such a right. And to the extent that right is recognized by case law, judicial references to it are scant and fleeting.[203] More importantly, nothing in the case law suggests that shareholders' proposal rights are a "mandatory rule" of Delaware corporate law and, therefore, not subject to private ordering.

Indeed, as noted above, many public corporations already impose restrictions on shareholder proposals made outside of the Rule through advance notice bylaws.[204] Delaware courts have routinely upheld these bylaws[205] on the basis that they promote the

199. *See* DEL. CODE ANN. tit. 8, § 151(a) (West 2017) (authorizing a corporation's charter to specify the voting powers associated with the corporation's shares).

200. *See id.* § 211(b) (West 2009) (providing only that, in addition to election of directors, "[a]ny other proper business may be transacted at the annual meeting"); Colon v. Bumble, Inc., 305 A.3d 352, 359 (Del. Ch. 2023) (providing a list of a shareholder's default rights under the DGCL); Strategic Invest. Opportunities LLC v. Lee Enters., No. 2021-1089, 2022 WL 453607, at *8 (Del. Ch. Feb. 14, 2022) (noting that the DGCL is "silent" as to how a stockholder may make proposals at an annual meeting of stockholders).

201. *Salzberg*, 227 A.3d at 115–16; *accord* Manti Holdings, LLC v. Authentix Acquisition Co., Inc. 261 A.3d 1199, 1218 (Del. 2021).

202. Delaware law "recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue." Strougo v. Hollander, 111 A.3d 590, 595 n.21 (Del. Ch. 2015). "From these fundamental rights flow subsidiary rights, including the right to communicate with other stockholders, nominate directors, and communicate with (and even oppose) management and the Board." Williams Cos. S'holder Litig., No. 2020-0707, 2021 WL 754593, at *20 (Del. Ch. Feb. 26, 2021). Notably, the right to make a proposal is not on either list.

203. *See, e.g.*, Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 881 (S.D.N.Y. 1993) ("Under Delaware law, a shareholder in attendance at the annual meeting may offer a proposal for shareholder approval, as long as the proposal involves a proper subject on which shareholders may vote."); Goggin v. Vermillion, Inc., No. 6465, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (explaining that under Delaware law a shareholder may raise "proposals . . . at an annual meeting" without any advance notice "unless the corporation has duly imposed such a requirement"); JANA Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335, 344 (Del. Ch. 2008) (explaining that, in the absence of an advance notice bylaw, "the default rule in Delaware" is that "any of [company's] thousands of stockholders are free to raise for the first time and present any proposals they desire at the Annual Meeting").

204. *See supra* note 154 and accompanying text.

205. *See, e.g.*, BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, 224 A.3d 964, 981–82 (Del. 2020); Sternlicht v. Hernandez, No. 2023-0477, 2023 WL 3991642, *15–25 (Del. Ch. June 14, 2023); Strategic Investment Opportunities LLC v. Lee Enters., No. 2021-1089, 2022 WL 453607, *16–18 (Del. Ch. Feb. 14, 2022); Rosenbaum v. CytoDyn Inc., No. 2021-0728, 2021 WL 4775140, *13–22 (Del. Ch. Oct. 13, 2021) (enforcing a company's advance notice bylaws); *see also* Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 239 (Del. Ch. 2007) ("Advance notice bylaws are often construed and frequently upheld as valid by Delaware courts.'").

orderly conduct of shareholder meetings.[206] A similar shareholder-welfare justification could be made for regulating shareholder proposals made under the Rule. Politically divisive precatory proposals are both costly[207] and consistently unpopular among shareholders.[208] Restricting such proposals could spare the corporation and its shareholders these costs while foregoing little potential benefit.

To be sure, unlike the typical advance notice bylaw, a provision restricting proposals made under the Rule would have implications for a shareholder right created by federal law. However, a provision in the corporate contract is not invalid simply because it regulates shareholders' federal law rights. Because the federal right to have a proposal appear on the company's proxy statement is itself dependent on shareholders' state law rights,[209] a provision regulating the latter would still be comfortably within the internal affairs doctrine that has long been the province of state corporate law.[210] Moreover, to the extent the regulation of shareholders' state law rights would indirectly regulate the availability of the federal rights afforded to shareholders under the Rule, both Delaware courts[211] and federal courts[212] have recognized that a provision of the corporate contract may validly regulate shareholder rights arising under federal law.

The only two limitations that Delaware law imposes on the validity of a proposal provision are relatively minor. First, to the extent a provision sought to regulate shareholder proposals indirectly through the regulation of shareholders' voting rights, as already noted, the DGCL requires any such provision to appear in the corporation's *charter*.[213] Consequently, a *bylaw* provision attempting to restrict shareholders' voting rights would be facially invalid under the DGCL.[214] This limitation is inconsequential, however, because a corporation unable to enact a charter amendment could just as easily regulate shareholder proposals directly through a board-adopted amendment to its bylaws.[215] Even where a bylaw amendment is unilaterally adopted by the board, without a shareholder vote, Delaware

206. *See* Kellner v. AIM ImmunoTech Inc., No. 3, 2024 WL 3370273, at *10 (Del. July 11, 2024); *BlackRock*, 224 A.3d at 980.

207. *See supra* Part II.B.

208. *See supra* Fig. 3.

209. *See supra* Part III.A.

210. *See* 1997 Proposing Release, *supra* note 146, at 50683 ("The shareholder proposal process affects the internal governance of corporations, and it is state law—not federal securities law—which is primarily concerned with corporate governance matters.").

211. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 114 (Del. 2020) (ruling that a plaintiff-shareholder asserting rights under federal securities law is subject to a forum selection provision in the defendant-corporation's charter); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 556–57 (Del. 2014) (ruling that the losing plaintiff-shareholder in a suit making claims under federal anti-trust law is subject to a fee-shifting provision in the defendant-corporation's bylaws).

212. *See* Lee v. Fisher, 70 F.4th 1129, 1138–59 (9th Cir. 2023) (en banc) (ruling that plaintiff-shareholder lacks the right to make derivative claims under federal securities law where such claims are precluded by a forum selection provision in the defendant-corporation's bylaws).

213. *See* DEL. CODE ANN. tit. 8, §§ 151(a) (West 2017), 212(a) (West 2020).

214. *See* Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 848 (Del. Ch. 2004) ("The use of the words 'unless otherwise provided in the certificate of incorporation' [in any section of the DGCL] can be read as a 'bylaw excluder,' in the sense that those words make clear that the specific grant of authority in that particular statute is one that can be varied only by charter and therefore indisputably not one that can be altered by a . . . bylaw.").

215. *See supra* Part III.A.2.

law is clear that the bylaw amendment becomes a part of the corporate contract and is binding on shareholders.[216]

Second, Delaware law would likely prohibit a proposal provision restricting any shareholder proposals to amend a corporation's bylaws. Unlike shareholders' right to make proposals, shareholders' right to amend a corporation's bylaws is a statutorily vested right[217] judicially protected as sacrosanct.[218] A provision restricting shareholder proposals would restrict a critical mechanism by which public company shareholders exercise their core right to amend the bylaws.[219] Therefore, a provision in the corporate contract purporting to restrict shareholders' right to propose bylaw amendments would likely be facially invalid because it would "transgress" both "a statutory enactment" *and* "a public policy settled by the common law" of Delaware.[220] This limitation means that a proposal provision must be limited to regulating precatory proposals. Again, however, this limitation is inconsequential because the vast majority of shareholder proposals submitted under the Rule are precatory, rather than proposals to amend a corporation's bylaws.[221]

3. Equitable Limits

Where a provision in the corporate contract is otherwise lawful under DGCL Sections 102(b) and 109(b), the only limit that Delaware law places on the enforceability of that provision is based in equity.[222] That is because under Delaware law, "all corporate acts must be 'twice-tested'—once by the law and again in equity."[223]

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216. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014) (ruling that "[b]ecause corporate bylaws are 'contracts among a corporation's shareholders," shareholders are bound to a "validly-enacted [fee-shifting] bylaw" unilaterally adopted by the corporation's board of directors); Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del. Ch. 2013) (ruling that because "bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders . . . stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations").

217. *See* DEL. CODE ANN. tit. 8, § 109(a) (West 2015) (stating that "[a]fter a corporation other than a nonstock corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote . . . directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws").

218. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232 (Del. 2008) ("[B]y its terms [DGCL] Section 109(a) vests in the shareholders a power to adopt, amend or repeal bylaws that is legally sacrosanct, *i.e.*, the power cannot be non-consensually eliminated or limited by anyone other than the legislature itself.").

219. Notably, the Rule is not the only mechanism by which a shareholder could solicit support for a bylaw's amendment. Outside of the Rule, a shareholder could still solicit proxies at their own expense. *See supra* note 52 and accompanying text.

220. *See supra* note 193 and accompanying text.

221. *See* Matsusaka, Ozbas & Yi, *supra* note 77, at 115 (reporting that only 2.5% of proposals for which a company sought no-action relief were binding proposals); Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 340 (2010) ("Although shareholders submit hundreds of proposals to publicly traded firms each year, the overwhelming majority of these proposals are precatory in nature; only a small fraction of shareholder proposals are proposals for binding bylaw amendments.").

222. *See* Mohsen Manesh & Joseph A. Grundfest, *The Corporate Contract and Shareholder Arbitration*, 98 N.Y.U. L. REV. 1106, 1133–35 (2023) (describing the equitable limits to contractual freedom in Delaware corporate law).

223. Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007) (Strine, V.C.) (quoting Adolphe A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931)); *accord* Bäcker v. Palisades Growth

This "twice-tested" framework means that even if a proposal provision is facially valid in the abstract, the provision will be unenforceable in any situation where it would operate inequitably against shareholders.[224] Thus, every time a corporation's board sought to enforce the provision to preclude a shareholder proposal, the directors would need to do so consistent with their fiduciary duties.[225] And a shareholder seeking to challenge the board's decision to quash the proposal would be entitled to the same equitable review that Delaware courts apply in any shareholder suit challenging a board action.[226]

Importantly, however, unlike situations where a corporation seeks to enforce an advance notice bylaw to block director nominations, which triggers enhanced judicial scrutiny,[227] the decision to enforce a provision restricting precatory shareholder proposals does not raise the same kinds of "situational conflicts" that would justify second-guessing the board's business judgment.[228] Because advance notice bylaws burden shareholders' ability to replace an incumbent board, the enforcement of advance notice bylaws against a shareholder raises the "omni-present specter" that the directors are acting selfishly to preserve their board seats.[229] The "situational conflict" between the board's desire to preserve its incumbency and the fiduciary duties it owes to the corporation and its shareholders justifies the enhanced judicial scrutiny of advance notice bylaws.[230] By contrast, the enforcement of a provision restricting precatory shareholder proposals does not implicate the same issues of board entrenchment and corporate control.[231] To the contrary, to the extent a board was to preclude a potentially popular proposal on dubious grounds, doing so would only

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Cap. II, L.P., 246 A.3d 81, 97 (Del. 2021); *In re* Inv'rs Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1222–23 (Del. 2017).

224. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible."); Coster v. UIP Companies, Inc., 255 A.3d 952, 960 (Del. 2021) (reaffirming *Schnell*).

225. *See Bäcker*, 246 A.3d at 97 ("Stockholders can entrust directors with broad legal authority precisely because they know that that authority must be exercised consistently with equitable principles of fiduciary duty.") (quoting *Sample*, 914 A.2d at 664).

226. *See* CCSB Fin. Corp. v. Totta 302 A.3d 387, 400 (Del. 2023) (holding that Delaware courts' "authority to apply established standards of review to breach of fiduciary duty claims" is an unwaivable, mandatory rule in corporate law).

227. *See* Kellner v. AIM ImmunoTech Inc., No. 3, 2024 WL 3370273, at *12–13 (Del. July 11, 2024) (holding that enhanced judicial scrutiny applies to advance notice bylaws).

228. *See In re* Columbia Pipeline Grp., Merger Litig., 299 A.3d 393, 456 (Del. Ch. 2023) (Laster, V.C.) ("Delaware courts deploy enhanced scrutiny in specific, recurring situations . . . where the realities of the situation can subtly undermine the decisions of even independent and disinterested directors [but where the] subtle structural and situational conflicts that do not rise to a level sufficient to trigger entire fairness review.").

229. *See* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985) ("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."); *see also Kellner*, 2024 WL 3370273, at *12–14 (holding that advance notice bylaws are subject to enhanced judicial scrutiny).

230. *See Columbia Pipeline*, 299 A.3d at 458 (explaining that a "situational conflict" involving "incumbent directors' [attempting] to retain their positions as directors and their concomitant control over the company" triggers enhanced judicial scrutiny).

231. *See* Coster v. UIP Companies, Inc., 255 A.3d 952, 962 (holding that enhanced judicial scrutiny applies when a stockholder challenges board action that interferes with the election of directors or a stockholder vote in a contest for corporate control).

make the board more vulnerable to shareholder backlash and potential ouster in the next annual elections.

Moreover, the mere fact that directors may disagree with the substance of a shareholder's precatory proposal does not mean that directors are unable to exercise independent business judgment in determining whether that proposal is barred by the corporation's charter or bylaws.[232] That kind of generalized allegation of bias has been rightly rejected by Delaware courts precisely because it could be asserted in every shareholder suit challenging board decisions.[233] Instead, Delaware law recognizes that there must be particularized allegations of specific facts that would deprive directors of the judicial deference afforded by the business judgment rule.[234]

Still, one might argue that when a board acts to deny shareholders the right to make a proposal, the board is "intruding into a space where stockholders possess rights of their own."[235] More broadly, one might argue that by denying shareholders the right to vote on a given proposal, the board is interfering with the "free exercise of the stockholder vote as an essential element of corporate democracy."[236] In such situations, "[t]he fiduciary's exercise of corporate power . . . raises questions about the allocation of authority within the entity" and, therefore, might warrant enhanced judicial scrutiny.[237]

But even if a board's decision to enforce a provision restricting precatory shareholder proposals triggers enhanced scrutiny, Delaware law would still uphold the board's action, so long as it was reasonable.[238] Applying this standard, Delaware courts have routinely allowed boards to enforce advance notice bylaws,[239] provided the bylaws are

232. *See* Beam v. Stewart, 845 A.2d 1040, 1048 (Del. 2004) ("[D]irectors are entitled to a presumption that they were faithful to their fiduciary duties."); MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) ("The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

233. *See* Beam, *supra* note 232, at 1049 ("Independence is a fact-specific determination made in the context of a particular case.").

234. *See* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1060 (Del. 2021) ("To show a lack of independence, a derivative complaint must plead with particularity facts creating 'a reasonable doubt' . . . .").

235. *See In re* Columbia Pipeline Grp., Merger Litig., 299 A.3d 393, 456 (Del. Ch. 2023) (Laster, V.C.) ("Delaware courts deploy enhanced scrutiny in specific, recurring situations [where the directors' decision] involves the fiduciary intruding into a space where stockholders possess rights of their own."); *accord In re* AMC Ent. Holdings, Inc. S'holder Litig., No. 2023-0125, 2023 WL 5165606, at *26 (Del. Ch. Aug. 11, 2023) (Zurn, V.C.) ("Enhanced scrutiny . . . is not limited to electoral contests where the entire board might be replaced. Enhanced scrutiny also applies in other situations where the law provides stockholders with a right to vote and the directors take action that intrudes on the space allotted for stockholder decision-making.").

236. *See* Coster v. UIP Companies, Inc., 300 A.3d 656, 672 (Del. 2023) (explaining that such situations justify enhanced judicial scrutiny).

237. *See Columbia Pipeline*, 299 A.3d at 456.

238. *See Coster*, 300 A.3d at 671 ("Fundamentally, the standard to be applied is one of reasonableness.") (quoting Strategic Inv. Opportunities LLC v. Lee Enters., Inc., No. 2021-1089, 2022 WL 453607, at *16 (Del. Ch. Feb. 14, 2022)).

239. *See supra* notes 205–06 and accompanying text.

unambiguous,[240] were adopted on a "clear day,"[241] and there has not been a "radical shift" in the company's position since the deadline specified in the bylaw.[242]

A bylaw restricting shareholder proposals should bear a similar result. Enhanced scrutiny's two-pronged analysis requires that (i) a board's decision to enforce a proposal provision against a given shareholder proposal advances a "legitimate" or "proper" corporate purpose and (ii) that enforcement of the provision is "reasonable."[243] The enforcement of a proposal provision advances a legitimate corporate purpose by avoiding the unwanted costs that a corporation and its shareholders incur in dealing with precatory proposals that may be largely unrelated to the corporation's business or unlikely to garner meaningful shareholder support. Given this legitimate corporate purpose, a board may enforce a proposal provision to quash a shareholder proposal, so long as the board's decision to enforce the bylaw was "reasonable,"[244] "proportionate,"[245] or "within the range of reasonableness."[246]

The reasonableness of enforcing a proposal provision against a particular shareholder proposal depends both on the nature of the proposal provision and the specific proposal to which it is applied. The more unambiguously the provision prohibits a specific proposal, the more likely a Delaware court is to defer to the reasonableness of the board's decision. If, however, the provision is ambiguous or vague, requiring the board to exercise more discretion in its application, a Delaware court may be more willing to second-guess it in the enhanced scrutiny context.

Likewise, the breadth or severity of a proposal provision may also factor into the reasonableness of both the board's initial decision to adopt the provision and then to enforce it. For example, a proposal provision that attempted to bar all shareholder proposals—whether expressly or constructively, by making it excessively burdensome to make a qualifying proposal—may be deemed unenforceable because it represents an unreasonable response to the corporate purpose that it purports to advance.[247]

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240. *See* Kellner v. AIM ImmunoTech Inc., No. 3, 2024 WL 3370273, at *15 (Del. July 11, 2024) ("An unintelligible bylaw is invalid under 'any circumstances.'"); BlackRock Credit v. Saba Capital, 224 A.3d 964, 977 (Del. 2020) ("If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholder's electoral rights."); Strategic Inv. Opportunities LLC v. Lee Enters., Inc., No. 2021-1089, 2022 WL 453607, at *9 (Del. Ch. Feb. 14, 2022) ("Delaware courts generally enforce clear and unambiguous advance notice bylaws to avoid 'uncertainty in the electoral setting.'").

241. *See* AB Value Partners, LP v. Kreisler Mfg. Corp., No. 10434, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) ("The clearest set of cases providing support for enjoining an advance notice bylaw involves a scenario where a board, aware of an imminent proxy contest, imposes or applies an advance notice bylaw so as to make compliance impossible or extremely difficult, thereby thwarting the challenger entirely.").

242. *See* Sternlicht v. Hernandez, No. 2023-0477, 2023 WL 3991642, at *15 (Del. Ch. June 14, 2023) ("[T]he board ha[s] a duty to waive an advance notice bylaw provision . . . where a 'radical shift in position, or a material change in circumstances' had occurred after the deadline for nominations had passed.").

243. *See* Coster v. UIP Companies, Inc., 300 A.3d 656, 671 (Del. 2023) (discussing cases that have applied enhanced judicial scrutiny); *Strategic Inv. Opportunities*, 2022 WL 453607, at *16 (applying enhanced judicial scrutiny to an advance notice bylaw).

244. *See Coster*, 300 A.3d at 671.

245. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1378–79 (Del. 1995).

246. *See id.* at 1388.

247. *See Strategic Inv. Opportunities*, 2022 WL 453607, at *16 (explaining that an advance notice bylaw that is "unreasonable" or makes "compliance . . . impossible" is "unenforceable"); AB Value Partners, LP v. Kreisler Mfg. Corp., No. 10434, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) (explaining that an advance notice bylaw that "make[s] compliance impossible or extremely difficult" is unenforceable).

By contrast, a proposal provision tightening shareholder eligibility or reviving prior SEC interpretations of the Rule would almost certainly be deemed reasonable. After all, heightening the ownership threshold to submit a shareholder proposal to mirror the threshold that has been broadly embraced for a comparable proxy access right could only be deemed unreasonable if the SEC and market participants were also unreasonable in setting that threshold.[248] Likewise, precluding proposals on grounds that mirror the SEC's prior formulations or interpretations of the Rule could only be deemed unreasonable if the agency was itself unreasonable in its prior formulations or interpretations.[249]

In all cases, a plaintiff-shareholder could not persuasively argue that a board's decision to enforce a proposal provision fails to withstand enhanced judicial scrutiny because it was "preclusive or coercive to the stockholder franchise."[250] While enforcement of a proposal provision might deprive the proposing shareholder of the right to make their proposal, and might even be said to deprive all shareholders of the right to vote on that proposal, deploying a proposal provision leaves untouched the shareholders' collective right to replace the board with new directors at the next annual election.

Thus, even under enhanced judicial scrutiny, a proposal provision would be enforceable, provided that it is reasonable. Beyond this equitable limit, however, legal realism suggests another limit. Even if a proposal provision is otherwise enforceable under Delaware law, the state's courts might be understandably reluctant to enforce the provision lest it violates federal securities law.[251] The next part delves into that question.

B. Enforceability under Federal Securities Law

Under the Supremacy Clause of the U.S. Constitution, state law cannot permit something that federal law precludes.[252] And the Exchange Act's anti-waiver clause expressly precludes any contract provision that contravenes the Rule.[253]

But nothing in the Rule prohibits a provision in the corporate contract limiting shareholders' rights to make or vote on a proposal.[254] Instead, as the SEC has always recognized, the Rule merely enables public company shareholders to exercise their state-law rights,

248. *See supra* Part III.B.1.

249. *See supra* Part III.B.2.

250. *See* Coster v. UIP Companies, Inc., 300 A.3d 656, 673 (Del. 2023); *see also* Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 601–03 (Del. 2010) ("[A board's action] is disproportionate and unreasonable *per se* if it is . . . either coercive or preclusive. A coercive [action] is one that is 'aimed at 'cramming down' on its shareholders a management-sponsored alternative.' . . . [A preclusive action] must render a successful proxy contest realistically unattainable given the specific factual context.").

251. *See, e.g.*, Rivest v. Hauppauge Digit., Inc., C.A. No. 2019-0848, 2022 WL 3973101, at *26 (Del. Ch. Sept. 1, 2022) ("Delaware law should strive to maintain its historically symbiotic relationship with the federal securities laws . . . . To that end, this court has taken the federal securities law into account when making determinations under Delaware law."); *In re* F. Mobile, Inc., C.A. No. 2020-0346, 2021 WL 1040978, at *5 (Del. Ch. Mar. 18, 2021) ("The Delaware authorities . . . reflect a consistent Delaware public policy against allowing capital-markets entrepreneurs to deploy Delaware law to bypass the federal securities laws . . . based on this court's understanding of the federal securities laws and the SEC's priorities."); Pfeiffer v. Toll, 989 A.2d 683, 707 (Del. Ch. 2010) ("Delaware is of course mindful of the fact that our national and state governments share jurisdiction over corporations.").

252. *See* U.S. CONST. art. VI, cl. 2.

253. *See* 15 U.S.C. § 78cc(a) (2018) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder . . . shall be void.").

254. *See generally id.*

whatever the scope of those rights might be.[255] Thus, if state law permits a provision in the corporate contract restricting shareholder proposals, then the Rule defers to state law. Overlooking this basic facet of the Rule, the sole precedent to suggest otherwise is the nonbinding *dicta* of a 75-year-old circuit court decision that is out-of-step with subsequent Supreme Court precedents interpreting federal securities law.

1. Facilitating Shareholders' State-Law Rights

A core, but sometimes overlooked, facet of the Rule is its dependence on state corporate law to define its scope and content. The Rule does not purport to preempt state law by creating new substantive rights for shareholders to vote or make proposals.[256] Recognizing instead that these rights are created by state law,[257] the Rule merely imposes a process enabling shareholders to exercise their state-law rights.[258]

From the Rule's inception to the present day, the SEC has consistently interpreted the Rule in this manner. In adopting the Rule, the SEC was concerned that in a world where shareholder voting occurred by proxy, rather than in person, shareholders would be unable to effectively exercise their traditional state-law right to make a proposal or vote on a proposal made by another shareholder.[259] As the SEC's chairman explained in 1943, "the rights that we are endeavoring to assure to the stockholders are those *rights that he has traditionally had under State law* to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on."[260] Those state law rights, the chairman explained, "would be rendered largely meaningless" in a world where "dispers[ed]" shareholders were not made aware and afforded the opportunity to vote on proposals made by their fellow shareholders."[261]

Today's SEC continues to embrace this characterization of the Rule.[262] For example, in a 2020 rulemaking, the agency affirmed that "[w]hile Rule 14a-8 provides a federal

255. *See id.*

256. *See generally id.*

257. *See supra* notes 137, 152–53 and accompanying text.

258. *See* ALAN PALMITER, FRANK PARTNOY & ELIZABETH POLLMAN, BUSINESS ORGANIZATIONS: A CONTEMPORARY APPROACH 483 (3d ed. 2019) ("The shareholder proposals rule is a mechanism to facilitate state-created shareholder voting rights."); Milton V. Freeman, *An Estimate of the Practical Consequences of the Stockholder's Proposal Rule*, 34 U. DET. L.J. 549, 549–50 (1957) ("[The Rule] in its fundamental aspects is not an invention of the SEC. It is an almost necessary consequence of the status of the individual shareholder under the laws of the various states of incorporation . . . . [The Rule] is merely a recognition of rights granted by state law.").

259. *See* 2010 Adopting Release, *supra* note 43, at 56670 ("One of the key tenets of the Federal proxy rules on which the Commission has consistently focused is whether the proxy process functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders."); 2007 Proposing Release, *supra* note 43, at 43467 ("Our [proxy] regulations have been designed to facilitate the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual, in-person gathering of security holders . . ."); *see also* Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1142–44 (recounting the origin of the Rule).

260. Chairman Purcell Testimony, *supra* note 51, at 172 (emphasis added).

261. *Id.*

262. *See, e.g.*, 2019 Proposing Release, *supra* note 43, at 66459 ("The rule . . . facilitates shareholders' traditional ability under state law to present their own proposals for consideration at a company's annual or special meeting, and it facilitates the ability of all shareholders to consider and vote on such proposals."); *accord* 2022 Proposing Release, *supra* note 60, at 45053 ("The [R]ule is intended to facilitate shareholders' right under state

process for proxy voting and solicitation for a shareholder proposal, matters of corporate organization such as voting rights and whether a proposal is a proper subject for action remain *governed by state law*."[263] Similarly, in 2007, the SEC explained that "[t]he federal proxy authority is *not* intended to supplant state law, but rather to *reinforce state law rights* with a sturdy federal disclosure and proxy solicitation regime."[264]

Beyond broadly recognizing that a shareholder's voting and proposals rights are defined by state law, the SEC has specifically acknowledged that (i) those rights may be varied pursuant to state law[265] and (ii) the Rule permits such private ordering.[266] For example, the agency explained in a 2007 release:

> With respect to subjects and procedures for shareholder votes that are specified by the corporation's governing documents, most state corporation laws provide that a corporation's charter or bylaws can specify the types of binding or non-binding proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. [The] Rule . . . supports these determinations by providing that a proposal that is violative of the corporation's governing documents may be excluded from the corporation's proxy materials.[267]

Applying this deference to private ordering under state law, the SEC has consistently granted no-action letters in favor of public companies with dual-class voting, confirming that the holders of nonvoting shares are ineligible to submit a proposal under the Rule.[268]

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law to present their own proposals at a company's meeting of shareholders and the ability of all shareholders to consider and vote on such proposals.").

263. *See* 2020 Adopting Release, *supra* note 53, at 70262–63 (emphasis added).

264. *See* 2007 Proposing Release, *supra* note 43, at 43467 (emphasis added).

265. *See, e.g.*, 2019 Proposing Release, *supra* note 43, at 66474 ("Under state law, a shareholder generally has the right to appear in person at an annual or special meeting and put forth a resolution to be voted on by the shareholders . . . *[c]ompany bylaws can limit* shareholders' ability to attend or present at shareholder meetings.") (emphasis added); 2007 Proposing Release, *supra* note 43, at 43467 ("One of the key rights that shareholders have under state law is the right to appear in person at an annual or special meeting and, *subject to compliance with* applicable state law requirements and *the requirements contained in the company's charter and bylaws*, such as an advance notice bylaw, present their own proposals for a vote by shareholders at that meeting.") (emphasis added).

266. *See, e.g.*, 2019 Proposing Release, *supra* note 43, at 66494 ("[R]ule 14a-8 was designed to facilitate shareholders' ability under state law to appear in person at an annual or special meeting and, *subject to certain requirements governed by state law and the company's governing documents*, present their own proposals for a vote by shareholders at that meeting.") (emphasis added); 2007 Proposing Release, *supra* note 43, at 43467–68 ("Because the proxy process is meant to serve, as nearly as possible, as a replacement for an actual, in-person meeting of shareholders, it should facilitate proposals concerning only those subjects that could properly be brought before a meeting *under the corporation's charter or bylaws and under state law*.") (emphasis added).

267. 2007 Proposing Release, *supra* note 43, at 43468.

268. *See, e.g.*, Scripps Networks Interactive, Inc., SEC Staff No-Action Letter, 2016 WL 390053 (Jan. 14, 2016) (allowing exclusion of a shareholder proposal where the corporation had multiple classes of stock and the proponent owned only Class A common shares which were not entitled to vote on the proposal); for examples of similar exclusions see N.Y. Times Co., SEC Staff No-Action Letter, 2013 WL 1717721 (Jan. 14, 2013); N.Y. Times Co., SEC Staff No-Action Letter, 2008 WL 192481 (Jan. 15, 2008); N.Y. Times Co., SEC Staff No-Action Letter, 2006 WL 3770789 (Dec. 18, 2006); E.W. Scripps Co., SEC Staff No-Action Letter, 2006 WL 3734546 (Dec. 4, 2006); The Washington Post Co., SEC Staff No-Action Letter, 2004 WL 2997716 (Dec. 24, 2004); N.Y. Times Co., SEC Staff No-Action Letter, 2003 WL 40631 (Jan. 3, 2003).

More recently, the SEC has expanded this principle to non-corporate business entities,[269] including Delaware statutory trusts[270] and Maryland REITs.[271] In each case, the SEC has concluded that where, pursuant to governing state law, an entity's governing documents restrict an investors' right to vote on a proposal, the investor is ineligible to make use of the Rule because the investor does not hold "*securities entitled to vote"* thereon.[272] Decrying the no-action letters granted to the business trusts, one shareholder advocate has warned that there is "no reason" an analogous principle would not apply to corporations.[273] But in fact, the SEC already has. By repeatedly granting no-action relief to corporations with non-voting shares, the SEC has confirmed that nothing in the Rule precludes private ordering of shareholders' voting and proposal rights in accordance with state law.

Indeed, it would be highly problematic for the SEC to interpret the Rule any differently.[274] As the Supreme Court has explained, the Exchange Act "implement[s] a 'philosophy of full disclosure.'"[275] The statute does not authorize the SEC to reallocate intra-corporate powers among directors and shareholders.[276] Instead, "the relationships among or between [a] corporation and its current officers, directors, and shareholders" are governed by state law, and in particular the law of the state that has chartered the

269. *See, e.g.*, First Tr. Senior Floating Rate Income Fund II, SEC Staff No-Action Letter, 2020 WL 3399580 (June 19, 2020) (granting no-action relief to a Massachusetts business trust).

270. *See, e.g.*, Templeton Emerging Mkts. Income Fund, SEC Staff No-Action Letter, 2021 WL 634005 (Feb. 5, 2021); Dividend & Income Fund, SEC Staff No-Action Letter, 2020 WL 1864569 (Apr. 10, 2020).

271. *See, e.g.*, Senior Hous. Props. Tr., SEC Staff No-Action Letter, 2019 WL 530450 (Mar. 13, 2019); Gov't Props. Income Tr., SEC Staff No-Action Letter, 2017 WL 6336208 (Feb. 20, 2018); RAIT Fin. Tr., SEC Staff No-Action Letter, 2017 WL 373305 (Mar. 10, 2017).

272. *See* Phillip Goldstein, *Can a Public Company Effectively Opt Out of Rule 14a-8?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2020), https://corpgov.law.harvard.edu/2020/03/30/can-a-public-company-effectively-opt-out-of-rule-14a-8/ [https://perma.cc/5DSW-6G9].

273. *Id.*

274. *See* 2007 Proposing Release, *supra* note 43, at 43467 ("[T]the federal proxy authority is not intended to supplant state law . . . [t]o that end, the Commission has sought to use its authority [under Section 14(a)] in a manner that does not conflict with the primary role of the states in establishing corporate governance rights."); LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, FUNDAMENTALS OF SECURITIES REGULATION 852 (7th ed. 2018) (explaining that SEC "has little choice" but to defer to state law in defining what is a proper subject for shareholder action because "[i]f Congress had intended to give the Commission power to reallocate [intra-corporate powers] . . . so radical a federal intervention would presumably have been more clearly expressed" in the Exchange Act); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme.").

275. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977).

276. *See id*. at 479 (explaining that the Exchange Act does "not seek to regulate . . . internal corporate mismanagement"); *see also* Burks v. Lasker, 441 U.S. 471, 479 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced [by federal securities law]."); Bus. Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990) (ruling that when the SEC "[s]teps beyond control of voting procedure and into the distribution of voting power, the Commission . . . assume[s] an authority that the Exchange Act's proponents [in Congress] disclaimed any intent to grant").

corporation.[277] In fact, "[n]o principle of corporation law and practice is more firmly established."[278]

The Court's deference to corporate federalism means that "except where federal law *expressly* requires, state law will govern the internal affairs of the corporation."[279] After all, "[s]tates . . . create corporations, . . . prescribe their powers, and . . . define the rights that are acquired by purchasing their shares."[280] Given "[t]he longstanding prevalence of state regulation in this area . . . , if Congress had intended to pre-empt state laws [with federal securities statutes], it would have said so *explicitly*."[281]

Whenever Congress has intended federal securities law to preempt state law, Congress has been explicit.[282] That is particularly true where federal preemption would intrude on the state regulation of internal corporate governance to grant shareholders new substantive powers. Consider the Dodd-Frank Wall Street Reform Act of 2010, which created three new federal voting rights for public company shareholders concerning executive pay.[283] In each case, the statute expressly required a corporation's proxy to include "a separate resolution *subject to shareholder vote* to approve the compensation of executives."[284]

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277. *See* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (explaining the general principle of the internal affairs doctrine); *accord* First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) ("[T]he law of the state of incorporation normally determines issues relating to the internal affairs of a corporation."); *see also* Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 260–65 (2020) (summarizing the internal affairs doctrine).

278. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

279. Cort v. Ash, 422 U.S. 66, 84 (1975) (emphasis added); *accord* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (explaining that federalism requires "[c]ongress to enact *exceedingly clear* language if it wishes to significantly alter the balance between federal and state power" in an area traditionally governed by state law) (emphasis added).

280. *CTS Corp.*, 481 U.S. at 91; *see also id*. at 89 ("[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law."); *Burks*, 441 U.S. at 478 (ruling that "the first place one must look to determine the powers" of directors and shareholders "is in the relevant State's corporation law"); *Cort*, 422 U.S. at 84 ("Corporations are creatures of state law . . . ."); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949) ("Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law . . . .").

281. *CTS Corp.*, 481 U.S. at 86; *see also* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) ("[A]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations . . . particularly where established state policies of corporate regulation would be overridden."); *Cort*, 422 U.S. at 84–85 ("We are necessarily reluctant [to interpret federal law in manner that] would intrude into an area traditionally committed to state [corporate] law.").

282. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998 § 16(b) (1998) (codified as amended at 15 U.S.C. § 77p(b)) ("No covered class action based upon the statutory or common law of any State . . . may be maintained in a State or Federal court . . . ."); National Securities Market Improvement Act of 1996 § 18(a) (1996) (codified as amended at 15 U.S.C. § 77r(a)) ("[N]o law, rule, regulation, or order, or other administrative action of any State . . . requiring . . . registration or qualification of securities . . . shall directly or indirectly apply to . . . a covered security . . . .").

283. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 951 (2010) (codified as amended at 15 U.S.C. § 78n-1).

284. *See* 15 U.S.C.A. § 78n-1(a)(1) (West 2018); *accord id*. §§ 78n-1(a)(2) (West 2018), (b)(2) (West 2018). And even then, Congress was explicit that the scope of the preemption intended by these new voting rights was minimal. *See id*. § 78n-1(c) (providing that the shareholder votes required by federal law are nonbinding and do not alter or add to the fiduciary duties owed by the board of directors under state law).

By contrast, nothing in Section 14(a) expressly references a shareholder's right to vote or make proposals at a shareholder meeting.[285] Instead, the text of Section 14(a) merely prohibits the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[286] While the Court once interpreted this statutory language expansively to evince "broad remedial purposes,"[287] that interpretation has since been rejected.[288] More recently, the Court has recognized that references to "the public interest" and "the protection of investors" do not justify reading the Exchange Act "more broadly than its language and the statutory scheme reasonably permit."[289]

Like the rest of the Exchange Act, Section 14(a) is primarily aimed at disclosure.[290] As the Court has explained, "[t]he purpose of Section 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation."[291] In enacting the provision, Congress was concerned "[t]oo often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought."[292] Indeed, when the SEC originally promulgated the Rule, the agency justified it on the basis of disclosure.[293]

Pointing to this same history, some skeptics have gone further, questioning whether the SEC has the authority to impose the Rule.[294] Others have contested this claim.[295] But

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285. *See* 15 U.S.C. § 78n(a) (West 2018); *see also* Fisch, *supra* note 259, at 1139 ("Section 14(a) does not impose any substantive requirements . . . ; it simply makes the solicitation of proxies without complying with the SEC rules unlawful.").

286. 15 U.S.C.A. § 78n(a) (West 2018).

287. *See* J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

288. *See* Mohsen Manesh & Joseph A. Grundfest, *Abandoned and Split, But Never Reversed: Borak and Federal Derivative Litigation*, 78 BUS. LAW. 1047, 1081–84 (2023) (explaining that the Court has repudiated *Borak*).

289. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (quoting SEC v. Sloan, 436 U.S. 103, 116 (1978)).

290. *See* Bus. Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990) ("[A]lthough § 14(a) broadly bars [any proxy solicitation] in contravention of Commission rules and regulations, it is not seriously disputed that Congress's central concern was with disclosure.").

291. *See Borak*, 377 U.S. at 431.

292. *Id.*

293. *See* Chairman Purcell Testimony, *supra* note 51, 169–70 (describing the SEC's rationale in adopting the shareholder proposal rule, namely that it would be "obviously misleading" for a company to solicit proxies without disclosing any proposal that the corporation was made aware would be brought before the shareholder meeting); J. Robert Brown, Jr., *The SEC, Corporate Governance and Shareholder Access to the Board Room*, 2008 UTAH L. REV. 1339, 1344–46 (discussing the early history of the rule). Courts have also rationalized the Rule on the basis of disclosure. *See, e.g.*, N.Y.C. Emp.'s Ret. Sys. v. Am. Brands, Inc., 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) ("Since a shareholder may present a proposal at the annual meeting regardless of whether the proposal is included in a proxy solicitation, the corporate circulation of proxy materials which fail to make reference to a shareholder's intention to present a proper proposal at the annual meeting renders the solicitation inherently misleading.").

294. *See, e.g.*, Liebeler, *supra* note 96, at 457–58; *Protecting Investor Interests: Examining Environmental and Social Policy in Financial Regulation*: *Hearing Before the H. Comm. on Fin. Servs.*, 118th Cong. 5 (2023) (statement of James R. Copland, Dir., Ctr. for Legal Policy, Manhattan Inst.) ("The entire legal foundation of the SEC's shareholder-proposal rule is suspect.").

295. *See, e.g.*, Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 421–22 (D.C. Cir. 1992) (Ginsburg, J.) (explaining that Rule 14a-8 fits within the SEC authority under Exchange Act Section 14(a) because the

one need not doubt the SEC's authority to promulgate the Rule to accept the far more modest conclusion that nothing about the Rule precludes private ordering under state law to regulate shareholders' proposals rights.

2. Transamerica *does not preclude Private Ordering*

Focusing instead on whether the SEC has the requisite authority to promulgate the Rule, both skeptics and proponents alike have largely failed to ask whether shareholder proposals made under the Rule are subject to private ordering under state law.[296] Instead, relying exclusively on a 75-year-old lower court precedent, *SEC v. Transamerica Corp.*,[297] both sides have assumed that the Rule precludes a charter or bylaw provision restricting shareholder proposals, even if that provision is valid and enforceable under state law.[298] For example, the leading securities law treatise explains that under *Transamerica, "*[i]t is clear that, at the very least, the [Rule] cannot be evaded by means of procedural obstacles that are claimed to be lawful in the state of incorporation."[299] This broad assertion, however, misreads *Transamerica*.

In *Transamerica*, the Third Circuit faced a bylaw that effectively granted the board of a Delaware corporation veto power over any shareholder proposal.[300] Exercising this power, the board purported to veto three proposals submitted by an activist shareholder,

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Rule protects shareholders' "informational" right "to sound out management views and to communicate with other shareholders on matters of major import"); 2007 Proposing Release, *supra* note 43, at 43465–67 ("[T]he Commission's authority under Section 14(a) encompasses both disclosure and proxy mechanics, [which includes] the procedure for soliciting proxies"); LOSS, SELIGMAN & PAREDES, *supra* note 274, at 829–30 (citing the Rule to illustrate to "[t]he Commission's power under Section 14(a) is not limited to ensuring full disclosure"); Dent, *supra* note 96, at 26–28 (concluding that the claim that the SEC lacks statutory authority "is weak"); Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 123–146 (1988) (concluding that the claim that the SEC lacks statutory authority "is fatally flawed"); *see also* Fisch, *supra* note 259, at 1131 ("The statutory language and legislative history are ambiguous as to whether the SEC is authorized to enact rules with a substantive effect on corporate governance or simply to implement disclosure requirements.").

296. *See, e.g.*, Fisch, *supra* note 259, at 1193 ("Because the proxy rules do not contain an opting-out mechanism, a corporation cannot determine how to conduct its proxy solicitation process through charter provisions."); *but see* Liebeler, *supra* note 96, at 459–65 (proposing private ordering of shareholder proposal rights).

297. SEC v. Transamerica Corp., 163 F.2d 511 (3d Cir. 1947).

298. *See, e.g.*, Bebchuk & Hirst, *supra* note 221, at 355 ("[T]he longstanding approach of the shareholder proposal rule has been to provide shareholders with minimum rights of access to the company's proxy card for their proposals, and to allow companies to provide shareholders with additional rights, but not to derogate from the set minimum.") (citing *Transamerica*); Palmiter, *supra* note 61, at 894–95 ("State corporate law uniformly permits shareholders to offer resolutions at shareholders' meetings . . . Like voting, these are mandatory rights, not subject to opt-out or amendment.") (citing *Transamerica*).

299. *See* LOSS, SELIGMAN & PAREDES, *supra* note 274, at 853.

300. *See Transamerica*, 163 F.2d at 518 ("[S]o long as the notice provision of By-Law 47 remains in effect[,] unless management sees fit to include notice of a by-law amendment proposed by a stockholder in the notice of meeting[,] the proposed amendment can never come before the stockholders' meeting with complete correctness."); *see also* Liebeler, *supra* note 96, at 460–61 ("Management's use of bylaw 47 . . . would have prevented any proposal . . . from reaching the meeting floor unless management agreed to [it]."); Manne, *supra* note 96, at 485–86 ("Since the [Transamerica] directors could choose to give notice only of proposals they approved, [the notice] provision in effect gave the directors a veto over any shareholder attempt to amend the by-laws.").

including two proposals to amend the corporation's bylaws.[301] The board argued that because it had vetoed these proposals pursuant to the corporation's bylaws, the proposals were not "a proper subject" for shareholder action and, therefore, properly excluded from the company's proxy statement.[302] Characterizing this argument as "overnice" and "untenable", the Third Circuit held that the veto power granted to the board by the corporation's bylaws, at least when applied "in all its strictness", was invalid as a matter of Delaware law.[303]

This narrow holding is almost certainly correct. As previously noted, in Delaware, the right of shareholders to amend a corporation's bylaws is statutorily vested and judicially protected as "sacrosanct." [304] Therefore, a provision in the corporate contract attempting to effectively divest shareholders of that right would be invalid under Delaware law.

But then, perhaps because the Third Circuit realized that it was not the final arbiter of Delaware law,[305] the court indulged in *dicta* to address the Exchange Act.[306] "[A]ssuming *arguendo*" the bylaw *was* enforceable under the state law, the court stridently asserted that the bylaw would:

> [C]ircumvent the intent of Congress in enacting the [Exchange Act]. It was the intent of Congress to require fair opportunity for the operation of corporate suffrage . . . . We entertain no doubt that [the Rule] represents a proper exercise of the authority conferred by Congress on the Commission under Section 14(a). This seems to us to end the matter. The power conferred upon the Commission by Congress cannot be frustrated by a corporate by-law.[307]

The meaning of this laconic passage is "not altogether clear."[308] What is clear, however, is that by any definition it is nonbinding *dicta*.[309] Having already ruled that the relevant bylaw was invalid as a matter of Delaware law, the Third Circuit's "broad language [addressing the Exchange Act] was unnecessary to the Court's decision, and cannot be considered binding authority."[310] Stated differently, even if the opposite were true—even

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301. SEC v. Transamerica Corp., 67 F. Supp. 326, 327–28, 330–32 (D. Del. 1946) (describing the facts of the case).

302. *See Transamerica*, 163 F.2d at 515–16 (explaining that the Commission asserts a "proper subject" for a stockholder is one in which the stockholder may be interested under Delaware law).

303. *See id.* at 518; *see also* LOSS, SELIGMAN & PAREDES, *supra* note 274, at 853 ("[T]he holding of the court seems to have been that the notice bylaw could not be applied 'in all its strictness' *purely as a matter of Delaware law*." (emphasis added)).

304. *See supra* note 218–19 and accompanying text.

305. LOSS, SELIGMAN & PAREDES, *supra* note 274, at 853 (explaining that "perhaps because the [*Transamerica*] court realized that did not have the last word in interpreting the state law, it added a paragraph [addressing the Exchange Act]").

306. Liebeler, *supra* note 96, at 460 (describing *Transamerica*'s discussion of the Exchange Act as "rather broad dictum").

307. *Transamerica*, 163 F.2d at 518.

308. LOSS, SELIGMAN & PAREDES, *supra* note 274, at 853.

309. *See* Liebeler, *supra* note 96, at 461 (explaining the statement that the bylaw provisions could not be used to prevent the shareholder proposal rule was dictum).

310. *See* Kastigar v. United States, 406 U.S. 441, 454–55 (1972) ("The broad language in [a previous opinion] was unnecessary to the Court's decision and cannot be considered binding authority."); *see also* Seminole Tribe of Fl. v. Florida., 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

if the bylaw was valid under the Exchange Act—the Third Circuit would have arrived at the same judgment, namely that the bylaw was unenforceable because it was invalid under state law.[311]

Of course, one reason *dicta* are derided as not binding is that when a particular issue is not fully briefed and argued before a court, any judicial pronouncement on the issue can reflect unconsidered judgment.[312] Thus, courts "are not bound to follow *dicta* in a prior case in which the point now at issue was not fully debated."[313] *Transamerica*'s pronouncements concerning the Exchange Act squarely fit this description. As the Third Circuit conceded, "[m]uch of the briefs of the parties and most of the argument have been devoted to a discussion of what is 'a proper subject' for action by the stockholders" under Delaware law.[314] That much is unsurprising. The judgment of the district court below, which both parties had appealed,[315] was expressly decided "not by federal but by Delaware law."[316] Thus, on appeal before the Third Circuit, the SEC and the defendant corporation gave little or no consideration as to the validity of the relevant bylaw under the Exchange Act.[317]

But even if the Third Circuit's statements regarding the Exchange Act are not mere *dicta*, but instead an "alternative holding,"[318] nothing in the decision strictly precludes private ordering to restrict shareholder proposals.[319] As a leading securities law scholar has noted, the Third Circuit "did not expressly find that Congress had authorized the SEC to override a charter provision or bylaw that had been adopted in compliance with state law."[320] Indeed, in the 75 years since *Transamerica* was decided, no court has cited the case for this proposition. And for good reason. Over the last half-century, the Supreme

311. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006) ("A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner. If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous . . . and is dictum.").

312. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) ("[A] concrete factual context [is] conducive to a realistic appreciation of the consequences of judicial action."); Cohens v. Virginia, 19 U.S. 264, 399 (1821) ("The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."); Leval, *supra* note 311, at 1262 ("When the assertion of a proposition of law determines a case's outcome, the court necessarily sees how that proposition functions in at least one factual context, at least with respect to the immediate result. In contrast, when a court asserts a rule of law in dictum, the court will often not have before it any facts affected by that rule.").

313. Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).

314. *See* SEC v. Transamerica, 163 F.2d 511, 515 (3d Cir. 1947).

315. *See id*.

316. SEC v. Transamerica Corp., 67 F. Supp. 326, 329 (D. Del. 1946).

317. *See Transamerica*, 163 F.2d at 515 (summarizing the parties' arguments on appeal).

318. LOSS, SELIGMAN & PAREDES, *supra* note 274, at 853 (describing the relevant *Transamerica* passage as either "an alternative holding or *obiter*"); *see also* Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.").

319. *See* Liebeler, *supra* note 96, at 461 ("*Transamerica* does not preclude corporations from adopting bylaws, which are valid under state law, to shareholders from bringing matters before a stockholders meeting.").

320. Fisch, *supra* note 259, at 1146. And to the extent that that finding is implicit in the court's statements concerning the Exchange Act, the court did not "explain how this finding . . . could be squared with the view that federal law deferred to the states to determine what issues were proper subjects for a shareholder vote." *Id*. at 1146 n.73.

Court has repeatedly signaled that federal securities statutes must be read narrowly in deference to corporate federalism.[321] Except where federal law "expressly" displaces state corporate law, state law governs a corporation's internal affairs.[322]

When read with deference to corporate federalism, the holding of *Transamerica* is merely that a bylaw provision that is invalid under state law cannot be used to circumvent the Rule.[323] The decision does not hold that the Exchange Act preempts all private ordering of shareholder rights under state law. This more modest reading of *Transamerica* is not only more faithful to the Court's subsequent federal securities law precedents.[324] It also accords with the SEC's longstanding interpretation of its own Rule.[325] And it means that corporations are, and always have been, free to adopt provisions in the corporate contract to restrict shareholder proposal rights.

V. IMPLICATIONS

Although corporations may, through private ordering, regulate shareholder proposals under the Rule does not mean that every public company will, or even should, opt to do so. This Part considers the implications of private ordering shareholder proposal rights, both from the perspective of individual companies and broader public policy.

For individual companies that can look past the potential resistance from investors, lawmakers, and the SEC, private ordering offers the promise of greater consistency and predictability in adjudicating shareholder proposal disputes under Delaware law, and before the Delaware courts, rather than through the SEC's no-action process. From a broader public policy perspective, economic efficiency strongly favors private ordering, while considerations of shareholder engagement, and stakeholder welfare do not strongly weigh against it.

A. Resistance to Proposal Provisions

Given the longstanding expectations established during the Rule's eight-decade reign, the first public companies that adopt provisions regulating shareholder proposal rights should expect some pushback among investors, the SEC, and potentially lawmakers. Investor opposition might come from not only the relatively few shareholder activists who have always used the Rule. A broader segment of investors, including institutional investors, who may consistently vote against most shareholder proposals, might still believe that the *right to submit* a proposal is an important governance right worth preserving unabridged.[326]

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321. *See* Manesh & Grundfest, *supra* note 288, at 1081–97 (describing this line of Court decisions in the specific context of derivative Section 14(a) litigation).

322. *See supra* notes 281–83 and accompanying text.

323. *See* Liebeler, *supra* note 96, at 462.

324. *See supra* notes 273–87 and accompanying text.

325. *See supra* notes 260–67 and accompanying text.

326. In 1983, when the SEC solicited comments to a proposal enabling public companies to privately order shareholder proposal rights under the Rule, see *infra* notes 327–28 and accompanying text, only "[o]ne percent of shareholder respondents and 47% of company respondents favored, and 93% of shareholders and 49% of companies disfavored, allowing each company to set up its own shareholder proposal process." 1997 Proposing

Aside from investors, the SEC, too, would likely oppose any attempt to privately order proposal rights. Indeed, in a 1983 release, the agency floated the possibility of allowing individual companies to regulate shareholder proposals,[327] only to reject it.[328] More recently, the SEC has explained that its federal proxy rules are "not merely a matter of private ordering. Rights, including shareholder rights, are artifacts of law, and in the realm of corporate governance some rights cannot be bargained away . . . ."[329] At minimum, these precedents signal the SEC's belief that private ordering is bad policy, if not precluded outright by the Rule.[330]

Such opposition means that the first public companies to regulate shareholder proposals through private ordering will face inevitable litigation. And even if the private ordering of shareholder proposals would likely prevail in any court challenge, companies face the prospect that federal and, perhaps, state lawmakers might intervene. As noted before, Congress has previously made incursions into internal corporate governance to create new federally-mandated shareholder rights.[331] And even if a federal incursion might seem unlikely, progressive states—led by California—have shown an increased willingness to regulate the public corporations that are headquartered in-state but chartered elsewhere.[332]

Given these considerations, the directors of many public companies, perhaps most, might understandably decline to adopt provisions regulating shareholder proposals. On the other hand, public company boards consistently oppose, and advise their shareholders against, nearly all proposals submitted under the Rule.[333] As duty-bound fiduciaries, these boards have thus signaled that nearly all shareholder proposals are not in the best interests of the corporation and its shareholders. Extending this logic forward, a public company board may well conclude that it is also in the best interests of the corporation and its shareholders to impose some reasonable restrictions on any future proposals. Indeed, as described in the next section, the prospect of resolving future shareholder proposal disputes

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Release, *supra* note 146, at 50683 n.28. Of course, shareholder sentiment may have significantly shifted in the intervening four decades. For example, significant numbers of shareholders who have in recent years purchased nonvoting shares, which enjoy no proposal rights, have signaled their amenability to forego such rights.

327. *See* 1982 Proposing Release, *supra* note 101, at 47422.

328. *See* Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091, 48 Fed. Reg. 38218, 38218 (Aug. 16, 1983).

329. *See* 2010 Adopting Amendment, *supra* note 43, at 56672.

330. *See id.* at. 56680 ("[N]o Federal proxy rule allows shareholders or boards to alter how the rules apply to companies. The concept that our rules are not subject to company-by-company variation is entirely consistent with our mandate to protect all investors."). At the same time, however, at least one commissioner has recently expressed support for the private ordering of shareholder proposals rights. *See* Uyeda, *supra* note 84 (describing inherent problems with the increase in shareholder proposals due to Commission staff position changes on Rule 14a-8).

331. *See supra* note 281–83 and accompanying text.

332. *See* Manesh, *supra* note 288, at 256–57 (describing recent legislation adopted in California requiring gender diversity among boards of directors for all corporations headquartered in-state); *see also* Loyti Cheng, David A. Zilberberg & Emily Roberts, *California enacts Major Climate-Related Disclosure Laws*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 22, 2023), https://corpgov.law.harvard.edu/2023/10/22/california-enacts-major-climate-related-disclosure-laws [https://perma.cc/K2AN-GVAL] (describing new legislation enacted by California mandating climate-related disclosures for all companies doing business in that state).

333. *See, e.g.*, Amazon.com, Inc., *supra* note 11, at 26–87 (recommending shareholders vote against all 18 proposals submitted during the 2023 proxy season); Amazon.com, Inc., *supra* note 75, at 26–86 (recommending shareholders vote against all 15 proposals submitted during the 2022 proxy season).

before Delaware courts, as opposed to the SEC's unpredictable no-action process, may well tip the balance in favor of regulating proposals through private ordering.

B. Adjudication in Delaware

Because a shareholder's right to make or vote on a proposal is governed by state law, a company's use of private ordering to regulate shareholder proposals would ultimately turn on the interpretation of the relevant state's law, rather than the SEC's interpretation of the Rule.[334] For most public companies, Delaware is the relevant state law,[335] and its courts provide the definitive interpretation of Delaware corporate law. Thus, private ordering of shareholder proposals would shift the locus of dispute resolution from the SEC's no-action process to Delaware courts.[336]

Indeed, a proposing shareholder seeking to challenge the exclusion of their proposal from a company's proxy would be compelled to file that challenge in a Delaware court if the company is one of the many that has adopted an intra-corporate forum selection bylaw.[337] But even if a proposing shareholder or the SEC, which is not bound by a corporation's forum selection bylaw, sought to challenge the company's decision to exclude the shareholder's proposal in federal district court, Delaware law would still govern the dispute.[338] Indeed, the federal court might well choose to certify the Delaware law questions to a Delaware court to resolve.[339]

Regardless of whether the dispute is ultimately resolved in federal or Delaware courts, the central question will be whether the corporation properly applied the provisions of its governing documents to exclude a shareholder's proposal from the corporation's proxy statement.[340] In cases involving a provision that imposes a bright-line restriction on shareholder proposals—for example, a provision limiting eligibility to submit proposals based on a quantitative ownership threshold—the board's exclusion decision is likely to inure more judicial deference. By contrast, where the applicability of a provision to a given shareholder proposal is more fact-intensive and allows for more discretion, a court may be more inclined to second-guess directors. For example, provisions precluding proposals that concern an "ordinary business" matter, have been "substantially implemented," or are

334. *See* 2007 Proposing Release, *supra* note 43, at 43479 (explaining that if "a company had in place a bylaw under which non-binding shareholder proposals were not permitted to be raised at meetings of shareholders" then the company's "ability to exclude the proposals would . . . be reliant on the bylaw's compliance with applicable state law and the company's governing documents").

335. *See* DEL. DIV. CORPS., *supra* note 29.

336. *See* Uyeda, *supra* note 84 ("If a company established its own standards [for permitting or excluding shareholder proposals], then neither the Commission nor its staff should be involved in determining whether the proponent satisfied those standards under state law; instead, any disagreement between the proponent and the company should be treated like any other dispute over an interpretation of a company's governing documents and resolved in state court.").

337. *See* Manesh & Grundfest, *supra* note 288, at 1055–58.

338. *See supra* notes 275–276.

339. *See* DEL. CONST. art. IV, § 11(8) (granting jurisdiction to hear certified question from other state and federal courts and the SEC); Justice Henry duPont Ridgely, *Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law*, 63 SMU L. REV. 1127, 1132 (2010) (citing various notable instances where federal courts have certified questions to Delaware courts).

340. *See* 2007 Proposing Release, *supra* note 43.

"substantially similar" to previous proposals all involve a degree of subjectivity and are therefore ripe for judicial scrutiny.[341]

In all cases, however, adjudication of shareholder proposal disputes under Delaware law, and particularly before Delaware courts, presents an attractive alternative to the SEC's lawless no-action process.[342] Where the SEC announces its decisions in terse, conclusory letters, Delaware courts issue reasoned opinions citing relevant precedents.[343] Where the SEC's interpretation and application of the Rule shifts with the political winds in Washington,[344] Delaware courts are nonpartisan and bound by *stare decisis*.[345] Indeed, Delaware's judges are appointed through a nonpartisan process on the basis of their corporate law expertise.[346] Thus, unlike the SEC, Delaware courts will be far less likely to deviate from prior judicial decisions. Moreover, because so many corporations are chartered in Delaware, the state's courts rapidly accumulate new judicial precedents, providing greater clarity and guidance to corporations and shareholders.[347] Thus, there is every reason to prefer adjudicating shareholder proposal disputes before Delaware courts over an unpredictable, partisan federal agency.

C. Policy Considerations

Putting aside whether public companies will choose to regulate shareholder proposals through private ordering, the prospect that some may do so raises broader questions of public policy. An assessment of policy considerations, however, favors private ordering.

First, there is a strong economic case for private ordering.[348] Given the great diversity of businesses and shareholders, no one set of rules for internal governance will be optimal for every company.[349] Private ordering enhances efficiency by enabling each company to tailor those rules to best fit its needs. While some corporations may seek to restrict

341. *See supra* Part III.B.2.

342. *See supra* Part II.C.

343. *See* Palmiter, *supra* note 61, at 922 ("[O]ne would expect more satisfying answers [from state courts] than the SEC staff's sometimes contradictory, usually unsubstantiated, and always conclusory no-action positions—hardly inspiring the confidence of a well-considered judicial opinion on a novel corporate device.").

344. *See* Uyeda, *supra* note 84 ("[Private ordering] provides certainty that the procedural standards will not change based on who is leading the Commission.").

345. *See* Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1278 (Del. 2021) ("[S]tare decisis is an important feature of Delaware law.").

346. *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1093–94 (2000) ("Delaware judges also enjoy an unusual degree of political independence relative to other state judges."); Randy J. Holland & David A Skeel, Jr., *Deciding Cases Without Controversy*, 5 DEL. L. REV. 115, 121–24 (2002) (describing Delaware's judicial selection process).

347. *See* Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 211–12 (2011) (describing the network and learning effects associated with Delaware law).

348. *See, e.g.*, Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1639 (2016) ("The advantages to implementing governance reform through private ordering include firm-specific tailoring of corporate governance rather than a one-size-fits-all approach, minimization of regulatory error, and the opportunity to overcome political and other constraints on regulatory change.").

349. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1428 (1989) ("Just as there is no right amount of paint in a car, there is no right relation among managers, investors, and other corporate participants. The relation must be worked out one firm at a time.").

shareholder proposal rights, others may opt to expand them beyond what the Rule allows.[350] In turn, capital markets will efficiently price these different governance regimes.[351] To the extent a particular corporation's regulation of shareholder proposals impairs or enhances value, market prices will accord the corporation's shares an appropriate discount or premium. Indeed, through private ordering, public companies already vary the voting rights attached to their shares.[352] One should, therefore, expect to see a similar diversity when it comes to the far less central governance right of making precatory proposals.

Setting aside considerations of economic efficiency, some might fear that restricting shareholder proposals under the Rule would suppress an important channel of communication between shareholders and corporate directors.[353] As already noted, the SEC characterizes the Rule as "a cornerstone of shareholder engagement," vital for promoting director accountability and democratic corporate governance.[354] But shareholders communicate their priorities to boards through multiple channels.[355] Shareholder proposals play only one small part in the process of shareholder engagement.[356]

First, and most fundamentally, shareholders express their priorities through the annual election of directors.[357] When compared to the feeble right to make nonbinding recommendations, the right to select who sits on a corporation's board is a far more direct and

350. *See* Uyeda, *supra* note 84 ("[P]rivate ordering allows a company to . . . best balance the benefits of shareholders proposals versus their costs, and specific to its shareholder base.").

351. *See, e.g.*, Easterbrook & Fischel, *supra* note 349, at 1430–32.

352. *See* COUNCIL INSTITUTIONAL INVS., *supra* note 139.

353. *See, e.g.*, J. Robert Brown, Jr., *Corporate Governance, Shareholder Proposals, and Engagement Between Managers and Owners*, 94 DENV. L. REV. 1, 6 (2017) ("Denying access to Rule 14a-8 will not lessen interest in the relevant issues but will interfere with the engagement process between owners and managers and force shareholders to pursue other avenues of influence, whether litigation, public campaigns, or broad based regulatory reform."); James D. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating a Corporate Public Square*, 2021 COLUM. BUS. L. REV. 1147, 1197 (2022) ("[T]he value of Rule 14a-8 is much broader as it must be understood as a communication mechanism among the proponent, the corporation and its management, the company shareholders, the corporation to its various non-shareholder stakeholders, and to boardrooms and investors everywhere.").

354. *See supra* note 63 and accompanying text.

355. *See* 2020 Adopting Release, *supra* note 53, at 70253 ("[T]he [R]ule is only one of many mechanisms for shareholders to engage with companies and their fellow shareholders and to advocate for the measures they propose."); 2019 Proposing Release, *supra* at 43, at 66463 ("[S]hareholders now have alternative ways [to engage management], such as through social media, to communicate their preferences to companies and effect change."); *id.* at 66504 (explaining that restricting shareholder access to the Rule "could lead to proponents seeking alternative avenues of influence, such as public campaigns, litigation over the accuracy of proxy materials, or demands to inspect company documents"); 1997 Proposing Release, *supra* note 146, at 50682 (noting that shareholder proposals are "not the only avenue for communication" between shareholders and companies "since a shareholder may undertake an independent proxy solicitation or may seek informal discussions with management or other shareholders outside the proxy process.").

356. *See* 2007 Proposing Release, *supra* note 43, at 43475–76 ("Given the opportunities for collaborative discussion afforded by the Internet and related technological innovations, the proxy mechanism by comparison offers limited opportunities—usually only the annual meeting—for shareholders to provide advice to management. Accordingly, the proxy system may not be the only, or the most efficient, means of shareholder communication with management on purely advisory matters.").

357. *See* 2010 Proxy Access Adopting Release, *supra* note 43, at 56670 ("A principal way that shareholders can hold boards accountable and influence matters of corporate policy is through the nomination and election of directors.").

potent tool to ensure board accountability and influence a corporation's strategic direction.[358] Moreover, outside of board elections, investors often engage directors informally through private dialogues, which are typically more nuanced and constructive than the kinds of adversarial engagements that shareholder proposals tend to engender.[359] These private dialogues can lead to meaningful discussions concerning corporate strategy, governance, and risks while fostering a culture of cooperative problem-solving between boards and shareholders.[360] Thus, when viewed through a wider lens, the Rule may be more aptly described as just one facet of shareholder engagement, rather than an indispensable "cornerstone".

Take, for example, the ESG movement. It is hard to overstate the movement's success in recent years in capturing directors' attention and shaping corporate strategy.[361] But ESG's broad impact has been the culmination of numerous factors,[362] including domestic and international regulatory pressures,[363] shifts in consumer demand and workforce

358. *See, e.g.*, Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1268–69 (2020) (describing threats made by the "big three" mutual fund companies to vote against corporate boards that failed to show progress on gender diversity among their members).

359. *See* 2019 Proposing Release, *supra* note 43, at 66467 ("Other forms of engagement, including dialogue between a shareholder and management, may sometimes accomplish a shareholder's goals without the burdens associated with including a proposal in a company's proxy statement"); Jill E. Fisch, Asaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors Passive Investors*, 168 U. PA L. REV. 17, 48–51 (2019) (explaining that "passive [index fund] investors increasingly use their voting power as leverage to gain an audience with managers and directors at their portfolio companies to communicate their views and encourage changes").

360. *See* Fisch, Hamdani & Solomon, *supra* note 359, at 41 ("Passive [index fund] investors need not resort to costly and confrontational tactics such as . . . shareholder proposals. Their ability to influence management through their voting power increases the likelihood that management will both meet with them and respond to their concerns."); Maria Castañón Moats, Paul DeNicola & Matt DiGuiseppe, *Director-Shareholder Engagement: Getting it Right*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 5, 2023), https://corpgov.law.harvard.edu/2023/06/05/director-shareholder-engagement-getting-it-right/ [https://perma.cc/GJV2-DJZ6] (describing the potential benefits of ongoing, private dialogues between directors and shareholders).

361. *See* Press Release, Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans' (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/67G4-V6BA] (statement signed by 181 CEOs committing "to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders"); *Sustainability Reporting in Focus,* GOVERNANCE & ACCOUNTABILITY INST. (2022), https://ga-institute.com/research/research/sustainability-reporting-trends/2022-sustainability-reporting-in-focus.html [https://web.archive.org/web/20240624132256/https://ga-institute.com/research/research/sustainability-reporting-trends/2022-sustainability-reporting-in-focus.html] (finding that 96% of S&P 500 companies issued an ESG or sustainability report in 2021).

362. *See generally* Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L. BUS. & FIN. 255 (2023) (identifying product and labor markets, direct action via walkouts and social media, large index funds, hedge funds, and regulators as separate complementary channels promoting ESG).

363. *See, e.g.*, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities and Exchange Act Release No. 33-11042, 87 Fed. Reg. 21334 (Apr. 11, 2022) (proposing new disclosure mandate regarding greenhouse gas emissions); Modernization of Regul. S-K Items 101, 103, and 105, Securities and Exchange Act Release No. 33-10825, 85 Fed. Reg. 63726, 63737–40 (Oct. 8, 2020) (adopting new disclosure mandates regarding human capital management); Emma Bichet, Jack Eastwood & Michael Mencher, *EU's New ESG*

preferences,[364] incentives tied to executive compensation,[365] and rising stakeholder activism in the form of boycotts, walkouts, and social media campaigns.[366] Increased shareholder interest in environmental and social issues has been only one of many factors driving ESG. And even that interest has largely manifested itself through shareholders' investment decisions,[367] and not through shareholder votes on ESG proposals. Thus, when ESG is viewed from this broader perspective, shareholder proposals have been a distracting sideshow, garnering outsized attention while accomplishing relatively little for ESG priorities.[368]

Finally, related to ESG, some might be concerned that private ordering to regulate shareholder proposal rights will harm non-shareholding stakeholders.[369] Indeed, many shareholder proposals ask a company to consider how its policies and practices might impact the company's employees, customers, or other constituencies.[370] If, through private ordering, companies suppress such proposals it would deny non-shareholders the desperately needed opportunity to make further gains.

Yet, stakeholder advocates must contend with the fact that shareholders alone—and not other corporate stakeholders—enjoy the right to make and vote on proposals.[371] In exercising these rights, shareholders have their own agenda, which may or may not be

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Reporting Rules Will Apply to Many US Issuers, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 23, 2022), https://corpgov.law.harvard.edu/2022/11/23/eus-new-esg-reporting-rules-will-apply-to-many-us-issuers [https://perma.cc/J5CV-MDH6] (summarizing new European Union ESG reporting mandate); *see also* Sean J. Griffith, *What's Controversial about ESG? A Theory of Compelled Commercial Speech under the First Amendment*, 101 NEB. L. REV. 876, 883–93 (2023).

364. *See* Barzuza, Curtis & Webber, *supra* note 362, at 276–79; Barzuza, Curtis & Webber, *supra* note 358, at 1295–1300.

365. *See* Matthew Mazzoni & Jennifer Teefey, *ESG + Incentives 2023 Report*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 3, 2023), https://corpgov.law.harvard.edu/2023/09/03/esg-incentives-2023-report/ [https://perma.cc/7P6W-BZ3J] (reporting that 72% of S&P 500 companies link executive compensation to some form of ESG performance metric); Merel Spierings, *Linking Executive Compensation to ESG Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 27, 2022), https://corpgov.law.harvard.edu/2022/11/27/linking-executive-compensation-to-esg-performance/ [https://perma.cc/JB5C-UWYY] (reporting a similar result).

366. *See, e.g.*, Barzuza, Curtis & Webber, *supra* note 362, at 282–85 (explaining that "[c]ancel culture, employee walkouts, and boycotts, create significant risk" for CEO who ignore ESG priorities); Stephen A. Miles, David S. Larcker & Brian Tayan, Protests from Within: Engaging with Employee Activists (Mar. 8, 2021) (unpublished manuscript) (on file with the Rock Ctr. for Corp. Governance at Stan. Univ.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801120 (identifying numerous high-profile instances of employee activism pressuring change in corporate policies).

367. *See, e.g.*, Barzuza, Curtis & Webber, *supra* note 362, at 285 (noting that "recent studies found clear evidence that investors with ESG preferences move their money to funds that better meet those preferences").

368. *See* Manne, *supra* note 96, at 492 ("[Shareholder proposals] in no sense initiated popular concern with issues like safety, pollution, racism, or sexism, and it is hard to believe that the legislation and regulation developing in these areas would not have come just as quickly in [their] absence . . . .").

369. *See, e.g.*, Cox & Thomas, *supra* note 353, at 1155.

370. *See, e.g.*, David A. Bell & Ron C. Llewellyn, *What's Next for Diversity Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 8, 2023), https://corpgov.law.harvard.edu/2023/10/08/whats-next-for-diversity-shareholder-proposals/ [https://perma.cc/9YE6-P7X6].

371. *See* Leo E. Strine, Jr., *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 178 (2017) (observing that only shareholders are vested with the powers to elect the board, vote on significant transactions, and sue the directors for breach of their fiduciary duties).

aligned with other stakeholders.[372] Moreover, given increasing wealth inequality during the Rule's long reign[373]—not to mention persistent inequality along other social and racial dimensions—one can be reasonably skeptical that shareholder proposals have ever been effective at advancing the interests of non-shareholding constituencies. As long as shareholders alone hold the tools of corporate governance, those tools will be deployed to benefit shareholders.[374] Therefore, the regulation of shareholders' rights under the Rule is unlikely to adversely affect the interests of stakeholders.

In sum, economic considerations favor the private ordering of shareholder proposal rights, while broader considerations of shareholder engagement, ESG, and stakeholder interests do not militate against it. Of course, how these considerations play at the level of individual companies may differ from one corporation to the next. But as a broad policy matter, the private ordering of shareholder proposal rights should be a welcome development.

VI. CONCLUSION

Delaware courts have long recognized the relationship between its state corporate law and federal securities law as "compatible," "complementary," and "symbiotic."[375] Perhaps nowhere is that description more apt than in the shareholder proposal context. Where state corporate law defines the scope of a shareholder's right to make and vote upon a proposal, the Rule imposes a federal procedure to facilitate the exercise of those state law rights.

Reasonable minds may differ on whether the current proposal process ultimately benefits public company shareholders. But it is hard to claim that the Rule and the no-action process by which it is implemented are optimal for every company. Private ordering, as permitted by state law, empowers each company to optimize the federally created proposal process for the benefit of its own shareholder base. The resulting federal-state symbiosis may ultimately foster a healthier, more rational corporate governance ecosystem than the politically divisive one that exists today.

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372. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 161 (2020) ("[A]s long as shareholders have exclusive power with respect to director elections . . . directors and executives [have] strong incentives not to benefit stakeholders beyond the point that would best serve shareholder value maximization."); *see also* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2628–34 (2021) (describing the process by which considerations of stakeholder welfare are reframed into considerations of shareholder welfare).

373. *See, e.g.*, Aneil Kovvali & Leo E. Strine, Jr., *The Win-Win that Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307 (2022) (surveying evidence that shows "[c]orporations have created financial returns for shareholders, but largely at the expense of other constituencies like workers").

374. *See* Leo E. Strine, Jr., C*orporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1171–74 (2017) ("If the only power within the corporate polity is wielded by equity capital, then the ends of governance will maximize equity's preferences . . . [T]he power dynamics created by corporate law itself dictate the ends of corporate governance.").

375. *See* Malone v. Brincat, 722 A.2d 5, 13 (Del. 1998) (describing the Securities Litigation Uniform Standards Act of 1998 as an instance of federal law generally matching Delaware's law on disclosures); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1619–22 (2005) (describing the "significant symbiotic element to the relationship between federal law and Delaware law").