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COMMENTS ON SECURITIES EXCHANGE ACT RELEASE NO. 106,383
RESCISSION OF RULE 14A-8'S FEDERAL
REGULATION OF SHAREHOLDER PROPOSALS AND AMENDMENTS TO RULE 14A-4

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Comments on Securities Exchange Act Release No. 106,383: Rescission of Rule 14a-8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a-4

File No. S7-2026-32

Stephen M. Bainbridge

Abstract: In 1942, the Securities and Exchange Commission adopted what is now Rule 14a-8, the shareholder proposal rule. Eight decades later, the Commission has proposed rescinding it entirely and leaving the question of shareholder access to the company's proxy statement to state law and private ordering. In this comment letter, I support rescission.

I begin with the Commission's threshold argument that the Rule exceeds its authority under Exchange Act § 14(a). The Proposing Release adopts, largely without attribution, an argument I have made since 1991. On that view, "fair corporate suffrage" refers to disclosure and fair solicitation procedures, not to the substance of shareholder voting rights. I also take up the Commission's rebuttal of the "privilege" theory of *Dyer v. SEC*. I suggest that the rebuttal may prove too much, because it threatens the universal proxy rule as well.

I then turn to policy. Corporations are not democracies, and Arrow's analysis of authority-based decision-making explains why shareholder review of board decisions shifts authority away from the board. The Rule imposes substantial costs, much of which is driven by a handful of gadflies. It gives proponents settlement leverage and distracts boards from their core responsibilities. Claimed reliance interests do not defeat rescission, given the Rule's constant reinterpretation under successive administrations. Instead, they oblige the Commission to justify the change under *Fox Television* and *Regents* and to consider transition measures, several of which I propose. Finally, universal proxy, e-proxy, concentrated ownership, and social media have reversed the cost calculus on which the Rule rested. Inclusion was once cheap and self-help expensive. Today the reverse is true.

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Comments on Securities Exchange Act Release No. 106,383: Rescission of Rule 14a-8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a-4

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I submit these comments in support of the Securities and Exchange Commission's proposed rescission of Rule 14a-8. The views expressed in this comment are solely my own. I have not been compensated by any party for preparing or submitting this comment.

Introduction 2
The Proposing Release 3
The Commission's Proposal 3
The Commission's Grounds 3
Why Not Just Fix the Rule? 5
The Scope of the SEC's Authority 5
The SEC's Argument 6
Points of Personal Privilege 7
The Meaning of Fair Corporate Suffrage 7
The Pertinent Case Law 8
Vindicated but not Acknowledged 9
Tackling the Substance/Procedure Distinction 10
Summation on Authority 10
Shareholder Proposals and Corporate Democracy 11
The Legal History 11
Corporations Are Not Democracies 12
Responses to Specific Commission Questions 13
Response to Questions 1 and 4 14
Flaws in the Current Rule 14
Distraction from Core Responsibilities 17
Response to Question 2 18
Reliance Interests in Regulatory Policy 18
The Argument that Stakeholders Have Reliance Interests in Rule 14a-8 19
Summation of the Reliance Issue Question 22

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Response to Question 6 22
Overview 22
The Universal Proxy Card 23
Notice, Access, and E-voting 24
The Concentration of Share Ownership 24
Social Media and Other Engagement Channels 25
Summation re Question 6 26
Conclusion 26

Introduction

In 1942, when one might have thought the government had bigger fish to fry, the Securities and Exchange Commission (SEC) adopted what was then called Rule X-14A-7. Later renumbered Rule 14a-8 and amended extensively, the so-called shareholder proposal rule has become a fixture of American corporate governance.

In brief, the Rule allows shareholders of public corporations who meet certain eligibility requirements to have a proposal—along with a supporting statement, the two together capped at 500 words—included in the company's annual meeting proxy statement and proxy card so that shareholders may vote on the proposal. If the Rule did not exist, a shareholder wishing to have a matter put before the annual shareholder meeting was obliged to go to the expense and hassle of conducting a proxy solicitation with its own proxy statement and card.[1]

If the proponent meets the Rule's ownership thresholds and complies with the Rule's various procedural requirements, the company must include the proposal unless it can establish that the proposal falls within one of the Rule's thirteen substantive exclusions, such as improper subject under state law, ordinary business, relevance, substantial implementation, duplication, or resubmission.

Every proxy season, hundreds of proposals—on topics ranging from declassified boards to climate disclosure—make their way onto corporate proxy statements via Securities Exchange Act Rule 14a-8. Generations of corporate lawyers have cut their teeth on no-action letters parsing the Rule's thirteen substantive exclusions.

Despite that long history, however, the Rule should be rescinded. Whether the SEC had authority to adopt the Rule in the first place is a close question. More important, as I explain below, the Rule is fundamentally unsound as a policy matter.

[1] As noted below, however, the costs of conducting an independent campaign have dropped significantly in recent years, which significantly reduces the need for Rule 14a-8.

The Proposing Release

In *Rescission of Rule 14a-8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a-4*,[2] the Commission proposes to rescind Rule 14a-8 in its entirety and "leave determinations about the role of shareholder proposals to State law and company governing documents."[3] At the same time, it proposes to amend Rule 14a-4, which governs discretionary voting authority, to expand the circumstances in which a company may vote proxies it receives on shareholder proposals that are not included in the company's own proxy materials.[4]

The Commission's Proposal

The Release states:

> Under the proposed rescission, the Federal proxy rules would no longer require companies to include in their proxy materials shareholder proposals on the basis that they satisfy procedural and substantive requirements established under Federal law. Instead, State law or, if permitted by State law, a company's governing documents would determine whether a shareholder proposal would be required to be included in a company's proxy materials.[5]

The release further explains that, "to the extent State law or a company's governing documents were to require inclusion of a shareholder proposal in a company's proxy statement, the company would be required to comply with the Commission's proxy rules with respect to that proposal."[6]

The Commission's Grounds

The Commission offers two independent grounds for rescission: (1) Rule 14a-8 exceeds its statutory authority under Exchange Act section 14(a). (2) Even if the Rule (or some part of it) were within its authority, there are sufficient policy reasons to rescind it.

The Authority Argument

Securities Exchange Act § 14(a) makes it unlawful to solicit 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."[7] The Commission reads that text as limiting its authority to proxy solicitations—i.e., the manner in which the solicitation is made and the

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[2] Recission of Rule 14a-8, Exchange Act Release No. 34,106383 (Sep. 21, 2026) (File No. S7-2026-32) [hereinafter cited as Proposing Release].

[3] *Id*. at 1.

[4] I do not address herein the merits of the proposed amendments to Rule 14a-4. I draw the Commission's attention to Professor Seth Oranburg's detailed and thoughtful analysis of those issues, see Seth C. Oranburg, Comment on SEC Proposal to Rescind Exchange Act Rule 14a-8, (Oct. 11, 2026), https://www.sec.gov/comments/S7-2026-32/s7202632-1090039-3819386.pdf. I specifically endorse the proposed amendments he sets out in Part III of his letter.

[5] Proposing Release, *supra* note 2, at 13.

[6] *Id*. at 53.

[7] 15 U.S.C. § 78n(a)(1).

information that must be disclosed.[8] It does not, however, allow the Commission to regulate the scope of voting rights themselves, such as the right to put a matter to a shareholder.[9]

The Commission acknowledges that companies and shareholders have built governance and engagement practices around the Rule over many decades. In reply, however, the SEC basically says "so what"? As it points out, "agencies may not add to their powers by adverse possession; longevity is not a substitute for legal authority."[10]

The Policy Arguments

Independent of the authority question, the Commission offers three policy reasons for rescission.

The Original Justifications No Longer Hold

According to the release, SEC Chairman Ganson Purcell defended the original rule on grounds that compliance costs were small, many proposals were supported by management or drew respectable votes, the volume of proposals was low, and state law on shareholders' right to present proposals was reasonably clear.[11] The Commission argues that each premise has eroded.

In addition, the SEC claims, independent solicitation has become cheaper thanks to notice-and-access and electronic delivery and, to the extent shareholders use Rule 14a-8 for engagement and communication rather than voting, online platforms and social media now offer alternative channels, including for small shareholders.[12]

Unintended Consequences

The Commission further contends that the Rule has had unintended consequences. The first is that it has become a bargaining tool. Because exclusion carries litigation risk, proponents often use the Rule as leverage in private negotiations. Accordingly, many proposals are quietly resolved without a shareholder vote. In the SEC's view, this pattern does not "fully align" with Congress's goal of fair corporate suffrage.[13]

Second, the Rule allows a small number of proponents to advance interests not necessarily shared by shareholders generally. In 2025, ten proponents submitted 455 of the 786 proposals.[14] Recalling Chairman Purcell's warning against using the corporate proxy machinery for a political "stump speech," the release argues that the Rule "often serves as a stump from which, figuratively, a small number of shareholders give speeches."[15]

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[8] *Id.* at 14-15.

[9] *Id*. at 15.

[10] *Id.* at 34.

[11] *Id*. at 35–36.

[12] *Id.* at 41–42.

[13] *Id.* at 44–45.

[14] *Id.* at 46.

[15] *Id.* at 47.

Third, the Rule draws the Commission into resolving questions of state law that belong to state legislatures and courts. The release notes that companies submitted 1,073 no-action requests between 2022 and 2025 and argues that as long as a federal rule exists, the parties will look to the Commission rather than to the states.[16]

Fourth, the federal rule has stunted the development of state law and private ordering. Although Rule 14a-8(i)(1) already allows states and, where permitted, companies to set their own standards, only Texas has legislated in this area in more than eighty years.[17] The Commission reports that it is unaware of any company that has adopted Rule14a-8 in its governing documents, apart from a handful that have opted into the Texas statute.[18] The Commission attributes this reluctance partly to fear of political backlash, investor campaigns, and adverse proxy advisor recommendations, and partly to lingering uncertainty—traceable to *SEC v. Transamerica*[19]—about whether Rule 14a-8 preempts state law. Rescission, it says, would eliminate "any implication of preemption."[20]

Why Not Just Fix the Rule?

Anticipating that many commentators will argue for tweaking rather than repealing the Rule, the SEC contends that any federal rule would have to choose a default—inclusion or exclusion—and specify how parties can opt out, which would inevitably favor one side or the other.[21] Even a rule that deferred completely to state law likely would still draw parties to the Commission for answers, as the history of Rule 14a-8 shows. Accordingly, the SEC concludes, the "prudent" course is to leave the matter entirely to the states and to companies.[22]

In a footnote, the Commission also disavows the view, going back to Chairman Purcell, that omitting a known shareholder proposal from company proxy materials would itself render the materials misleading in the absence of Rule 14a-8. Citing *Heinze v. Tesco Corp*.,[23] it asserts that such an omission "is generally not, without more, materially false or misleading."[24]

The Scope of the SEC's Authority

Among the SEC's arguments in favor of repealing the Rule is the assertion that the SEC lacked authority to adopt the Rule. Indeed, the lack of authority is the SEC's main argument. To be sure, it offers up various policy arguments, but the SEC frames those as secondary—"independent of,"

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[16] *Id.* at 49 n.160, 50–51.

[17] *See* TEX. BUS. ORGS. § 21.373.

[18] Proposing Release, *supra* note 2, at 49–50 & nn.161–62.

[19] 163 F.2d 511 (3d Cir. 1947).

[20] Proposing Release, *supra* note 2, at 52–53.

[21] *Id*. at 53.

[22] *Id*. at 55.

[23] 971 F.3d 475 (5th Cir. 2020).

[24] Proposing Release, *supra* note 2, at 55 n.175.

in its own words—its threshold conclusion that Rule 14a-8 exceeds what Congress gave it power to do under Section 14(a) of the Exchange Act.[25]

The legislative history of section 14(a) is relatively sparse, in large part because the controversy over federal proxy regulation was resolved early in the legislative process.[26] As originally introduced, the proxy provision mandated substantial disclosures and gave the SEC authority to adopt additional disclosure requirements. The proposal met with substantial criticism.

Congress redrafted section 14(a) in response to these criticisms. In doing so, Congress did what it often does when it has a tough problem to solve: it told somebody else to solve it. In effect, the Act simply made it unlawful to solicit 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." If the delegation doctrine had any teeth, that statutory language would never have succeeded because it gave the SEC zero guidance as to how to regulate proxies.

Having punted the problem to the SEC early in the legislative process, there were few references to proxy regulation in the legislative history. Indeed, virtually the only pertinent legislative history are a pair of cryptic references in a House Committee Report to "fair corporate suffrage":

- "Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange."[27]
- "Inasmuch as only the exchanges make it possible for securities to be widely distributed among the investing public, it follows as a corollary that the use of the exchanges should involve a corresponding duty of according shareholders fair suffrage."[28]

The question is what those sparse references tell us about the scope of the SEC's authority under § 14(a).

The SEC's Argument

In the proposing release, the Commission contends that Congress intended only that the Commission have power to regulate how a proxy solicitation is conducted and what gets disclosed by those who solicit proxies. Congress did not intend that the SEC have power to regulate whether the shareholder has a right to put a matter to a vote in the first place. Instead, the SEC argues, that threshold question—i.e., is this a proper subject for shareholder action?—is answered by state law.

As originally adopted, the Rule was a modest regulatory initiative that largely deferred to state law. In the subsequent decades, the Rule grew from a little over 200 words[29] to a more than 3,000 word regulation with complex qualifications and substantive grounds for exclusion. Except

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[25] *Id*. at 119.

[26] This discussion of the pertinent legislative history draws on my article, see Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L.Q. 565, 607–08 (1991).

[27] H.R. REP. No. 73-1383, at 13 (1934).

[28] *Id.* at 14.

[29] Professor J. Robert Brown gives the precise count as 215 words, inclusive of its title. *See* J. Robert Brown, Jr., *The Evolving Role of Rule 14A-8 in the Corporate Governance Process*, 93 DENV. L. REV. ONLINE 151, 151 (2016).

for two of the substantive exclusion grounds, the bulk of the Rule is now divorced from state law. The exclusion for proposals that are not a proper subject for shareholder action under state corporate law, moreover, departs from deference to state law by creating an SEC-mandated presumption favoring precatory proposals. As the release correctly opines, that presumption operates "in substance as a mandate" rather than genuine deference to state corporate law. Accordingly, the SEC opines, Rule 14a-8 no longer facilitates state-law voting rights, as SEC Chairman Purcell said it would when the SEC adopted it. Instead, it has become a freestanding federal standard for determining when a proposal is proper, built out of the Commission's own accumulated judgments rather than any state's law. Some eight decades later, the SEC finally concluded that nothing in § 14(a) authorizes such a standard.

Points of Personal Privilege

Over a career spanning nearly four decades, I have written widely and frequently on issues of corporate governance, including the SEC's powers with respect to corporate governance. I trust the Commission will indulge me in a certain amount of self-referential analysis.

The Meaning of Fair Corporate Suffrage

The so-called Shadow SEC invokes the "fair corporate suffrage" passage in support of its argument that § 14(a) was intended, inter alia, to address "the inability of many shareholders to communicate with each other about shareholder resolutions and other topics of interest . . .."[30] This is simply not supported by the legislative history or the case law. There is no reference in the single House Report in which that phrase appears to anything resembling the sprawling modern shareholder proposal rule or even the more modest 1942 version.

In my article, *The Short Life and Resurrection of SEC Rule 19c-4*, I reviewed the scant legislative history, placed it in context, and concluded that:

> The proper interpretation of "fair corporate suffrage" now becomes evident. In using that term, Congress did not mean to address the substantive question of how many votes per share to which a stockholder is entitled. Instead, … Congress was talking about an entirely different concern: the need for full disclosure and fair solicitation procedures.[31]

The SEC appears to have accepted my argument, albeit without citing me:

> Congress's purpose in enacting this provision was to empower the Commission to facilitate "fair corporate suffrage" on the proxy by regulating the "conditions under which proxies may be solicited." [The legislative history] also suggests an intent to authorize regulations that would protect "free exercise of the voting rights" of shareholders, require "adequate disclosure" of the matters to be decided at the shareholder meeting, and prevent "irresponsible outsiders" and

[30] John C. Coates et al., Comment on SEC Proposal to Rescind Exchange Act Rule 14a-8 (Oct.13, 2026), https://www.sec.gov/comments/S7-2026-32/s7202632-1091219-3831988.pdf.

[31] Bainbridge, *supra* note 26, at 610.

> "unscrupulous corporate officials" from "concealing and distorting facts" in their proxy solicitations.[32]

None of which suggests the proxy rules were intended to provide a forum in which shareholders can "communicate with each other."

The Pertinent Case Law

The proposing release's arguments lean heavily on a set of judicial opinions I've spent a fair amount of my own career building an argument around.

- *Business Roundtable v. SEC*: The 1990 decision striking down Rule 19c-4, the one-share/one-vote rule, supplies the core holding that Section 14(a) doesn't let the Commission "step beyond control of voting procedure and into the distribution of voting power."[33]

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[32] Proposing Release, *supra* note 2, at 17.

[33] Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990). The Shadow SEC comment letter cites a passage from the *Business Roundtable* in which the court stated that "'The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting.' 905 F.2d at 410 (emphasis in original)." Coates, et al., *supra* note 30, at n.7. In doing so, the Shadow SEC ignores the thrust of the *Business Roundtable* decision, which simply put was that the SEC has no authority to regulate corporate governance. *See, e.g.,* Bus. Roundtable v. S.E.C., 905 F.2d 406, 413 (D.C. Cir. 1990) (explaining that the securities laws draw a "conceptual line excluding the Commission from corporate governance"). Indeed, the Shadow SEC's analysis is further flawed because they fail to engage the thrust of the *Business Roundtable* decision while, at least implicitly, acknowledging that Rule 14a-8 regulates corporate governance. *See* Coates, et al., *supra* note 30 ("Nothing about modern corporate governance has eliminated the need for shareholders to communicate with each other to instruct and oversee proxies or engage in informed governance with full disclosure—a core mandate of the securities laws."). Nothing about the federal securities laws allows the SEC to regulate corporate governance.

The Shadow SEC's carefully selected passage from *Business Roundtable* also elides a critical point. The passage states that the proxy rules are supposed to "to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting." Yet, because most shareholder proposals are required to be precatory, Rule 14a-8 does not allow shareholders to control the corporation. Accordingly, if the Shadow SEC is correct, the SEC should amend Rule 14a-8 to allow shareholder proposals to mandate corporate action.

In addition, shareholders who attend shareholder meetings in fact have essentially no power to "control the corporation." As does the law of every other state, Delaware General Corporation Law § 141(a) provides that: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors …." Control of the corporation is vested in the board. Not the shareholders.

> The vast majority of corporate decisions accordingly are made by the board of directors acting alone, or by persons to whom the board has properly delegated authority. Shareholders have virtually no right to initiate corporate action and, moreover, are entitled to approve or disapprove only a very few board actions. The statutory decisionmaking model thus is one in which the board acts and shareholders, at most, react.

Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 603 (2006). Accordingly, as I have observed:

> In U.S. corporate law, shareholder control rights in fact are so weak that they scarcely qualify as part of corporate governance. Under the Delaware Code, for example, shareholder voting rights are essentially limited to the election of directors and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution. As a

- *Santa Fe Industries v. Green*: Supplies the reluctance to federalize corporate law absent a clear congressional signal.[34]
- *CTS Corp. v. Dynamics Corp*.: Supplies the line I quoted in a 2007 essay, *The Scope of the SEC's Authority Over Shareholder Voting Rights*[35]: "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."[36]

In addition, the release invokes the modern major-questions and clear-statement canons—see, e.g., *West Virginia v. EPA*[37]—to reinforce the federalism point.

As for *SEC v. Transamerica*,[38] the 1947 decision the Commission has periodically cited as validating Rule 14a-8's pedigree, the release doesn't try to distinguish it so much as deflate it, observing that the scope of Commission authority "was not squarely presented or addressed" in the decision.[39]

Vindicated but not Acknowledged

I must confess to feeling a certain amount of vindication writing this section. I made essentially the same argument as the SEC—same cases, same disclosure/substance line, same federalism canon—in *The Short Life and Resurrection* and again in *The Scope of the SEC's Authority*. The Commission doesn't cite either piece. The Proposing Release cites me exactly once, for an unrelated point in my 2016 Fordham piece about state-law inconsistency in defining "ordinary business." But the architecture is mine, or at least it's the architecture a fairly small group of us built out over three and a half decades of arguing that Section 14(a) is a disclosure statute wearing a governance-statute costume.[40]

> formal matter, only the election of directors and amending the bylaws do not require board approval before shareholder action is possible. In practice, of course, even the election of directors (absent a proxy contest) is predetermined by the existing board nominating the next year's board.

Id. at 616–17.

Yet, Rule 14a-8 has allowed a host of shareholder proposals that go far beyond the scope of what shareholders are allowed to control at the shareholder meeting. As such, the Shadow SEC's argument fails.

[34] 430 U.S. 462 (1977).

[35] Stephen M. Bainbridge, *The Scope of the SEC's Authority Over Shareholder Voting Rights* 18 (UCLA Sch. L. Pub. L. & Legal Theory Rsch. Paper Series, Rsch. Paper No. 07-16, 2007), https://ssrn.com/abstract=985707.

[36] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987).

[37] 597 U.S. 697 (2022).

[38] 163 F.2d 511 (3d Cir. 1947).

[39] The same is true of the cases cited in a lengthy footnote to the Shadow SEC's comment letter. *See* Coates et al., *supra* note 30, at n.8. Those decisions apply Rule 14a-8 rather than deciding whether it is authorized. The Shadow SEC's statement that those cases "held or presumed" that Rule 14a-8 was authorized is carrying a lot of weight it cannot support.

[40] Perhaps the SEC failed to cite my work because I suggested in *The Short Life* that the *Business Roundtable* decision requires courts to determine whether a challenged rule is substantive or procedural. The court recognized the existence of a "murky area between substance and procedure" that may resist classification, but offered the example that "rule 14a-4(b)(2)'s requirement that proxies give shareholders an opportunity to withhold authority to

Tackling the Substance/Procedure Distinction

Although the SEC does not reference my discussion of the substance/procedure distinction, the SEC does address that distinction in critiquing *Dyer v. SEC*.[41] In that 1959 decision, the Eighth Circuit opined that:

> It is to be borne in mind that Rule X-14A-8 affords a privilege, which does not otherwise ordinarily exist in favor of stockholders. Necessarily, the Commission could properly impose reasonable conditions and limitations on the scope and manner of enjoyment of the privilege, in relation to the other elements of holding stockholder meetings and conducting corporate affairs. There clearly is no basis for us reviewingly to say that either the regulation or its application to the present situation was an improper and unwarranted act on the part of the Commission.[42]

The proposing release takes this argument head-on. In it, the Commission anticipates commentators making precisely the "privilege" framing and rejects that framing ex ante.

According to the SEC, once the conditions attached to the privilege are not themselves derived from state law, calling the Rule "procedural" is a mislabeling. A rule that decides, using standards it invented itself, whether a proposal must appear on the proxy card is a rule that decides the scope of the shareholder's voting opportunity. Procedure is thus doing substantive work.

Summation on Authority

To be honest, I haven't quite decided whether the SEC's rebuttal of the privilege argument succeeds or whether it proves too much.

The logic of the SEC's current argument re Rule 14a-8, if pushed just a little further, would seem to threaten the universal proxy card rule—which also imposes federally created conditions (nomination and disclosure requirements) on a shareholder's ability to have a name appear on a proxy card—and arguably even Rule 14a-7's cooperation mandate. The release tries to wall off

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vote for individual director nominees … 'bars a kind of electoral tying arrangement, and may be supportable as a control over management's power to set the voting agenda, or, slightly more broadly, voting procedures ….'" Bus. Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990).

I went on to posit that:

> Rules addressing unfair solicitation procedures thus should pass muster…. The shareholder proposal rule presents a somewhat less compelling case. Even though full disclosure of all matters to come before a shareholders meeting was its original justification, at first blush the [R]ule does not seem to advance either purpose of section 14(a). However, absent the [R]ule, shareholders have no practical means of holding management accountable through the voting process or even affecting the agenda. As such, it too may be supportable "as a control over management's power to set the voting agenda."

Bainbridge, *supra* note 26, at 621–22. I suppose "may be supportable" proved the stumbling block, even though it was not a ringing endorsement of the Rule.

[41] 266 F.2d 33 (8th Cir. 1959).

[42] *Id.* at 41.

the universal proxy rule by insisting that that rule merely replicates a state-law right to vote for directors that clearly exists, whereas 14a-8's underlying state-law right (to propose precatory matters) is, at best, uncertain. That's a real distinction, but one might argue that it's a distinction of degree, not of kind.

Shareholder Proposals and Corporate Democracy

Proponents of the Rule argue that it serves "the congressional aim to facilitate 'corporate democracy.'"[43] As the story goes, § "14 of the Securities Exchange Act of 1934 (governing proxies), under which Rule 14a–8 was promulgated, was intended to 'give true vitality to the concept of corporate democracy.'"[44]

Hence, for example, former SEC Commissioner Caroline Crenshaw has complained that Rule 14a-8 is "a preferred punching bag of those who wish to diminish corporate democracy."[45]

All of which is lousy legal history and worse corporate governance theory.

The Legal History

As discussed above, the legislative history of § 14 is exceedingly sparse. Proponents of the corporate democracy argument typically rely on the pair of passages from a single House committee report, discussed above, referencing "fair corporate suffrage." But those passages make very slender reeds to uphold sweeping claims about corporate democracy.

In fact, as the D.C. Circuit explained in its well-researched and reasoned *Business Roundtable* opinion:

> While the House Report indeed speaks of fair corporate suffrage, it also plainly identifies Congress's target—the solicitation of proxies by well informed insiders "without fairly informing the stockholders of the purposes for which the proxies are to be used." The Senate Report contains no vague language about "corporate suffrage," but rather explains the purpose of the proxy protections as ensuring that stockholders have "adequate knowledge" about the "financial condition of the corporation ... [and] the major questions of policy, which are decided at stockholders' meetings."[46]

The court went on to explain that "proxy regulation bears almost exclusively on disclosure."[47] Fair corporate suffrage thus refers primarily to disclosure and, to a certain extent, process. It is

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[43] *See, e.g.,* Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 422 (D.C. Cir. 1992).

[44] Apache Corp. v. Chevedden, 696 F. Supp. 2d 723, 741 (S.D. Tex. 2010).

[45] Press Release, Caroline A. Crenshaw, Statement on Staff Legal Bulletin 14M (Feb. 12, 2025), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-staff-legal-bulletin-14m-021225. I note with some amusement that one rather hyperbolic commenter opined that rescission of Rule 14a-8 will "likely lead to the ultimate downfall of the United States as a democrat form of governance." *See* William Klein, Comment on SEC Proposal to Rescind Exchange Act Rule 14a-8, https://www.sec.gov/comments/S7-2026-32/s7202632-1074099-3720066.html. This seems somewhat farfetched.

[46] Bus. Roundtable v. S.E.C., 905 F.2d 406, 410 (D.C. Cir. 1990).

[47] *Id.*

intended to ensure that shareholders are informed about the matters to come before the meeting. Not to impose some form of participatory democracy on corporations.

Corporations Are Not Democracies

I have made this point in depth elsewhere.[48] In brief, under U.S. law, shareholders have virtually no meaningful control rights. Indeed, shareholder control rights are so weak that they scarcely qualify as part of corporate governance. Under the Delaware General Corporation Law, for example, shareholder voting rights are essentially limited to the election of directors and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution. As a formal matter, only the election of directors and amending the bylaws do not require board approval before shareholder action is possible. In practice, of course, even the election of directors is predetermined by the existing board nominating the next year's board (absent a proxy contest, which is incredibly rare). These are hardly the attributes we would associate with owners who rule by participatory democracy. This is precisely why, of course, that early N.Y. opinion held that it is the directors—not the shareholders—who "act in every way as if they owned" the corporation.[49]

Why don't shareholders run the corporation the way New Englanders run their town meeting? All organizations must have some mechanism for aggregating the preferences of the organization's constituencies and converting them into collective decisions. As Kenneth Arrow explained, such mechanisms fall out on a spectrum between "consensus" and "authority."[50] Consensus-based structures are designed to allow all of a firm's stakeholders to participate in decision making. Authority-based decision-making structures are characterized by the existence of a central decisionmaker to whom all firm employees ultimately report, and who is empowered to make decisions unilaterally without approval of other firm constituencies. Such structures are best suited for firms whose constituencies face information asymmetries and have differing interests. It is because the corporation demonstrably satisfies those conditions that vesting the power of fiat in a central decisionmaker—such as the board of directors—is the essential characteristic of its governance.

Shareholders have widely divergent interests and distinctly different access to information. To be sure, most shareholders invest in a corporation expecting financial gains, but once uncertainty is introduced shareholder opinions on which course will maximize share value are likely to vary widely. In addition, shareholder investment time horizons vary from short-term speculation to long-term buy-and-hold strategies, which in turn is likely to result in disagreements about corporate strategy. Likewise, shareholders in different tax brackets are likely to disagree about

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[48] *See* Stephen Bainbridge, *A Corporation is Not a Democracy*, BAINBRIDGE ON CORPS. (Sep. 14, 2025), https://www.bainbridgeoncorporations.com/p/a-corporation-is-not-a-democracy. The discussion that follows is a brief summary of my theory of director primacy. The foundational law review article is Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2002).

[49] Manson v. Curtis, 119 N.E. 559, 562 (N.Y. 1918).

[50] KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 68–70 (1974).

such matters as dividend policy, as are shareholders who disagree about the merits of allowing management to invest the firm's free cash flow in new projects.

As to Arrow's information condition, shareholders lack incentives to gather the information necessary to actively participate in decision making. A rational shareholder will expend the effort necessary to make informed decisions only if the expected benefits of doing so outweigh the costs. Given the length and complexity of corporate disclosure documents, the opportunity cost required for making informed decisions is both high and apparent. In contrast, the expected benefits of becoming informed are quite low, as most shareholders' holdings are too small to have significant effect on a vote's outcome. Accordingly, corporate shareholders are rationally apathetic.

In sum, it would be surprising if the modern public corporation's governance arrangements attempted to make use of consensus-based decision making. Given the collective action problems inherent to such a large number of potential decisionmakers, the differing interests of shareholders, and their varying levels of knowledge about the firm, it is "cheaper and more efficient to transmit all the pieces of information once to a central place" and to have the central office "make the collective decision and transmit it rather than retransmit all the information on which the decision is based." Shareholders therefore will prefer to irrevocably delegate decision making authority to some smaller group; namely, the board of directors.

Strong limits on shareholder control are essential if that optimal allocation of decision making authority is to be protected. Any meaningful degree of shareholder control necessarily requires that shareholders review management decisions, and step in when management performance falters to effect a change in policy or personnel. Giving shareholders this power of review differs little from giving them the power to make management decisions in the first place. Even though shareholders probably would not micromanage portfolio corporations, vesting them with the power to review board decisions inevitably shifts some portion of the board's authority to them.

As Arrow explained:

> Clearly, a sufficiently strict and continuous organ of [accountability] can easily amount to a denial of authority. If every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B and hence no solution to the original problem.

This remains true even if only major decisions of A are reviewed by B.

And that is precisely why Rule 14a-8 is inconsistent with the basic organizing principle of corporate governance and ought to be repealed. As we shall see, despite the exclusions for proposals that lack economic relevance (Rule 14a-8(i)(5)) and ordinary business matters (Rule 14a-8(i)(7)), shareholders have repeatedly tried to use the Rule to micromanage corporations.

Put simply, democracy is not an appropriate metaphor for corporate governance. It thus cannot serve as a justification for the shareholder proposal rule.

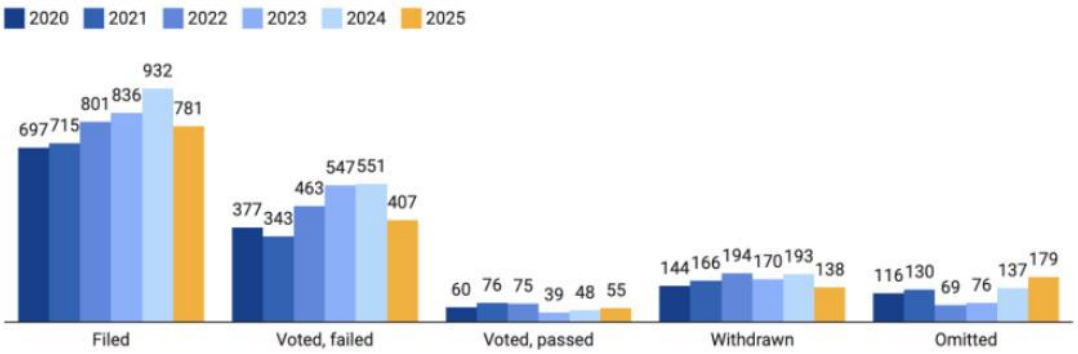
Responses to Specific Commission Questions

In the proposing release, the SEC set out 13 questions it wished commenters to address.

Response to Questions 1 and 4

1. "Should Rule 14a-8 be rescinded as proposed?"

4. "To what extent have costs to registrants associated with Rule 14a-8 (such as the costs of addressing and including shareholder proposals), the volume of shareholder proposals, and the degree of shareholder support changed since the adoption of Rule 14a-8?"According to a report in the Harvard Law School Forum on Corporate Governance, the number of shareholder proposals filed in this decade ranged from a low of 697 in 2020 to a peak of 932 in 2024.[51]



The vast majority of those proposals either failed, were withdrawn, or were omitted from the proxy statement pursuant to one of the exclusionary grounds in the Rule.

Because Rule 14a-8(i)(1)—as interpreted by the SEC—provides that a proposal that is not a proper subject of shareholder action may be omitted from the proxy statement unless it is phrased as a recommendation or request, the handful of proposals that pass are almost uniformly advisory in nature.

The question thus must be posed: Why should companies and the SEC be required to devote significant time, money, and effort to a process with such a tiny payoff?

Flaws in the Current Rule

High Costs and Burdens

The financial and administrative burdens associated with Rule 14a-8 are significant:

- Internal staff spending hours reviewing proposals, coordinating responses, and managing legal compliance.
- Legal fees and administrative costs associated with filing requests for SEC staff guidance on excluding proposals.
    - The SEC's recent decisions to suspend providing no action letters are likely to have unintended consequences in that risk averse companies will err on the side of including shareholder proposals. If the SEC does not rescind the Rule, it should resume providing no action guidance.

[51] Matteo Tonello, *2025 Proxy Season Review: From Escalation to Recalibration*, HARV. L. SCH. F. CORP. GOVERNANCE (Sep. 15, 2025), https://corpgov.law.harvard.edu/2025/09/15/2025-proxy-season-review-from-escalation-to-recalibration/.

- Expenses tied to drafting, printing, and distributing opposing statements within proxy materials.
- Direct outreach and negotiation efforts intended to reach a compromise or secure a proposal's withdrawal.
- Additional shareholder outreach to encourage opposition to the proposal.

One estimate suggests that a single shareholder proposal can cost a company as much as $150,000 in direct expenses, not including the considerable time and effort required to manage the process.[52]

The SEC proposing release reports that:

> One recent survey found that the aggregate direct costs over a four-year period that companies incurred to comply with Rule 14a-8 varied widely among 35 public company respondents: 20 percent reported four-year aggregate direct costs of less than $100,000; 25.7 percent reported between $100,000 and $250,000; and 17.1 percent reported between $251,000 and $500,000.… Another survey found that nearly 20 percent of the 35 responding companies, including some companies that have small market capitalization, noted that they spend over $500,000 in external costs addressing shareholder proposals in a typical proxy season.[53]

For many companies, these costs disproportionately benefit a small minority of shareholders while providing little value to the broader shareholder base.

The Commission's proposing release estimates that rescinding the Rule would provide annual aggregate savings for reporting companies of "approximately $29.7 million attributable to a reduction in internal burden hours and an additional $9.9 million attributable to a reduction in external costs, for a total of about $39.6 million."[54]

Litigation Risk and Settlement Leverage

Excluding a proposal, or trying to, may expose a company to litigation risk. The proposing release cites *DiNapoli v. BJ's* and the Heritage Foundation suit against Airbnb as examples.[55] The Commission argues this lets proponents use the Rule for leverage. Proponents can use Rule 14a-8 as leverage to extract concessions through private settlement even where they have little realistic chance of prevailing in an actual vote.

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[52] Daniel Clevenger, *SEC Proposes to Rescind Rule 14a-8 and Modernize Proxy Rules*, JD SUPRA (Sep. 22, 2026), https://www.jdsupra.com/legalnews/sec-proposes-to-rescind-rule-14a-8-and-8628808/.

[53] Proposing Release, supra note 2, at 36–37.

[54] *Id*. at 176.

[55] DiNapoli v. BJ's Wholesale Club Holdings, Inc., No. 26-cv-11075, 2026 WL 1762143 (D. Mass. Apr. 22, 2026); Heritage Found. & Am. Conservative Values ETF v. Airbnb, Inc., 1:25-cv-00676, 2026 WL 395797 (D.Del. Feb. 12, 2026).

Misuse by Activists

At least prior to the recent developments discussed below, using a shareholder proposal—rather than conducting a proxy solicitation—was dirt cheap. That differential has encouraged a cottage industry of hobbyist activists to make abundant use of Rule 14a-8.

In fact, Rule 14a-8 is disproportionately utilized by a handful of "corporate gadflies" who submit proposals on personal, political, or social issues rather than matters of economic importance to the company.

In 2022, for example, the top 10 most active proponents accounted for over 60% of submitted proposals. Notorious gadfly John Chevedden single handedly accounted for a whopping 155 proposals. James McRitchie and Kenneth Steiner each accounted for another 49.[56]

Moreover, union pension funds and other institutional investors often leverage the Rule to advance private agendas, such as labor disputes or political initiatives, rather than promoting shareholder value. These practices deviate from the Rule's intended purpose and impose additional costs on the majority of shareholders.[57]

Without Rule 14a-8, companies could allocate resources more effectively, investing in initiatives that directly contribute to shareholder value. The elimination of costly and time-consuming proposal processes would free management to address substantive business concerns.

Caveats

Two caveats to the discussion of costs in the preceding sections deserve acknowledgment. First, the Commission's figures capture only basic distribution costs; a serious campaign with a proxy solicitor, legal counsel, and advocacy materials will cost considerably more. Second, a proponent soliciting on its own must comply with the company's advance notice bylaws, which typically demand more disclosure than Rule 14a-8 and are policed in state court rather than through staff letters. The proposed Rule 14a-4 amendments would also reduce the leverage a self-soliciting proponent now enjoys by allowing the company to exercise discretionary authority against proposals it omits from its card.

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[56] 10th Anniversary Edition 2022 Proxy Season Review: Part 1 Rule 14a-8 Shareholder Proposals, 20221012P NYCBAR 14. Chevedden's ability to spam corporate proxy statements with hundreds of proposals year after year rests on two serious problems with the current rule.

First, the Rule simply does not require a proponent to have enough skin in the game. The Rule currently provides that a proponent must have held "(A) At least $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years; or (B) At least $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or (C) At least $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year." These ownership thresholds are outdated and fail to ensure that proposal proponents have a meaningful economic stake in the company.

Second, the current tiered holding periods are inadequate. All proponents should be required to have held shares for at least three years, so as to ensure that proposals come from long-term investors genuinely committed to the company's success.

[57] *See* John G. Matsusaka, Oguzhan Ozbas & Irene Yi, *Opportunistic Proposals by Union Shareholders* 26 (Marshall Sch. of Bus. Working Paper, No. 17-3, 2016), http://ssrn.com/abstract=2666064 (finding evidence of unions using "shareholder proposals opportunistically" in negotiations).

Neither caveat changes the bottom line. Higher spending is a choice proponents make when they believe the stakes justify it, which is precisely the signal a well-functioning system should require. Advance notice bylaws are a matter of state law and private ordering, which is where the Commission's proposal rightly locates the question. The Rule 14a-4 amendments remove only the ability to shift solicitation costs to the company, not the ability to solicit. A rule that subsidizes the activist by conscripting the company's proxy statement does not cure that problem; it simply transfers the cost to the passive majority. A proposal that cannot attract a proponent willing to spend a five-figure sum to advance it is not one the other shareholders should be forced to pay six figures to consider.

Distraction from Core Responsibilities

Shareholder primacy is not the organizing principle of corporate governance.

Director primacy is.

> Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to [the board of directors] honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.[58]

Rule 14a-8 undermines board primacy by forcing directors to engage with proposals that delve into operational matters traditionally reserved for management. This distraction erodes the business judgment rule's protections and detracts from boards' focus on long-term value creation.

To be sure, the Rule 14a-8(i)(7) exclusion allows companies to omit proposals related to ordinary business operations. As I demonstrated in my article, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal,* however, judicial and SEC decisions have largely eviscerated the ordinary business operations exclusion.[59] Corporate decisions involving "matters which have significant policy, economic or other implications inherent in them" may not be excluded as ordinary business matters, for example, which creates a gap through which countless proposals have made it onto corporate proxy statements. As a result, the exclusion no longer fulfills its core function of preventing shareholders from micromanaging the company. The exclusion thus should be revitalized to empower boards to exclude proposals that intrude on management operational prerogatives.

Repealing Rule 14a-8 would reaffirm the primacy of the board of directors in corporate governance. Directors are better positioned than shareholders to make informed decisions on operational and strategic matters. Eliminating the Rule would allow boards to focus on their fiduciary duties without the procedural distractions imposed by frivolous or ideological proposals.

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[58] Pollitz v. Wabash R. Co., 100 N.E. 721, 724 (N.Y. 1912).

[59] Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705 (2016).

Response to Question 2

In the proposing release, question 2 asks:

> Do companies and proponents have reliance interests in Rule 14a-8 that should be considered? If so, what are those interests and how can we balance the need to address the Commission's authority concerns with the potential effects on affected parties?

As question 2 suggests, the SEC recognizes that public corporations, shareholders, and, in a very few cases, even state lawmakers have adapted to a regulatory framework that has been in place longer than most of the relevant stakeholders have been alive (roughly 84 years). Accordingly, the proposing release notes that "Rule 14a-8 has been in existence for many years" and that "both shareholders and companies are likely to have shaped certain governance and engagement practices around the [R]ule's provisions."[60] In turn, the release acknowledges, this may have created "reliance interests in the current rule" and/or in "alternative approaches within the scope of the Commission's authority."[61]

Reliance Interests in Regulatory Policy

Federal law recognizes that regulated parties can develop reliance interests when they organize their affairs around an existing regulatory framework and therefore assume it will remain in operation. These reliance interests can be upset, for example, when an agency changes a longstanding policy. A number of US Supreme Court cases have held that an agency cannot simply ignore those settled expectations, specially where the prior policy has induced substantial reliance. Those cases teach that, as a practical matter, the longer a rule has been in place and the more conduct it has shaped, the harder those interests are to dismiss.

The Change of Policy Challenge

In *FCC v. Fox Television Stations*,[62] the FCC had gradually loosened its policy against the use of profanity on TV. In reviewing a Commission order finding certain comments made on Fox broadcasts, the FCC issued an order disavowing prior Commission policy "that the isolated use of an expletive ... was not indecent or could not be indecent." In reviewing that order, the Second Circuit:

> … relied in part on Circuit precedent requiring a more substantial explanation for agency action that changes prior policy. The Second Circuit has interpreted the Administrative Procedure Act and our opinion in *State Farm* as requiring agencies to make clear "'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive'" as well as "'why the new rule effectuates the statute as well as or better than the old rule.'"[63]

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[60] Proposing Release, *supra* note 2, at 34.

[61] *Id.* at 12.

[62] 556 U.S. 502 (2009).

[63] *Id.* at 514.

The majority SCOTUS opinion, however, concluded that "We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."[64] The new rule announced by the majority stated:

> An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. [citation omitted] And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. [citation omitted] It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.[65]

The Argument that Stakeholders Have Reliance Interests in Rule 14a-8

Some will argue that eight decades of regulatory stability give market participants a long time to build practices around a rule.

- Activist shareholders have structured their engagement strategies around Rule 14a-8's eligibility requirements, deadlines, and substantive standards.
- Companies have developed internal procedures for reviewing proposals, communicating with proponents, preparing opposition statements, and seeking no-action relief from the Commission.
    - Many advance-notice bylaws expressly carve out proposals made under Rule 14a-8, on the assumption that 14a-8 governs those proposals. Repeal would not make those carve-outs disappear. It would leave them pointing at a nonexistent regime.
- State legislators have been able to largely ignore the shareholder proposal question because they have been able to assume the relevant issues have been federalized.

The Trouble with that Argument

There are at least two critical problems with that argument.

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[64] *Id.* at 514.

[65] *Id.* at 515–16 There is an interesting discussion in Centro de Trabajadores Unidos v. Bessent, 167 F.4th 1218 (D.C. Cir. 2026), of whether "[t]he change-of-position challenge to agency statutory interpretation" remains valid post-Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). The DC Circuit explained that the change of policy line of cases rested on the *Chevron* doctrine that *Loper Bright* abrogated. The SEC should consider the impact of that decision on its current proposal.

The Lack of Regulatory Stability

Stability is hardly the right word to describe Rule 14a-8's regulatory history. Constant change is the right way of describing it.

When first adopted (as Rule X-14A-7) the shareholder proposal rule was about 200 words long. The rule has been amended 9 times just since 1998. As a result, according to the SEC release, it is now about 3,000 words long.

Not just the text of the Rule has changed. SEC interpretations of the Rule have frequently changed. Lately, as the Rule has become more politicized, those changes have come with every new Presidential administration:

- Staff Legal Bulletin No. 14I:
  - Issued in 2017 during the first Trump Administration
  - Encouraged companies seeking "no-action" relief under the ordinary business exception (Rule 14a-8(i)(7)) to include a discussion of the board of directors' analysis
  - Shifted the focus of the economic relevance exception (Rule 14a-8(i)(5)) to evaluate a proposal's significance to the company's specific business, independent of the ordinary business rule
  - Placed the burden on the proponent to demonstrate how a proposal is significantly related to the company's business
- Staff Legal Bulletin No. 14J:
  - Issued in 2018 during the first Trump Administration
  - Set forth new policy re the ordinary business and economic relevance exclusions
- Staff Legal Bulletin No. 14K:
  - Issued in 2019 during the first Trump Administration
  - Set forth new guidance re the ordinary business exclusion
  - Defined micromanagement standards
  - Outlined how boards should analyze proposals
- Staff Legal Bulletin No. 14L:
  - Issued in 2021 during the Biden Administration
  - Rescinded earlier SEC guidance (as contained in Staff Legal Bulletins 14I, 14J, and 14K) as to how the staff evaluates ordinary business and economic relevance exclusions
  - Made it much harder for public companies to exclude environmental, social, and governance (ESG) shareholder proposals from proxy statements
- Staff Legal Bulletin No. 14M:
  - Issued in 2025 during the second Trump administration
  - Rescinded SLB 14L.
  - Restored prior interpretations of ordinary business and economic relevance exceptions
  - Renewed emphasis on excluding proposals seeking to micromanage the company

That's five major policy changes in the space of eight years, two of which involved rescinding recently issued guidance promulgated by the SEC in prior administrations.

That is regulatory instability, not regulatory stability. It's hard to argue that stakeholders have strong reliance interests when the rules of the game are constantly changing.

Reliance Interests Do Not Preclude Change

Even if stakeholders have strong reliance interests in the continued existence of Rule 14a-8, it does not follow that the SEC must preserve Rule 14a-8 unchanged. It simply means that the Commission must justify change.

Recall from above that under *Fox Television* an agency changing policy need not show the new policy is superior to the old one. Instead, the SEC simply must show awareness that it is changing position, give good reasons, and give "a more detailed justification" when the prior policy "engendered serious reliance interests that must be taken into account."

One justification, which we discussed above, is that the SEC simply got it wrong back in 1942. The rule was bad policy. The SEC's authority to adopt it was debatable. The proposing release focuses on the latter. The final release should do even more on the former.

A second justification is available, but likely would require additional work by the Commission. As the SEC acknowledged in the proposing release, there may be a transition period that could last "several years" and "be associated with elevated litigation costs."

This is critical because the SCOTUS held in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*,[66] that even when an agency changes policy because it concluded that the prior policy was unlawful, the agency still must consider reliance interests in deciding how to unwind the prior policy, including forbearance, phased implementation, transition periods, and grandfathering.

In the final release, the SEC therefore should more expressly address transition measures. If the Commission concludes such measures are not warranted, it should explain why in painstaking detail.

Possible Transition Measures

- When the SEC amended Rule 14a-8 to increase the minimum stock ownership requirement and create a tiered requirement based on length of holding period, the new rules became effective on January 4, 2021. Recognizing that the effective date would cause companies and stakeholders problems as the proxy season was about to begin, the SEC delayed implementation of the new rules to January 1, 2022. It seems unlikely that the SEC will be able to rescind Rule 14a-8 before the 2027 proxy season begins. As it did in 2020, the SEC could similarly defer rescission to January 1, 2028.
    1. A delay would also provide time for companies to adopt private ordering approaches and for states to adopt legislative approaches.
- The reliance issues likely are more pronounced with respect to large accelerated filers, because they tend to be targeted more often. The SEC could rescind the Rule immediately for non-accelerated filers and phase-in rescission for accelerated and large accelerated filers.

[66] 591 U.S. 1 (2020).

- The SEC could issue guidance on "what do proponents do now?" by providing more detail than does the current release regarding such matters as Rule 14a-9 exposure for omitting proposals, the 14a-2(b) exemptions for proponents who self-solicit, and how notice-and-access applies to proponents.

Summation of the Reliance Issue Question

In sum, there likely are reliance interests at stake in connection with Rule 14a-8. But those interests cannot defeat the proposal. They simply require the SEC to dot all the i's and cross all the t's.

Response to Question 6

In the proposing release, the SEC asks:

> 6. To what extent have recent developments, including the potentially lower burdens of independent solicitation campaigns and the emergence of alternative shareholder engagement channels, weakened the original justifications for a Federal shareholder proposal rule? To what extent have costs to proponents associated with conducting an independent solicitation changed since the adoption of Rule 14a-8?

In my view, post-1942 developments have not merely undercut Rule 14a-8's original justifications, those developments have actually flipped the cost calculus on which the Rule rested.

Overview

As we have seen, in the absence of a shareholder proposal rule, a shareholder who wished to put an issue before the annual shareholder meeting was effectively obliged to conduct a proxy solicitation in compliance with the full panoply of federal proxy regulations. In most cases, especially when dealing with issue rather than election proxy contests, such a shareholder faced prohibitive printing, mailing, and solicitation costs. Hence, when the Commission adopted what was then Rule X-14A-7, Chairman Purcell defended it on the ground that including a proposal was a very small item of expense for the company.

Today the opposite is true. As we have seen, the Commission itself estimates that a company spends between $20,000 and $150,000 per proposal and survey evidence suggests that a meaningful fraction of companies spend more than $500,000 per season. Meanwhile, the basic cost of an independent solicitation has collapsed to the low five figures or less. A rule premised on cheap inclusion and expensive self-help thus now operates in a world of expensive inclusion and cheap self-help.

Three developments drive that inversion: the universal proxy card, the e-proxy and electronic voting infrastructure, and the rise of social media and other direct engagement channels. I take them up in turn.

The Universal Proxy Card

In my view, the single most important post-1942 development is one the Commission itself created. Rule 14a-19, adopted in 2021, requires every party in a contested director election to use a universal proxy card listing all duly nominated candidates. The UPC matters here in two distinct ways.

First, UPCs were intended to make—and likely have made—proxy contests substantially cheaper. Before Rule 14a-19, a dissident essentially had to persuade shareholders not only to vote in support of the dissident's specific proposal but also to do so using the dissident's proxy card. In addition, the dissident effectively had to solicit proxies from all shareholders.

This requirement was especially problematic because the dissident faced two major obstacles. First, the Rules on reimbursement of proxy expenses meant that the incumbent board of directors could freely spend corporate funds to defend their positions, while the dissident could obtain reimbursement of its expenses only if approved by the shareholders. This was a particular problem for issue campaigns, since the incumbent board remained in office and controlled what matters could be put to the shareholders for a vote. Second, rational shareholder apathy meant that many investors—especially retail investors—simply voted with management.

In contrast, under Rule 14a-19, the dissident need only solicit holders of 67 percent of the voting power, and because every shareholder receives a card bearing the dissident's nominees, the dissident in effect rides on the company's own distribution. The Commission estimated the median basic cost of a solicitation—proxy distribution fees and postage for the first mailing—at roughly $14,000, and the cost of a nominal solicitation relying on notice and access at $5,300 to $9,800 depending on market capitalization.[67] Compared to the costs incurred before the new rules, the floor has fallen dramatically.

Second—and this is the point most directly relevant to Question 6—universal proxy has turned the proposal-only solicitation into a practical tool. To be sure, Rule 14a-19 does not directly apply to a so-called zero-slate campaign, in which the proponent nominates no candidates. But a dissident soliciting support for a proposal can end-run that limitation by simply listing the company's nominees on its card. The proponent's card thereby becomes a complete ballot, and a shareholder loses nothing by using it. The Commission staff has identified at least three such campaigns since 2022—the United Mine Workers at Warrior Met Coal and Starboard Value at News Corporation in 2024, and Stilwell at Central Plains Bancshares in 2026—plus threatened campaigns by Trillium at BJ's Wholesale and the Communications Workers at Nexstar.[68]

Proponents ranging from a labor union to a hedge fund to a small-cap activist have thus shown that a shareholder can put proposals before the entire electorate without relying on Rule 14a-8 at all. If anything, the problem those campaigns revealed ran in the opposite direction, because under current Rule 14a-4(c), a proponent that satisfies the solicitation threshold can pressure the company into carrying its proposals on the company's card, thereby benefiting from the company's solicitation of all shareholders without bearing the full cost. Currently, if a company excludes an independent shareholder proposal from its own proxy card, a dissident running a

[67] Universal Proxy, Release No. 34-93596, 86 Fed. Reg. 68330 (Dec. 1, 2021).

[68] Proposing Release, *supra* note 2, at 72 n.223.

zero-slate campaign distributes an alternative card containing both the company's director nominees and the independent proposal. Because institutional investors want to vote on both, companies may cave and add the proposal to the official management card to avoid losing voting control via the dissident's card. That is a problem of cheap self-help being too effective, not too expensive.[69]

Notice, Access, and E-voting

The new universal proxy card system is just one—albeit a very important—piece of a new legal world in which the cost of soliciting shareholders has changed dramatically. In 1942, reaching shareholders required printing and mailing physical materials to record holders, which usually was preceded by state court litigation over access to the shareholder list. In contrast, the Commission's e-proxy rules now allow anyone soliciting proxies to post materials online and mail shareholders a notice directing them to the website.[70] The shift to electronic communications is nearly complete. According to Broadridge, 90 percent of the proxy communications it processed in 2025 were digital, and more than 97 percent of voted shares were cast electronically.[71]

These changes matter because reaching shareholders is no longer the expensive, labor-intensive undertaking it was in 1942. Once proxy materials are posted online, the cost of reaching additional shareholders is negligible, and shareholders can vote with just a few clicks.

The Concentration of Share Ownership

Share ownership has become much more concentrated since 1942. A proponent who wins the support of a relatively small number of large institutional investors can secure a substantial share of the votes cast. Against that backdrop, the solicitation thresholds in Rules 14a-4(c)(2) and 14a-

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[69] Granted, the Commission's proposed amendments to Rule 14a-4 would address this problem. The proposed amendment to Rule 14a-4(c) eliminates the solicitation threshold and allows a company to leave a non-Rule 14a-8 proposal off its proxy card entirely while retaining discretionary voting authority to vote against it on all management proxies received.

I note that the Commission's proposed changes to Rule 14a-4 also solve the Shadow SEC's claim that, absent Rule 14a-8, "corporation risks material omission liability, and shareholders risk having their authority misused to vote on an uninformed basis." Coates et al. , *supra* note 30. They posit that:

> Rule 14a-8 addresses another gap in disclosure when (as customary) a corporation solicits the authority to vote shareholders'shares on any matter that may arise at a shareholder meeting. If such requests are made with corporate knowledge that a shareholder intends to seek action on a proposal at the meeting, the corporation would need to communicate its position about the proposal as part of its proxy solicitation.

Id. But that is precisely the problem solved by the proposed Rule 14a-4 amendments, which they entirely ignore. Indeed, their letter never mentions the 14a-4 component of the Commission's proposal, which is a significant gap given their liability argument. They criticize the Release for not considering how the omission problem would be handled, while ignoring the part of the same package that handles it.

[70] *Amendments to Rules Requiring Internet Availability of Proxy Materials*, Release No. 33-9108, 75 Fed. Reg. 9074 (Feb. 26, 2010).

[71] Broadridge, *2025 Proxy Season Key Stats and Performance Ratings*, BROADRIDGE, https://www.broadridge.com/campaign/2025-proxy-season-key-stats-and-performance-ratings.

19 are considerably less burdensome in practice than the percentages alone might suggest. In turn, the availability of those provisions means that the costs of a dissident's solicitation have fallen significantly.

Social Media and Other Engagement Channels

The Commission correctly posits that Rule 14a-8 was never meant to serve as a general forum for shareholder communication. But that is increasingly what it has become.[72] And to the extent that shareholders use the Rule for that purpose, technology has largely made it unnecessary.

I should acknowledge that this was not always my view. In earlier work, I argued that the broad definition of solicitation potentially exposed shareholders who talked with one another to liability and subjected them to the risk of being obliged to conduct an expensive full solicitation. I further argued that the Commission's 1992 amendments had failed to fully eliminate those risk. As such, I argued, the proxy rules significantly impeded shareholder collective action.[73]

What has changed since I set out those views isn't so much the law but the practicalities. Insofar as the law is concerned, the pertinent safe harbors remain much as they were in 1992. Rule 14a-2(b)(1) still exempts communications by shareholders who do not seek proxy authority, while Rule 14a-1(l)(2)(iv) still excludes public statements about how a shareholder intends to vote. What has changed, and changed dramatically, is the ease with which shareholders can take advantage of those exemptions. In 1992, getting a message to other shareholders generally meant printing and mailing materials or paying for space in a newspaper. Today, a shareholder can publish the same message on a website, Substack, X, or LinkedIn for virtually nothing. That message can reach interested investors, journalists, and proxy advisors almost immediately. The barriers to shareholder communication that concerned me thirty years ago have therefore become much lower in practice.

There is substantial evidence that these channels work. As Seth Oranburg showed a decade ago, activists can reach virtually all shareholders and shape public opinion through social networks with little regulatory friction.[74] Platforms such as Say have given retail holders a direct line to management, as Tesla's use of the platform illustrates.[6] In a particularly striking example, conservative activist Robby Starbuck successfully pressured many major companies to revise their DEI commitments using nothing more than his massive social media following. Unlike corporate governance activists of old, Starbuck never filed a single Rule 14a-8 proposal.[75] Whatever one makes of the merits of Starbuck's campaign, his success demonstrates that a determined shareholder can now influence corporate policy far more cheaply and effectively outside the proxy system than within it.

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[72] Proposing Release, *supra* note 2, at 42.

[73] *See generally* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Right*s, 53 UCLA L. REV. 601 (2006).

[74] Seth C. Oranburg, *A Little Birdie Said: How Twitter Is Disrupting Shareholder Activism*, 20 FORDHAM J. CORP. & FIN. L. 695, 707 (2015).

[75] Donna Fuscaldo, *Say Gives Retail Investors a Voice and Tesla Listens*, FORBES (Feb. 19, 2019), https://www.forbes.com/sites/donnafuscaldo/2019/02/19/say-gives-retail-investors-a-voice-and-tesla-listens/.

The availability of these alternative engagement channels also answer the concern that rescission will confine engagement to large holders with access to the boardroom. A retail investor with a compelling argument and a social media account has a broader audience today than a 1942 proponent whose 100-word supporting statement was buried in a printed proxy statement.

Summation re Question 6

In sum, the universal proxy card, the e-proxy infrastructure, and the rise of social media and direct engagement platforms have collectively stripped away the practical justification for a federal mandate. Whatever the merits of Rule 14a-8 in 1942, shareholders who wish to be heard today have more effective—and, in some cases, cheaper and faster—means of being heard.[76]

Conclusion

The shareholder proposal rule, Securities Exchange Act Rule 14a-8, has long been heralded as a democratizing tool in corporate governance, allowing shareholders to voice their concerns through inclusion in company proxy materials. While well-intentioned, Rule 14a-8 is no longer fit for purpose. The rule imposes disproportionate costs on issuers, enables misuse by a small group of activists, and distracts boards from their core fiduciary responsibilities. Attempts at reform have failed to address these systemic flaws. The SEC should rescind the Rule.

[76] The Shadow SEC's comment letter posits that:

> [S]hareholders will use alternative tools in lieu of Rule 14a-8 proposals. Those tools may well disrupt corporate governance far more than non-binding proposals submitted under Rule 14a-8. Proxy fights, coalitions with hedge fund activists, withhold-vote campaigns, negative votes on management proposals, shareholder-sponsored binding bylaw amendments, and lawsuits are among those tools. Say-on-pay votes will continue as they are mandated by statute.

Coates et al., *supra* note 30.

Precisely! This passage simply confirms that there are alternative engagement methods, which confirms that Rule 14a-8 is unnecessary. Moreover, as a matter of sound policy, using those alternative tools is precisely what we want shareholders to do. Those tools are costly and must be self-funded, which means only proposals with real investor backing will be pursued. Under the current rule, the company bears the cost of proposals that routinely draw single-digit support. The letter treats increased friction as a harm without asking whether the subsidy was producing net benefits. Ironically, that is the same failure it accuses the SEC of.