

Rule 14a-8 and the Governance Architecture of the Exchange Act

A Historical and Institutional Account of the Shareholder Proposal Rule

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Executive Summary

Rule 14a-8 requires a public company to carry a qualifying shareholder's proposal in its own proxy materials. This paper asks on what authority that obligation rests. It traces the answer from the drafting of the Securities Exchange Act of 1934 to the Division of Corporation Finance's withdrawal from the process in August 2026. It closes on the Commission's proposal, the following month, to rescind the rule. The account is built from the primary record. It includes the Federal Register releases, the Securities and Exchange Commission's adopting documents, and the printed transcript of the 1943 House hearings on the proxy rules. It also includes the fourteen Staff Legal Bulletins and the reported opinions. The paper does not address proxy advisory firms or institutional voting policy, which bear on how votes are cast after a proposal has been included.

The federal obligation to carry shareholder proposals was never authorized by Congress in specific terms. It was constructed administratively on a statutory silence. That silence was filled with substantive content the Commission took from state law rather than supplied itself. The obligation was defended in 1943 on committee report language because the statute said nothing. And it was sustained for eighty years by a no-action process the Commission itself repeatedly proposed to abandon and stopped operating in August 2026. In September 2026 the Commission proposed to rescind the rule as beyond its statutory authority.

The shareholding public Section 14(a) addressed was recent, created within about fifteen years by investment banks building a national network to sell new issues. Section 14(a) itself supplies no substantive standard. It makes it unlawful to solicit a proxy in contravention of such rules as the Commission may prescribe, bounded only by the public interest and the protection of investors. Elsewhere in the same Act Congress enumerated required content in detail. Section 12(b), governing registration, lists eleven categories of information an application must contain and then a residual for any further financial statements the Commission deems necessary. Section 14 enumerates nothing. Five documents of the period were in a position to record a security holder proposing, submitting, or placing a matter before a meeting. Not one does. They are the two committee reports, the committee staff history of the market, the bill as introduced, and the account of the investigation its own counsel published in 1939. In all of them the stockholder receives information and votes on questions somebody else has decided to put. Who decides is what Congress left unanswered.

The access Congress had before it in 1934 was the shareholder list, used by an opponent at the opponent's own expense. The Commission's own first rules matched that. In 1935 it required an issuer to mail a record holder's proxy material to everyone management had solicited, at the holder's cost. That is the ancestor of Rule 14a-7 rather than of Rule 14a-8. The obligation to carry proposals predates any rule expressly creating it. The Commission's first affirmative proxy rules, of 1938, contained no express provision on the subject. The Commission enforced an inclusion requirement anyway, under the anti-fraud rule, on a theory that omitting a proposal management knew would be presented rendered the solicitation misleading. The 1940 amendments then did two things. They closed the route by which management could rely on proxies solicited for other purposes to supply the quorum that defeated a disclosed proposal. And they wrote into Schedule 14A an express procedure permitting management to give notice of a proposal without putting it on the proxy for a vote. The December 1942 revision added the proponent's hundred-word statement, the proponent's name and address, and a limitation to

proposals that are a proper subject for shareholder action. It also added an advance-notice requirement that restricted access, and it removed management's election. That is a larger change than the conventional account allows, and a different one.

The authority for all of it was put to the Commission directly at the 1943 hearings and was left unresolved. SEC Chairman Purcell testified that the rules had been promulgated principally and almost entirely on a disclosure theory. He conceded that requiring a company to provide a ballot space could not fairly be described as disclosure. Baldwin Bane, the Director of the Division of Corporation Finance, said the same and located the justification in the committee reports, observing that Congress did not say disclosure in the section itself. Members who objected read the same silence the other way. Both sides asked Congress to clarify the language. Congress did not. The operative language of Section 14(a) is unchanged. The two amendments Congress has made to the subsection since, in 1964 and 2010, left the question where the hearings left it.

The rule's substantive content came from elsewhere. The phrase proper subject for action stood in the rule undefined from 1942 until 1954. The Commission filled it with the law of the state of incorporation. It did so first in testimony in 1943, then in a Division letter of January 1945, then in the rule text in 1954. The federal rule governs what management must circulate. What shareholders may decide remains a question of state law, and the federal rule cannot create an entitlement that state law withholds. That premise is what the current dispute turns on.

Formal rulemaking built the architecture, and every one of the thirteen grounds for omission was adopted by amendment. Applying those grounds, however, belonged to an instrument of a different character. Companies asserting a right to omit have been required to file their reasons since 1947. The staff's answer to that filing was advisory. It bound nobody and carried no precedential weight. Review was formally available and practically closed, because the Commission declined it and kept the question out of a court of appeals. It was nonetheless the operative standard, because litigation was the only alternative and almost nobody took it. There were thirteen reported decisions through 1990, against what the Commission told a court in 1992 were roughly 350 requests a year.

No statutory standard sat underneath it. The operative rule could therefore be moved by each successive administration, through instruments that require no amendment to the rule text and no reasoned explanation of the kind a rulemaking must carry. In the case of the staff legal bulletin those instruments require no Commission vote and no notice and comment at all. The order of those two claims matters. The statutory silence is the cause and the oscillation is the effect. In 1976 the Commission announced the significant social policy doctrine in the Federal Register. It did so in the same release in which it concluded that it could not write the line as a rule, because no reasonable standard was apparent. What it could not write, it assigned to correspondence. The Staff Legal Bulletins, from 2001, became the instrument through which that assignment was exercised and repeatedly reversed. Fourteen issued through 2025. Three times the Division reversed a position and said the earlier one had been wrong. Once it recorded that it had run a ground for three decades as though the Commission's amendment to it had not occurred. On the ordinary business ground it moved the test in 2017, extended it in 2018 and 2019, reversed it in 2021, and restored part of it in 2025. No rule text changed and no decision intervened. The license was the Commission's own, and the 2025 bulletin cites it.

The Commission considered withdrawing from the process across fifty-four years, and Section X sets out each occasion. In 1972 it considered handing inclusion to the courts and declined. Between 1977 and 1980 it held the widest inquiry it has made into the rule, and that record is the strongest evidence against the thesis stated here. Commentators said the rule was working, and the endorsement came from the corporate side while the complaints came from proponents. Three things answer it. First, a consensus that a rule is useful is not authority to make it, and the staff report that came out of the inquiry never asks the authority question. Second, the same proceeding shows the Commission doubting its own reach. In February 1977 it divided two to two on a set of proposals and told its staff to take no position. The Commission's stated ground was that the policy issues raised had implications beyond the ambit of the federal securities laws. Third, the rule the commentators endorsed is not the rule that operates now. Four fifths of what shareholders voted on in 1979 concerned ordinary corporate governance. Approval of that rule is not approval of a different one.

In 1982 the Commission asked the public whether access should be provided under the Exchange Act at all or left to state law. The same release proposed eliminating eleven of the thirteen grounds. It canvassed withdrawing from the field in 1997 and declined to reduce its role in 1998. It asked a third time in 2019 and declined again in 2020, and withdrew its 2022 proposal in June 2025 without giving a reason. In November 2025 the Division suspended substantive responses for the season, preserving one ground. It received no request on that ground for the entire season, and on August 14, 2026, it discontinued responding altogether. The rule still requires a company to file its reasons for omitting a proposal. The Commission no longer answers. On September 16, 2026 it proposed to rescind the rule altogether.

Litigation replaced the process. Six proponent suits were filed over exclusions in the 2026 season. Three settled with the company agreeing to include or implement the proposal, one preliminary injunction was granted, and two were denied. On that record access is distributed by the capacity to bring a suit rather than by the ownership thresholds the rule sets. The Commission's own staff warned of exactly that in 1980. At the same time, the state-law premise is contested. In October 2025 the Chair set out how a Delaware company could exclude a precatory proposal under Rule 14a-8(i)(1). The ground would be an opinion of counsel that it is not a proper subject under Delaware law. He would extend the same deference to restrictions a company adopts in its own bylaws and to state statutes. Whether Delaware law recognizes a precatory proposal as a shareholder right, or merely tolerates a federal practice, is unsettled. Both sides argue from the same authorities.

What remains is the question the record leaves. The rule has mostly been defended, and attacked, on grounds concerning what shareholders want and what corporations are for. Two writers put it instead as a question about what Congress enacted, and their exchange did not settle it. The best argument that Congress supplied the authority is in a statute rather than a case. In 2010 Congress required a say-on-pay vote and provided that it may not be read to limit shareholders' ability to make proposals related to executive compensation for inclusion in proxy materials. But that is a rule of construction about the new vote, and it presupposes the practice rather than conferring it. In the same subsection Congress showed what an authorization looks like, granting express power over the inclusion of shareholder nominees. It wrote nothing of the kind for proposals. No court has settled the question either. *Transamerica* is where it is supposed to have been settled. There the federal court of appeals for the Third Circuit held that the proposals were proper subjects under Delaware law, and that decided the

case. Then, in dicta, it relied not on the statutory language but on a committee report, claiming the intent of Congress was “to require fair opportunity for the operation of corporate suffrage.” Two panels of the D.C. Circuit later read the same two committee reports twenty-one months apart and drew opposite inferences.

The Commission has now proposed to rescind Rule 14a-8. Its first ground is that the rule exceeds the Commission’s authority under Section 14(a). Its second is policy, which the release states as independent of the first. The release’s theory is narrower than this paper’s. It objects to federal standards that displace state law. It does not decide whether an obligation confined to state law would be authorized. Nor does it take up the 1943 request for clarification or the 2010 nominee grant. After *Loper Bright*, a court would owe the Commission’s new reading no more deference than its old one. A rescission sustained on policy alone would leave a later Commission free to adopt a rule again. The choice is not between a rule and no rule. Congress can authorize a shareholder proposal mechanism and set its outer limits, or decline and leave the subject to state corporate law. Either settles it. Both sides asked Congress to choose at the first hearings ever held on this rule. The question is still open, and it is still Congress’s. The Commission’s proposal says as much.

I. Introduction

Rule 14a-8, made under the Securities Exchange Act of 1934, requires a public company to carry a qualifying shareholder's proposal in its own proxy materials, at the company's expense. The rule sets who may submit, on what subjects, and on what grounds a company may refuse. It has been in continuous operation since its predecessor was adopted in December 1942, and it has been amended, reinterpreted, and litigated over ever since. This paper asks a question prior to all of that, on what authority the obligation rests. It answers from the primary record, and above all from the printed transcript of the 1943 House hearings on the proxy rules. There the question was put to the Securities and Exchange Commission ("Commission" or "SEC") and left unresolved.¹

The paper advances a thesis, and it is stated here so a reader can test it against the record that follows. The federal obligation to carry shareholder proposals was never authorized by Congress in specific terms. It was constructed administratively on a statutory silence. That silence was filled with substantive content the Commission took from state law rather than supplied itself. The obligation was defended in 1943 on committee report language because the statute said nothing. And it was sustained by a no-action process the Commission itself repeatedly proposed to abandon and stopped operating in August 2026. In September 2026 the Commission proposed to rescind the rule as beyond its statutory authority. Section XII.F takes up that proposal.

Nothing in the statute fixed a standard for inclusion. What the rule meant in practice was therefore whatever the sitting Commission said it meant, and that changed with each one. Changing it required no amendment to the rule text, and no reasoned explanation of the kind a rulemaking must carry. A staff legal bulletin issues without a Commission vote and without public comment. The order matters. The silence is the cause and the oscillation is the effect.

The account is confined to the rule governing inclusion, and it asks what a shareholder may place before other shareholders in management's proxy materials. The arguments made for and against the rule are taken up in Section XII, where each is stated in the terms of whoever makes it. This paper does not address proxy advisory firms or the voting policies of institutional investors. Those bear on how votes are cast once a proposal has been included, which is downstream of every question asked here. Where a development in that field falls within a period the paper describes, it is recorded as a fact of the regulatory landscape and not assessed.

II. The Market Before the Act, 1820 to 1934

The record of the 1943 hearings opens with a document that is not about proxies at all. Before any Commission witness was heard, the committee printed a written statement by Paul W. Frum,

¹ Rule 14a-8 is codified at 17 C.F.R. § 240.14a-8 (2025), <https://www.law.cornell.edu/cfr/text/17/240.14a-8>. For the rule's early history, see Solicitation of Proxies Under the Act, 7 Fed. Reg. 10,655 (Dec. 22, 1942) (adopting Rule X-14A-7, the predecessor shareholder proposal rule), F.R. Doc. 42-13669, filed Dec. 21, 1942. The document as printed carries no release number and no date of Commission action. The number 3347 and the date December 18, 1942 are supplied by later Commission releases and by the secondary literature. For historical overview, see George W. Dent, Jr., *SEC Rule 14a-8: A Study in Regulatory Failure*, 30 N.Y.L. SCH. L. REV. 1 (1985) [*hereinafter* Dent, *Regulatory Failure*]; Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129 (1993).

special counsel to its own Securities Acts Subcommittee, titled *History and Development of Security Financing and Investment Banking* in the United States.² The statement is committee staff work rather than Commission testimony, and it is used here as background. It is also the record's only sustained account of the market the Exchange Act was written to regulate.

What it establishes, in seven parts, is that the shareholder the Act addressed did not exist for most of the country's history. When that shareholder did appear, it was not by accident.

Before 1820 there was no security financing of industry and business at all, and no investment banking system to channel surplus savings into productive uses. Business units were small, the corporate form was little used, and no substantial class held surplus savings to be gathered.³ Between 1820 and 1860 security financing was practically confined to government securities, federal, state and municipal, together with the beginnings of railroad finance. The population was overwhelmingly rural. Industrial enterprises were founded with small capital and grew by reinvesting profits and borrowing from banks and acquaintances. Real estate financing moved through individual mortgages. The corporate form was used very little, except in railroading.⁴ Between 1860 and 1880 the railroads were practically the exclusive occupants of the field of corporate security financing. The United States remained a debtor nation and foreign funds remained the principal source of capital.⁵

Across all three periods Frum records the same two absences, and he records them three times. There was no substantial class of small investors, individual or institutional. And information about the returns, profits and condition of industrial and business enterprises was practically unavailable to the public, who were generally unfamiliar with securities.⁶ Frum treats the two absences as related. The general public did not hold securities in part because it could not learn anything about them.

The change begins between 1880 and 1914. The nation emerged from its predominantly rural economy, the population nearly doubled, and the urban share rose to nearly one half. For the first time the value of manufactured products exceeded the value of agricultural products. Industrial and business units became larger and more widely known to potential investors, and information upon their operations began to be made available to the public in varying degrees. A class of small investors began to appear after the turn of the century. It remained unimportant as a source of capital until about 1914.⁷

It stayed unimportant because of how securities were distributed, not because of attitudes about ownership. That distinction is the part of Frum's account that bears most directly on everything that follows. Under the system then in use, an originating banker bought an issue outright and resold it at an advance to a purchase group, which resold it at a further step-up to a larger banking group. The securities reached the public only through the manager's own employees and agents. Those distributing

² Security and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate & Foreign Com., 78th Cong., pt. 1, at 1 (1943) (transcript published 1944), <https://hdl.handle.net/2027/mdp.39015030433604> (History and Development of Security Financing and Investment Banking in the United States, statement of Paul W. Frum, special counsel to the Securities Acts Subcommittee, House Committee on Interstate and Foreign Commerce) [*hereinafter* 1943 Hearings].

³ 1943 Hearings, *supra* note 2, at 1.

⁴ *Id.* at 2.

⁵ *Id.* at 2–3.

⁶ *Id.* at 2, 3. The two absences are stated separately for each of the three periods and are treated by Frum as related.

⁷ *Id.* at 4.

organizations were few in number and concentrated in the eastern and northeastern parts of the country. Distribution was often accomplished in three to six months for relatively small issues, but frequently took much longer, two years or more and on occasion over five. Purchase and banking groups were characteristically set up to last a year with broad power of extension, and there are records of such groups continuing from two to five years or more. The long period of distribution occasionally froze bank credits and produced financial crises, as in the panic of 1903. Spreads between what the issuer received and what the public paid were larger than they later became.⁸

Frum's assessment of that system is what the section turns on. It was adapted and effective only to distribute a limited number of new issues in substantial blocks. The buyers were foreign investors, a limited number of large domestic institutional investors, and wealthy individuals with whom the manager and his agents had a close customer relationship. The distribution reached only a restricted area of the country. It therefore reflected and tended to perpetuate a national economic situation in which small individual and small institutional investors, and the larger part of the country, were of negligible importance as sources of capital for security financing.⁹ The distribution system did not merely fail to reach small investors. It was a reason they did not matter.

What displaced it was demand for capital. Between 1914 and 1933 industrial expansion, including the arrival of the automobile, radio, petroleum, aircraft and chemical industries as well as the effect of income and estate taxation on the older sources of investment capital, combined to require a different method. The total volume of new corporate issues rose from \$1.4 billion in 1915 to nearly \$8 billion in 1929. The United States became for the first time a creditor nation and foreign funds became relatively unimportant. The widespread distribution of federal bonds during World War I and the wider availability of security information left the general public familiar with securities and, in Frum's phrase, "security investment conscious."¹⁰

As early as 1919 a leading investment banker, whom Frum does not name, publicly called attention to the change and said that under the new conditions "successful distribution of large volumes of new securities can only be carried on by following wealth into the millions of small rivulets and channels into which it now flows."¹¹ The old method, distribution by the manager through his own employees, became wholly inadequate, and a distributing organization of national scope became necessary.

The mechanism that answered that need was the selling syndicate and then the selling group. Members of a selling group acted as principals and not as agents of the manager.¹² Distribution ceased to be something a single house did through its own staff in a few eastern cities. It became something a national body of dealers did on its own account. The period of distribution fell to thirty or sixty days. By

⁸ *Id.* at 4–5.

⁹ *Id.* at 5 (the system was adapted and effective only to distribute a limited number and volume of new issues in substantial blocks to foreign investors, to a limited number of large domestic institutional investors and wealthy individuals with which the manager and his agents had a close customer relationship, and only in a restricted area of the country, and it reflected and tended to perpetuate a national economic situation in which small individual and small institutional investors and the larger part of the country were of negligible importance as sources of capital for security financing).

¹⁰ *Id.* at 6.

¹¹ *Id.* at 6–7.

¹² *Id.* at 7 (members of a selling syndicate or group always acted as principals and not as agents of the manager or originating banker).

1938 to 1940 the average duration of an original distribution was eleven days for utility bond and note issues and nine days for industrial.¹³

That is the shareholding public the Exchange Act found in 1934, and Frum's account establishes something about it that the standard account does not. Dispersed ownership is usually described as a condition, a fact about the modern corporation that such an account observes and that federal regulation then had to accommodate. On the record of these hearings, it is better understood as a product. Frum says so himself. The new method, on his account, produced wide and well-digested distribution and the dispersion of ownership of American business and industry among bona fide investors scattered throughout the country. The dispersed shareholder was assembled within about fifteen years by an industry solving a distribution problem. Nobody built the shareholding public in order to give it a vote. The governance consequences came afterward, and the entire subsequent argument about what such a shareholder is entitled to do, which is the subject of this paper, is an argument about a constituency created for a different purpose.

Frum does not take the story further, and the limit should be stated. Nothing in his statement discusses proxies, shareholder voting, or communication among shareholders. He closes by noting that along with these developments came the speculative and other excesses which gave rise to the two Acts. He refers those matters to SEC Chairman Ganson Purcell's opening statement before the full committee in October 1941. The abuses themselves are the subject of the next section.¹⁴

III. What Congress Said, and What It Left Out

A. The Collapse and the Divorce of Ownership from Control

The Securities Exchange Act of 1934 was enacted in the aftermath of the stock market collapse of 1929 and the severe economic contraction that followed. The collapse and the speculative practices before it damaged public confidence in the integrity of financial markets and in the governance of large public corporations. The contraction as a general economic condition did not. The legislative record of 1933 and 1934 rests on those practices and on the abuses the Pecora hearings documented, not on Depression-era economic policy more broadly.¹⁵ The congressional response was shaped by the Senate Banking and Currency Committee's investigation of stock exchange, banking, and securities market practices. Ferdinand Pecora served as its counsel from January 1933 to July 1934.¹⁶ Section III.B sets its treatment of proxies against the committee's report on the bill.

The Exchange Act created the Securities and Exchange Commission, established federal regulation of securities exchanges and broker-dealers, and required ongoing public disclosure from

¹³ *Id.* at 8. For Frum's own summary of the result, see *id.* at 7.

¹⁴ 1943 Hearings, *supra* note 2, at 8. The record citation Frum gives for Purcell's statement is volume I, pages 3 to 92.

¹⁵ H.R. Rep. No. 73-1383, at 2-3 (1934), <https://hdl.handle.net/2027/nnc1.cu04274776>. Under the heading The General Purposes of the Bill, the committee gives the object of the bill as reaching the causes of the unnecessary, unwise and destructive speculation condemned by the President's message of February 9, 1934, and states the lesson of 1921 to 1929 as the ground for changing the practices of the exchanges and the relations between listed corporations and the investing public.

¹⁶ FERDINAND PECORA, WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS (Simon & Schuster 1939) (the investigation's counsel summarizing its essential story for the general reader, five years after it closed).

companies with securities listed on registered exchanges. Section 14(a) delegated to the new Commission authority to regulate proxy solicitation in connection with registered securities.¹⁷

The governance conditions that Section 14(a) addressed were closely connected to a structural transformation that Adolf Berle and Gardiner Means analyzed in *The Modern Corporation and Private Property* (1932).¹⁸ Congress stated the same proposition in its own words. The House Report records that ownership and control are in most cases largely divorced, and that nearly half of corporate wealth sat in the two hundred largest nonbanking corporations, each owned by thousands of investors and controlled by holders of a very small proportion of the stock.¹⁹ Section IV.A sets out what that left the dispersed holder in practice, on the Commission's own finding of 1938.

B. The “Fair Corporate Suffrage” Language and Its Limits

The House Report accompanying the Exchange Act stated that:

*“[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies. Insiders having little or no substantial interest in the properties they manage have often retained their control without an adequate disclosure of their interest and without an adequate explanation of the management policies they intend to pursue.”*²⁰

The first sentence has been quoted more often than the paragraph it opens. The two that follow are what the report was about. The passage sits under the heading Control of Unfair Practices by Corporate Insiders, after the provisions on insider holdings and short selling, and what it describes is entrenchment through solicitation. The phrase appears twice in a report of thirty-two pages, and both times in the passage this quotation opens.²¹ The remedy follows from that diagnosis. The House bill gave the Federal Trade Commission power to control the conditions under which proxies may be solicited, and named the object as preventing the recurrence of abuses which had frustrated the free exercise of the voting rights of stockholders.²²

¹⁷ Securities Exchange Act of 1934, ch. 404, § 14(a), 48 Stat. 881, 895 (codified as amended at 15 U.S.C. § 78n(a)), <https://uscode.house.gov/statviewer.htm?volume=48&page=895> (authorizing the Commission to adopt rules “necessary or appropriate in the public interest or for the protection of investors” governing proxy solicitation). For judicial description of Section 14(a)’s purpose, see *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964) (stating that the purpose of § 14(a) is “to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation”).

¹⁸ ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

¹⁹ H.R. Rep. No. 73-1383, at 3. The committee gives its own figures. More than ten million individuals held stocks and bonds directly, and over one fifth of the corporate stock outstanding was held by individuals with net incomes under \$5,000 a year.

²⁰ H.R. Rep. No. 73-1383, at 13 (emphasis added).

²¹ *Id.* at 13–14.

²² *Id.* at 14. For an earlier treatment of this language and of the 1943 hearings, see Timothy M. Doyle & Robert G. Eccles, *Fair Corporate Suffrage or Federal Overreach? The 1943 Hearings and Rule 14a-8*, Harv. L. Sch. F. on Corp. Governance (Sept. 23, 2025), <https://corpgov.law.harvard.edu/2025/09/23/fair-corporate-suffrage-or-federal-overreach-the-1943-hearings-and-rule-14a-8/>.

The Senate Report reaches the same place by a different route and without the same wording, as “fair corporate suffrage” does not appear in it.²³ Its treatment of proxies is the seventh item in a list of trading and disclosure practices, sitting between the conduct of brokerage accounts and civil liabilities. It opens by stating the rationale directly. “In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served,” the report says, “it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders’ meetings.”²⁴ The abuse it illustrates is a corporate president soliciting ratification by a letter that omitted secret options and his own interest in an underwriting agreement.²⁵ Its recommendation is a single sentence, that “the solicitation and issuance of proxies be left to regulation by the Commission.” The same committee said it twice. The committee’s investigative report on stock exchange practices carried the same two sentences again on June 16, ten days after the Act was approved, under the heading Abuse of proxies, and set out the American Commercial Alcohol episode at length behind them. The disclosure rationale for the proxy provision is therefore the committee’s own conclusion from its investigation, stated first in the report on the bill and repeated afterward with the record behind it.²⁶

The two chambers did not write the same provision. Both bills placed proxies at section 13 as introduced. The House kept it there and let the Commission prescribe rules in the interest of the issuer and its security holders. The Senate moved proxies to section 14 and gave the standard as the protection of investors. It added that the prohibition does not reach the mere submission of a form of proxy for the convenience of stockholders. Section 14(a) as enacted took the Senate’s number and the Senate’s standard, and added the public interest. The House formulation did not survive. The report that carried the issuer-and-security-holders standard is the report that carried “fair corporate suffrage.”²⁷

One subject the two reports do not treat alike is federal interference with the management of corporations. The House Report does not raise it anywhere.²⁸ The Senate Report raises it and answers it,

²³ S. Rep. No. 73-792, at 12 (1934), item 7, Proxies. The phrase fair corporate suffrage does not appear anywhere in the report, which runs to twenty-four printed pages. U.S. Serial Set vol. 9770, https://www.govinfo.gov/app/details/SERIALSET-09770_00_00-059-0792-0000/context. The direct PDF is at https://www.govinfo.gov/content/pkg/SERIALSET-09770_00_00-059-0792-0000/pdf/SERIALSET-09770_00_00-059-0792-0000.pdf. See *Bus. Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990) (noting the absence and reading the Senate Report as explaining the purpose of the proxy protections in terms of adequate knowledge).

²⁴ S. Rep. No. 73-792, at 12. Item 7 sits between item 6, Conduct of Brokerage Accounts, and item 8, Civil Liabilities.

²⁵ *Id.* The report does not name the company. Its facts are those of the American Commercial Alcohol Corporation special meeting of August 1, 1933, set out at S. Rep. No. 73-1455, at 75–76 (1934) (Stock Exchange Practices), <https://www.senate.gov/about/resources/pdf/pecora-final-report.pdf>, where the letter to stockholders is recorded as failing to disclose the secret interest of the chairman of the board and other officers in the underwriting agreement, and an option to Thomas E. Bragg for 25,000 shares in which the president of the board and others were secret participants. At 77 the same report states what was contemplated of the rules: protection of investors from promiscuous solicitation of their proxies, both by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporation officials and by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts, and the prevention of brokers with no beneficial interest usurping the franchise power of their customers.

²⁶ S. Rep. No. 73-792, at 12. The report was ordered printed April 17, calendar day April 20, 1934. Compare S. Rep. No. 73-1455, at 74, ordered printed June 6, calendar day June 16, 1934, which carries the same two sentences with matters for questions.

²⁷ H.R. Rep. No. 73-1383, at 24, section 13, Proxies; S. Rep. No. 73-792, at 20, section 14, Proxies. For the enacted text, see *infra* note 45.

²⁸ H.R. Rep. No. 73-1383. Federal interference with the management of corporations is not raised anywhere in the report, and there was nothing in the House bill to raise it about. The committee’s summary gives its periodical reports provision, section 12, two subsections, at 23–24. The Senate committee’s summary of its own section 13 gives four, the fourth being the disclaimer. S. Rep. No. 73-792, at 20.

at page 10, under item 5 on corporate reports and two items before the proxy discussion. What it answers is an objection to the reporting provisions rather than to the proxy provision. The principal objection to those provisions was that they were “a veiled attempt to invest a governmental commission with the power to interfere in the management of corporations.” The committee “has no such intention, and feels that the bill furnishes no justification for such an interpretation,” and points to its own text. “To make this point abundantly clear, section 13 (d) specifically provides that nothing in the act shall be construed to authorize interference with the management of corporate affairs.”²⁹

The provision did not survive, and the conference report records what it said, whose it was, and why it went. It was in the Senate amendment, and the House bill contained nothing corresponding to it. Its terms were that “nothing in this title shall be construed as authorizing the Commission to interfere with the management of the affairs of an issuer.” The conferees omitted it “as unnecessary, since it is not believed that the bill is open to misconstruction in this respect.”³⁰ The clause was wider than the objection that produced it. It named the Commission and it reached the whole of Title I, not the reporting provisions alone.

The committee that supplied the rationale left the subject off its own list of unfinished business. Chapter VII of the investigative report opens by saying the committee does not recommend a definite program of legislation and merely wishes to recapitulate the problems which merit further consideration. It names the conduct and management of banking institutions, the capital structure and governance of investment trusts, and holding companies. Proxies do not appear in the chapter, and neither does shareholder voting.³¹ That silence is of a piece with a wider one. The House Report, the Senate Report and the investigative report run to roughly four hundred fifty printed pages together. “Fair corporate suffrage” appears twice in them, in one passage, in one report.³²

The same absence runs wider than the two reports. Five documents of the period were in a position to record a shareholder placing a matter before other shareholders, and not one of them does. Two are the reports set out above. The third is the committee staff history printed at the head of the 1943 record.³³ It traces the assembly of the dispersed shareholding public across seven parts and never reaches proxies, shareholder voting or communication among shareholders. The fourth is section 13 of S. 2693 as introduced, which prescribed the proxy disclosure in the statute itself.³⁴ It named the persons who would exercise the proxy and the holders from whom it was solicited, and no other person who might put a matter to them. The fifth is the account of the investigation its own counsel published in 1939, which does not treat proxies or shareholder voting.³⁵

²⁹ S. Rep. No. 73-792, at 10, item 5, Corporate Reports. Section 13(d) is the Senate bill’s numbering, not the enacted Acts.

³⁰ H.R. Rep. No. 73-1838, at 35 (1934) (Conf. Rep.).

³¹ S. Rep. No. 73-1455, at 393–94, Chapter VII, Conclusions.

³² H.R. Rep. No. 73-1383; S. Rep. No. 73-792; S. Rep. No. 73-1455.

³³ 1943 Hearings, *supra* note 2, at 1–8. The statement discusses proxies, shareholder voting and communication among shareholders nowhere across its eight printed pages. Section II sets out what it does establish.

³⁴ S. 2693, 73d Cong. § 13 (1934), printed at *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) Before the S. Comm. on Banking & Currency*, 73d Cong., pt. 15, at 6422 (1934), with section 13 at 6429, <https://fraser.stlouisfed.org/title/stock-exchange-practices-87/hearings-s-res-84-s-res-56-s-res-97-33971>.

³⁵ Pecora, *supra* note 16. The work does not treat proxies, shareholder voting or the submission of proposals by shareholders. Its only use of the word proxy is in the ordinary sense of a vote cast by an agent.

The five are not one silence repeated. They come from five different hands with five different purposes. A House committee reported a bill. A Senate committee reported the same bill. Committee staff wrote market history for a later Congress. A Senate draftsman set out disclosure in statutory terms. And the investigation's own counsel wrote for a general readership five years afterward. Each had its own occasion to describe a shareholder who puts a question to other shareholders. None of them takes it. One further reading bears on all five. Patrick Ryan searched the same record in 1988 for a congressional theory of shareholder participation, and reported that the reports give little insight into one.³⁶ Section XII sets out the case he built instead.

One agency document shows what the silence cost, and it was written in defense of the rule. In 1980 the Commission's staff set out the legislative basis of Section 14(a) for the Senate Banking Committee. It quoted the House report at 13–14 and the Senate report at 77, both from 1934. It then described the Senate Banking and Currency Committee as having recognized two needs. One was disclosure of the matters management planned to present. The other was that shareholders be given a reasonable opportunity to present their own proposals and views to fellow security holders. For that second need the staff cited a Senate report of 1957. It was working the 1934 record on the same page and did not take the proposition from it.³⁷

Two things follow, and the second is the more consequential. The first is that the reports are not in tension. Both identify deceptive solicitation as the abuse and both describe the grant as power over the conditions of solicitation. The second is that neither report contemplates a shareholder-initiated mechanism. In both, the shareholder is a recipient of information and a caster of a vote on questions decided at the meeting. Who determines what those questions are is a subject on which the legislative record of 1934 is silent. The statutory text did not specify the scope of Section 14(a)'s delegation, and the reports did not resolve it. Whether it reached substantive governance participation or was confined to disclosure and procedural fairness was left open. What the Commission built on this foundation in 1942, and how it defended that construction in 1943, is the subject of Section V.³⁸

IV. The Statute and the First Proxy Rules, 1934 to 1940

A. State Law and Its Limitations

Before federal intervention, proxy voting was governed primarily by state corporation law. A 1942 survey of state law found a statute authorizing stockholders to vote by proxy in every state but

³⁶ Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 136–40 (1988). He identifies two models of the shareholder in the record, as monitor and as decisionmaker. *See also id.* at 124–25 (the statute says nothing specific about the shareholder role and the intrinsic aids are quickly exhausted).

³⁷ Div. of Corp. Fin., SEC, Staff Report on Corporate Accountability: A Re-examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 96th Cong., 2d Sess. 141–42 (Comm. Print 1980) (printed for the use of the S. Comm. on Banking, Hous. & Urban Affairs), <https://www.govinfo.gov/app/details/CPRT-96SPRT679200> [hereinafter 1980 Staff Report]. Each page of the print carries a running arabic number and a chapter folio, and pinpoints here are to the arabic number. Pages 141 and 142 are folios B-9 and B-10. The 1934 citations on those pages are H.R. Rep. No. 73-1383, at 13–14, and S. Rep. No. 73-1455, at 77. The sentence on shareholders presenting their own proposals carries the report's note 23, which cites S. Rep. No. 85-700, at 3 (1957).

³⁸ H.R. Rep. No. 73-1383; S. Rep. No. 73-792.

Iowa and Texas, and those statutes were older than the securities laws.³⁹ They regulated form rather than substance. Twenty-four jurisdictions required that a proxy be in writing, six of them requiring that it also be filed with the corporation's secretary.⁴⁰ Seventeen limited how long a proxy remained good. Eleven of the seventeen set that limit at eleven months unless the holder specified a longer term.⁴¹ The authorization forms were broad, and a general proxy commonly empowered the holder to vote with all the powers the stockholder would possess if present. Breadth did not make them binding. A proxy was revocable at the grantor's pleasure unless coupled with an interest, whatever the instrument recited.⁴²

State law said nothing about who might see the proxies once they were returned. The same survey found no case that had raised the question and no state statute that appeared to confer such a right, though stockholders had a general right at common law and by statute in most states to inspect the corporation's books.⁴³ In 1938 the Commission set out a stockholder's practical alternatives. On receiving a management proxy form, a stockholder could fail to vote, attend the meeting in person or send a representative, form an independent committee to solicit proxies against management, or sign and return the form. The Commission found the first and the last to be the only practical alternatives. Attendance was out of the question for a holder who did not live near the meeting. A personal representative entailed expense that might be prohibitive for a small holder, and an independent committee required resources and initiative not ordinarily present.⁴⁴

B. Section 14(a) and the First Federal Proxy Rules

Section 14(a) of the Securities Exchange Act of 1934 provided:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange 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.⁴⁵

³⁹ Leonard H. Axe, *Corporate Proxies*, 41 MICH. L. REV. 38, 46 & n.27 (1942), <https://repository.law.umich.edu/mlr/vol41/iss1/3>. Iowa permitted the right to be conferred by charter, articles or by-laws, and Texas stockholders had voted by proxy by universal custom from an early date. New York provided for proxy voting in its first general incorporation statute of 1811 and imposed an affidavit requirement on monied corporations in 1827. Maryland followed in 1838 and New Jersey in 1841. *Id.* at 47–48.

⁴⁰ *Id.* at 53 n.67.

⁴¹ *Id.* at 54 n.75. Maximum statutory validity elsewhere ran from three to seven years. Four jurisdictions appear on both lists.

⁴² Leonard H. Axe, *Corporate Proxies: II*, 41 MICH. L. REV. 225, 246–49, 256–58 (1942), <https://repository.law.umich.edu/mlr/vol41/iss2/3>. Axe records that proxies irrevocable in terms but revocable in fact were commonly solicited, and that most attempts to unite the voting power of several stockholders permanently by irrevocable proxy failed because the courts permitted revocation.

⁴³ Axe, *Corporate Proxies: II*, *supra* note 42, at 242–43. The common-law right to inspect the books rested on the stockholder's interest in ascertaining whether the corporation's affairs had been properly conducted. *Huyilar v. Cragin Cattle Co.*, 40 N.J. Eq. 392, 398 (1885). Most states had a statute, absolute in some.

⁴⁴ SEC. & EXCH. COMM'N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, pt. VII, at 128–30 (1938). The finding rests on forty-four capital readjustments in which management solicited proxies for a charter amendment.

⁴⁵ Securities Exchange Act of 1934, ch. 404, § 14(a), 48 Stat. 881, 895, <https://uscode.house.gov/statviewer.htm?volume=48&page=895>. The text quoted is as enacted and as it stood in 1943.

The provision specifies no substantive standard. It does not mention disclosure, proxy statements, shareholder proposals, or the content of the rules it authorizes. It makes it unlawful to solicit a proxy in contravention of whatever rules the Commission prescribes, bounded only by the requirement that they be necessary or appropriate in the public interest or for the protection of investors. Elsewhere in the same Act Congress enumerated required content in detail. Section 12(b), governing registration of securities, lists eleven categories of information an application must contain and then a residual for any further financial statements the Commission deems necessary.⁴⁶ Section 14 enumerates nothing. That was not the shape of the provision as introduced. In S. 2693, the bill the Senate committee took up on February 26, 1934, the proxy provision was section 13, and it prescribed the disclosure itself. Solicitation was unlawful unless the persons named to exercise the proxy filed a statement with the Federal Trade Commission. That statement was to be included as part of every solicitation, and it was to set forth the purposes of the proxy, the persons to exercise it, their relations to and interest in the security, and the names and addresses of those from whom similar proxies were being solicited. The words the enacted subsection now rests on appear in the bill as well, and there they govern only such further information as the Commission might require beyond that list. Between February and enactment the list came out and the residual became the whole standard.⁴⁷ What the proxy rules would require was left to the Commission to determine in the first instance.

A defender of the rule has given a reason for the removal, and it is not a reason about the shareholder. Ryan traced it to the abandonment of the clause just set out.⁴⁸ Corcoran conceded before the House committee in February 1934 that the statement need be filed only with the Federal Trade Commission. He said on the same page what the clause was for. Under existing conditions the only interest holding a list of holders was “the house sponsoring one protective committee,” and a holder who did not want to go along had no way to find “the other stockholders and bondholders similarly situated, with whom he might cooperate, and form a protective committee.” The provision, he said, “prevents the great mass of unorganized stockholders and bondholders from being at the mercy of a management which controls the lists of those to whom proxy solicitations can be sent.”⁴⁹ Walter S. Gifford, president of American Telephone and Telegraph, wrote to the committee that printing and delivering the lists would cost his company about \$950,000 in the first year and about \$900,000 in each year after.⁵⁰ The committee answered the objection before it abandoned the clause. H.R. 8720, introduced on March 19 and taken up the next day, kept the filing with the Commission and excepted the names and addresses of the persons solicited from what had to accompany the solicitation. Rayburn told the committee the new draft had been written to meet the criticisms made over the preceding three weeks.⁵¹ The enacted section removed what was left of the list. Section 14 of that same draft,

Section 14(a) was amended in 1964 by Pub. L. No. 88-467, § 5(a), which replaced the limitation to securities registered on a national securities exchange with registration under Section 12. It was amended again in 2010 by Pub. L. No. 111-203, § 971(a), which designated the existing text as paragraph (1) and added paragraph (2). The current version appears at 15 U.S.C. § 78n(a).

⁴⁶ Securities Exchange Act of 1934 § 12(b)(1), 15 U.S.C. § 78l(b)(1), <https://www.law.cornell.edu/uscode/text/15/78l>. Subparagraphs (A) through (K) are the enumerated categories. Subparagraph (L) is the residual.

⁴⁷ S. 2693, § 13. The Chairman directed that the hearings open with the printing of the bill. *Id.* at 6421. The Commission the bill names is the Federal Trade Commission. *Id.* at 6423. Section 14 of the bill is over-the-counter markets. *Id.* at 6429.

⁴⁸ Ryan, *supra* note 36, at 132–33, 143–44.

⁴⁹ Stock Exchange Regulation: Hearing on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate & Foreign Com., 73d Cong. 138 (1934) [*hereinafter* 1934 House Hearing].

⁵⁰ *Id.* at 528–29 (letter of Walter S. Gifford to Rep. James W. Wadsworth, Jr., Mar. 2, 1934, printed at the Chairman’s direction).

⁵¹ *Id.* at 625 (statement of Chairman Rayburn), 636 (§ 13).

printed on the same page, made conduct unlawful in contravention of such rules and regulations as the Federal Trade Commission might prescribe. The formula the enacted proxy provision rests on was on the page in March, applied to another subject, while proxies still carried the statutory list. Opposition to that one clause produced most of what was said against Section 14, and the language took its present form once the clause was abandoned.⁵² None of that changes what was enacted.

Gifford raised the alternative himself and rejected it. It might conceivably be argued, he wrote, that the policy of the bill was to encourage stockholders to circularize their fellow investors in opposition to management. On that argument the company's cost did not matter, because canvassing holders would be cheaper with the lists furnished in book form. He answered that the bill defeated its own purpose, because those opposing management would be required to pay the same expense of publishing and sending out the lists. A dissenting minority could already obtain a stockholders' list from the books of the corporation. It could then canvass the other holders at a fractional part of what the bill would cost. He set the New York limitation against it, that inspection shall not be for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation.⁵³ The access concept before the committee in 1934 was therefore the list, exercised by the opponent at the opponent's own expense and bounded by state law, and not inclusion in management's own solicitation.

The formula the enacted provision rests on drew objections in the same record, twice. A section-by-section brief attacked the rulemaking grant at section 18(a) as a power Congress should not give away. Brokers, it said, would be placed in a class by themselves, with no right even to apply to be heard when the Commission made rules that would become part of the law. The same brief attacked section 14 of the introduced bill, which was then the over-the-counter provision, as so vague and undefined that it should be struck. Section 14 of the enacted statute uses that same formula for proxies. Congress was told in plain terms that the formula was too broad, and enacted it anyway.⁵⁴

The Commission's first proxy rules came in 1935, and they did more than later accounts of them allow. On September 24, 1935 it adopted Rules LA1 through LA7 under Section 14. LA3 required that specified information be presented to each person at the time of first solicitation, including a brief description of the various matters, actions or transactions which it is intended to present or consider, with the names of nominees permitted to be omitted. LA4 prohibited solicitation by any statement false or misleading with respect to a material fact. LA5 required the form of proxy and the LA3 information to be filed with each listing exchange and with the Commission not later than the first date of solicitation. And LA6 was headed Duty of issuer to mail proxies upon request of security holder. It made it unlawful for an issuer to solicit unless the issuer honored the application of any record holder. On such an application the issuer mailed that holder's own form of proxy and accompanying letter or statement to every record holder of each class management had solicited. The applicant supplied the forms, envelopes and postage and tendered either the reasonable cost of the mailing or a surety bond. The

⁵² Ryan, *supra* note 36, also cited the following. For the objections the clause drew, *Stock Exchange Practices*, *supra* note 34, at 6896, 6913, 6991, 7050–51, 7087, 7169, 7265, 7278, 7283–84; and for the floor response to its removal, 78 CONG. REC. 7713–14 (1934) (Rep. Wadsworth), and *id.* at 8279–80 (Sen. Steiwer).

⁵³ 1934 House Hearing, *supra* note 49, at 529. He cites section 10 of the New York Stock Corporation Law for the limitation.

⁵⁴ 1934 House Hearing, *supra* note 49, at 262. Section 14 of H.R. 7852 as introduced was the over-the-counter provision and the proxy provision was section 13. *Id.* at 8–9, 14.

issuer could not demand more than the cost to it of mailing its own proxies for a service of comparable magnitude.⁵⁵

LA6 gave a shareholder a federal route to the holders that the management had solicited, seven years before the shareholder proposal rule was written. It is also a different mechanism. LA6 gave access to management's solicitation list at the shareholder's own expense. It put nothing into management's own proxy statement, and it is the ancestor of what became Rule 14a-7 rather than of Rule 14a-8. Corcoran had wanted the statutory list for that same purpose in 1934, before either rule existed.⁵⁶

The Commission's first affirmative proxy regulations were those of 1938. Purcell so described them at the 1943 hearings, dating the shareholder proposal obligation to that year and to those rules. The 1938 rules required that information be given as to the matters to be acted on and that stockholders be given an opportunity to vote for or against any proposal presented. They were amended effective January 26 and February 15, 1940.⁵⁷

Many regulatory delegations of the New Deal era were broadly worded. The agencies charged with administering them operated with substantial discretion, and that discretion was subject to serious and sometimes successful constitutional challenge. The Supreme Court invalidated several New Deal statutes in the mid-1930s, including on delegation grounds, and that line of decisions preceded the President's 1937 proposal to expand the Court.⁵⁸ No delegation challenge to the Exchange Act or to a rule adopted under it appears to have reached the Supreme Court in this period, and Purcell told the 1943 committee that as to the proxy rules "no charge of their validity has been made in the courts."⁵⁹

⁵⁵ Exchange Act Release No. 34-378 (Sept. 24, 1935). The release predates the Federal Register and no Federal Register citation exists for it. The rules are reprinted entire in SEC. & EXCH. COMM'N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES 120-21 n.29 (1940), which cites them as Release No. 34-378 as amended by Release No. 34-1497 (Dec. 20, 1937). The 1937 amendment reached Rule LA7 alone. Amendment of Rule LA7, 2 Fed. Reg. 3395 (Dec. 22, 1937). The 1940 report gives the release date as December 20, 1937. The Federal Register publication is December 22.

⁵⁶ The 1947 codification placed mailing communications for security holders at § 240.14a-7 and the shareholder proposal rule at § 240.14a-8. 12 Fed. Reg. 8768, 8770 (Dec. 24, 1947).

⁵⁷ 1943 Hearings, *supra* note 2, at 169 (statement of Ganson Purcell, describing the rules of 1938 as the Commission's first affirmative regulations). Regulation X-14 as it stood before the December 1942 revision is reproduced in 1943 Hearings, *supra* note 2, at 24-34. The text preceding the 1940 amendments appears at Exchange Act Release No. 34-1823 (Aug. 11, 1938), 3 Fed. Reg. 1991 (Aug. 13, 1938), and the 1940 amendments at Exchange Act Release Nos. 34-2394 (effective January 26, 1940) and 34-2376 (effective February 15, 1940). Release No. 34-2394 amended the exemption at Rule X-14A-7(f) for solicitations made in a registered holding company reorganization. Every provision this paper relies on entered by Release No. 34-2376, and the reproduction at 1943 Hearings, *supra* note 2, at 27 attributes each amendment to its own release. See Rule X-14A-1 (duty to furnish a proxy statement), Rule X-14A-2 (duty to provide means by which desired action can be specified), and Rule X-14A-5 (false or misleading statements).

⁵⁸ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415, 430 (1935) (section 9(c) of the National Industrial Recovery Act exceeded the limits of delegation because Congress had declared no policy, established no standard and laid down no rule); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 541-42, 550-51 (1935) (holding the code-making authority of section 3 of the same Act an unconstitutional delegation of legislative power, and holding separately that the application of the code provisions to the defendants' intrastate transactions exceeded the commerce power, the two grounds being independent of one another). *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936), invalidated subdivision (g) of part 3 of section 4 on a different footing. The objection was not the absence of a standard but the identity of the delegate, a self-interested private majority of producers and miners empowered to fix maximum hours nationally and minimum wages by district, binding on a competing minority. The Court rested that holding on the due process clause of the Fifth Amendment rather than on Article I, section 1. That characterization is the majority's.

⁵⁹ 1943 Hearings, *supra* note 2, at 20 (statement of Ganson Purcell). On the character of New Deal-era rulemaking grants, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467,

V. How the Obligation Was Built, 1938 to 1943

This section draws on the printed record of the 1943 congressional hearings on the proxy rules. Testimony is reported as what witnesses said rather than as established fact. Where the text of the rules or other evidence in the record bears on a witness's characterization, that is noted.

A. Adoption of the Shareholder Proposal Rule

The federal obligation to carry shareholder proposals in management's proxy materials predates the 1942 rules. Commission testimony in 1943 dated the obligation to the 1938 proxy season, in which it was first enforced under the anti-fraud rule on a theory of misleading omission, before any express provision existed. Purcell described the 1940 revision, effective February 15, 1940, as setting the privilege out specifically for the first time.⁶⁰ The obligation arose by implication from the operation of several provisions rather than from any express grant, which is part of why the conventional account has dated it to 1942. By the time the 1942 rules were adopted, shareholders had had the privilege for five full proxy seasons.⁶¹

The Commission's own staff summary accompanying the August 1942 draft described the existing position plainly. Management already had to include a statement of the proposal and an opportunity for shareholders to vote on it.⁶² A Wall Street Journal editorial of April 1942, read into the hearing record, recorded the same practice in operation, citing three proposals from a single seventy-five-share holder in the Woolworth annual meeting notice.⁶³ The record on this point is not uniform, and the Commission's own August 1942 draft carried the staff comment that the rule is new.⁶⁴ The rule was new as a written provision, but the obligation was not new as an enforced practice. Purcell dated the practice to the 1938-39 season, when management omitted a noticed proposal and the Commission required disclosure in a supplemental letter on the ground that the solicitation was misleading.⁶⁵

In 1939 John and Lewis Gilbert told Bethlehem Steel that they intended to move three amendments to the bylaws at the annual meeting. The first would have curtailed the bonuses of the

510 & n.215 (2002) (treating the Exchange Act's general grant at section 23(a) as legislative because sections 21(e) and 32 attached enforcement and penalties to violations of the rules). The characterization of Rule 14a-8's administrative history as an instance of a broader New Deal administrative pattern is the paper's own analytical framing, not a doctrinal claim.

⁶⁰ 1943 Hearings, *supra* note 2, at 16, 169–70, 172. Purcell's characterization should be read against the rule text. Regulation X-14 as it stood before the 1942 revision, reproduced in 1943 Hearings, *supra* note 2, at 24–34, contains no provision affirmatively granting a privilege to present proposals. The obligation is an implication of three provisions: Rule X-14A-8(i), which defines matters to be acted upon pursuant to the proxy to include matters the solicitor is informed other persons intend to present, where the solicitor intends the proxy be used for a vote on them or for a quorum supporting one; Rule X-14A-2, which requires that a means be provided to specify action on each matter described as intended to be acted upon; and Schedule 14A Item 15. Schedule 14A Item 16, added effective February 15, 1940 by Exchange Act Release No. 34-2376, supplies the alternative. Where the solicitor intends that a noticed matter not be acted upon pursuant to the proxy, it requires only a statement identifying the matter and indicating the disposition proposed.

⁶¹ 1943 Hearings, *supra* note 2, at 181.

⁶² *Id.* at 35 (Summary of Proposed Revision, Aug. 1942).

⁶³ *Id.* at 231 (Wall Street Journal editorial of Apr. 24, 1942, read into the record by Baldwin B. Bane).

⁶⁴ 1943 Hearings, *supra* note 2, at 38. The August 1942 draft prints each proposed rule with a comment of its own. The comment on Rule X-14A-6 is that there is no substantial change. The comment on Rule X-14A-7, which is the shareholder proposal rule, is that the rule is new.

⁶⁵ 1943 Hearings, *supra* note 2, at 169–70. Purcell gives the episode as an illustration and dates it to the 1938-39 proxy season. He sets out the three amendments in order, the omission from the notice and the supplemental letter. He names no company.

corporation's executives where no dividends were paid on the stock. The second would have moved the meeting from Delaware to New York City, where it would be more accessible to stockholders. The third would have provided for shareholder election of the auditors. Management's notice of meeting and form of proxy did not mention them, and the solicitation sought voting authority only for the election of directors. The Gilberts complained to the Commission, which advised the company that the failure to inform shareholders rendered the solicitation false and misleading and suggested that the meeting be adjourned. Bethlehem Steel adjourned, wrote to shareholders describing the amendments, and did not seek voting authority on them. They were defeated at the meeting by those shareholders physically present.⁶⁶

The Commission closed that route the following January. The January 1940 amendments defined matters to be acted upon pursuant to the proxy to include matters the solicitor is informed another person intends to present, where the proxy is to be used for a vote on them or for a quorum supporting such a vote. Management could no longer disclose a proposal, decline to seek authority on it, and rely on proxies solicited for other purposes to supply the quorum by which it was defeated.⁶⁷

The sequence has a participant's account closer to the events than any later reconstruction. Milton Freeman was in the Commission's General Counsel's office from 1934 and Assistant Solicitor from 1942, and he set it out in 1957. Managements asked first whether they could confine the proxy statement to their own matters, and the Commission answered that they could not. Management then proposed to seek authority on its own matters alone, so that the proposal could be voted down by those present in person. The Commission's answer was that the proxies could not be used to make the quorum for that vote. Holders had to be told both that a proposal would be presented and that management meant to defeat it.⁶⁸ Freeman names no company and gives the exchange as recollection. George Dent gave the same sequence in 1985. His sources were the 1943 hearings, the Commission's annual report for 1939, and a contemporaneous account in the Cornell Law Quarterly.⁶⁹ Neither has displaced the conventional dating.

⁶⁶ Jill E. Fisch, *The Transamerica Case*, in *THE ICONIC CASES IN CORPORATE LAW* 46, 49 (Jonathan R. Macey ed., 2008) [*hereinafter* Fisch, *Transamerica*]. Fisch names the company and the brothers, which Purcell's account does not, and cites Arthur H. Dean, *Non-Compliance with Proxy Regulations: Effect on Ability of Corporation To Hold Valid Meetings*, 24 CORNELL L.Q. 483, 503 (1939), a contemporaneous account, and John Bainbridge, *The Talking Stockholder*, NEW YORKER, Dec. 11 & 18, 1948.

⁶⁷ For the 1940 amendments and the definition of matters to be acted upon pursuant to the proxy, see *supra* note 60.

⁶⁸ Milton V. Freeman, *An Estimate of the Practical Consequences of the Stockholder's Proposal Rule*, 34 U. DET. L.J. 549, 550–51 (1957). The credential note at 549 gives the General Counsel's Office of the Securities and Exchange Commission from 1934 to 1942, the Securities Division of the Federal Trade Commission in 1934, and Assistant Solicitor of the Commission from 1942 to 1946.

⁶⁹ Dent, *Regulatory Failure*, *supra* note 1, at 3. Dent cites the 1943 Hearings at 169–70; 5 SEC Ann. Rep. 60–62 (1939); and Dean, *supra* note 66, at 499.

The 1942 revision, adopted in December as Rule X-14A-7,⁷⁰ extended the mechanism rather than creating it.⁷¹ It added the proponent's own hundred-word statement in the proponent's words, together with the proponent's name and address. It also imposed an express limitation to proposals that are a proper subject for action by the security holders. It allocated responsibility for the supporting statement to the holder rather than to management, and it set a reasonable-notice requirement with thirty days treated as *prima facie* reasonable.⁷² The Commission staff characterized these additions not as disclosure measures but as an extension of the rights of stockholders not connected with the management.⁷³

The provision was not originally designated Rule 14a-8. It was Rule X-14A-7 until the amendments of December 1947, which renumbered it and first excluded elections to office. Section VI.C sets out the filing requirement those amendments imposed, and Section VIII.C the elections ground.

The revision also changed the form of the obligation. The earlier provisions conditioned the duty on management's own stated intention as to whether the matter would be acted upon pursuant to the proxy, while the 1942 rule imposed it unconditionally. Commission witnesses in 1943 testified that in practice the earlier rules had already provided a for-or-against ballot on stockholder proposals, and that the hundred-word statement was the new element. Baldwin Bane, Director of the Division of Corporation Finance, put it directly when Representative Hall said the Commission was now in Fuller's corner helping him. What Fuller, a frequent proponent, had gained was "the right and the support of the 100-word statement," which, as Hall added and Bane accepted, "goes to those who do not attend." Fuller, on Bane's account, "had been doing just the same thing; that is, had been going to meetings, making these proposals; bringing up discussions on the floor, before that rule was ever adopted."⁷⁴

⁷⁰ The Commission's proxy rules of this period were designated with an X prefix, as Regulation X-14, with individual rules numbered X-14A-1 and following, together with Schedule 14A. Rule numbers from this period should be read as dated. Before the 1942 revision there was no discrete shareholder proposal rule to number. The obligation arose from the operation of three provisions. See *supra* note 60. Positions 7 and 8 were then occupied by other rules. The amendments effective February 15, 1940 deleted the rule at position 8 and moved the definitions rule from position 9 into it. X-14A-8 then carried the definitions from 1940 until the 1947 amendments. The shareholder proposal rule was designated X-14A-7 as proposed in August 1942 and as adopted in December 1942, and remained at that designation through the Commission's first interpretation of it in January 1945. It appears at § 240.14a-8 in the amendments of December 1947. By December 1952 the codified section numbers were primary in the rule text, with the X form surviving as a parenthetical alias in Schedule 14A cross-references, for example § 240.14a-6 (Rule X-14A-6), and in Item 6(d), which refers to proxies solicited under Regulation X-14. The 1940 amendments are Exchange Act Release No. 34-2376, 5 Fed. Reg. 174-77 (Jan. 12, 1940), filed January 11, 1940 and effective February 15, 1940, F.R. Doc. 40-186. The text preceding them appears at Exchange Act Release No. 34-1823, *supra* note 57.

⁷¹ Release No. 34-3347, *supra* note 1, 7 Fed. Reg. at 10,655-56. Regulation X-14 as amended begins at 10,655 and Rule X-14A-7 prints at 10,656, headed Duty of management to set forth stockholders' proposals. The regulation as adopted comprises §§ 240.14a-1 through 240.14a-9, with Schedule 14A following. It took effect January 15, 1943, except as to solicitations commenced before that date by persons who had released definitive material in connection with the last annual meeting of security holders before January 15, 1942.

⁷² Rule X-14A-7 as adopted Dec. 18, 1942, effective Jan. 15, 1943, reproduced in 1943 Hearings, *supra* note 2, at 47-48, compared with the August 1942 draft at 38. Before the 1942 revision, Rule X-14A-7 was the exemptions rule. The number was reassigned to the shareholder proposal rule. The August draft already contained the hundred-word cap and the requirement to name the security holder. What the adopted version added over the draft was the allocation of responsibility for the statement to the holder rather than management, and a thirty-day *prima facie* standard of reasonable notice in place of a fixed thirty-day condition. The draft applied only where management opposed the proposal but intended that the matter be acted upon pursuant to the proxy. The adopted rule carried no such condition. On the advance-notice requirement, see *id.* at 169.

⁷³ 1943 Hearings, *supra* note 2, at 35.

⁷⁴ 1943 Hearings, *supra* note 2, at 115, 235; *id.* at 38 (staff comment on the August 1942 draft); *id.* at 169-70 (Purcell on the 1938-39 enforcement matter). Bane first answered that the preceding rules did not provide for the ballot, and declined an

Not all of the additions expanded access. The advance-notice requirement was a restriction. Purcell described the new rules as requiring proposals to be presented well in advance in order to be included. No such requirement had existed before. Three of the eight August 1942 proposals were not adopted. One of them would have required management to list shareholder nominees for director in its proxy materials.⁷⁵ The 1942 rules did not create shareholder access to the management proxy for director nominations.

The rule as adopted did not require management to carry every proposal. It applied only to a proposal that was a proper subject for action by the security holders.⁷⁶ That limitation was not in the August draft. The proposal the Commission put out for comment in August 1942 carried no limitation on what a shareholder might propose. David Bayne wrote in 1957 that the draft contained no limitation whatsoever on what was proper for proposal, and that it left the matter with the states. The limitation entered between the August proposal and the December adoption.⁷⁷

The rule did not say what made a subject proper. The phrase stood alone in the text from 1942 until 1954, when the Commission wrote the standard in. It observed that the rule as it then stood did not specifically provide that state law is the standard for determining what is a proper subject, and that the Commission had so stated in a prior release. That release is the letter of January 3, 1945 discussed in Section VI.A.⁷⁸ The letter is the first written statement of the reading. The reading itself is older. At the 1943 hearings, nineteen months earlier, Representative Boren pressed Bane, whose division would issue that letter, on what the proper-subject limitation actually restrained. Bane answered that it “would include anything upon which stockholders act under the laws of the particular State, and the charter, and the bylaws of the particular corporation, any proper subject.”⁷⁹ Boren replied that this was a limitation “you have to find with a magnifying glass almost, because it certainly is a wide-open door,” and Bane refused the characterization. The reading that the limitation took its content from the law of the State of incorporation is therefore the Commission’s, given in testimony in 1943, stated in writing in 1945, and made express in the rule in 1954, rather than a feature of the 1942 text.

invitation to amend that answer, before correcting himself two exchanges later. *Id.* at 235. The objectors’ own account agrees. Their October 1942 memorandum described the then-existing rules as requiring management to include a summary of the proposal and to provide an opportunity for stockholders to indicate their wishes. *Id.* at 159. *See also* CONG. RSCH. SERV., R48855, THE SHAREHOLDER PROPOSAL RULE 6–7 (Feb. 11, 2026), https://www.everycrsreport.com/files/2026-02-11_R48855_190a41e23f0df4ceed948f1db5c891e0d86e72af.pdf (tracing the same sequence). The rule text as written also left a route by which management could give notice of a proposal without submitting it to a vote. Schedule 14A Item 18 carried it, in the Schedule adopted in December 1942. The same provision stood at Item 16 in the Schedule the 1940 amendments produced, and the December 1942 revision renumbered it. No witness or member invoked the route at any point in the hearings. Bane stated the same point without prompting at 226, in answer to Hall’s objection that the rule was an invitation to men like Fuller.

⁷⁵ 1943 Hearings, *supra* note 2, at 19.

⁷⁶ Rule X-14A-7 as adopted, reproduced in 1943 Hearings, *supra* note 2, at 47–48.

⁷⁷ David C. Bayne, *The Basic Rationale of Proper Subject*, 34 U. DET. L.J. 575, 590–91, 593 (1957) (printing the August 1942 proposal and the adopted rule). For the same comparison from the hearing record, *see supra* note 72.

⁷⁸ Amendment of Proxy Rules, Exchange Act Release No. 34-4979, 19 Fed. Reg. 246, 246 (Jan. 14, 1954). The Commission acted on January 5, 1954 and the release was filed on January 13. The amendments applied to solicitations commenced on or after February 6, 1954. The amendment to the second sentence of Rule X-14A-8(a) applied only from March 6, 1954. The Schedule 14A amendments were optionally available from January 6, 1954. The Commission’s statement and its citation of Release No. 34-3638 appear in the discussion of Rule X-14A-8 at 246.

⁷⁹ 1943 Hearings, *supra* note 2, at 225. Bane’s office is given at 8 and at 211.

The federal rule thus took its scope from state law. What shareholders could propose was whatever state law and the corporation's own governing documents allowed them to decide. The rule was therefore procedural in a specific sense. It governed what management had to circulate, while the substance of what shareholders could decide remained a question of state law. It did not require management to implement proposal outcomes or to act on shareholder preferences expressed through the proposal vote.

B. Administrative Rationale

The Commission's administrative justification rested on a gap between formal and practical shareholder rights. Purcell put it in terms of state law. He said the rules were intended to assure rights the stockholder had traditionally held under state law. Those rights were to appear at the meeting, to make a proposal, to speak on it at appropriate length, and to have it voted on. Those rights, on his account, had been rendered largely meaningless by the dispersion of security ownership across the country. He described them as rights state law meant to give stockholders. The rules, he said, protect them and make them real. That is a characterization of state law by a federal official defending a federal rule.⁸⁰

What that justification cost, and who bore it, was put to Purcell directly. The exchange between Representative Hall and Purcell ran as follows:

Mr. Hall. Why do you think that the responsibility as to that shifts from the man who wants to make the objection to the management of the corporation? Why should it not be incumbent upon the stockholder who raises that objection to advise the other stockholders? Why make the responsibility shift to management?

Commissioner Purcell. Because he has advised the management that he is going to make the proposal at the meeting. It seems only right that the management should circulate that proposal along with the rest of the matters which the management advises the stockholders are to be taken up at the meeting.

Mr. Hall. Apparently—I know you think it is right.

Commissioner Purcell. That is right.

Mr. Hall. Because you have done it.

Commissioner Purcell. Yes.

Mr. Hall. But certainly you have not shown anything here today to me which would make me believe that that responsibility of publicity, if you call it that, shifts from the man who makes the objection to the management.

Commissioner Purcell. You would leave the responsibility and the expense on the individual stockholders to send it out?

⁸⁰ 1943 Hearings, *supra* note 2, at 172, 181.

Mr. Hall. Absolutely.

Commissioner Purcell. To send notice to all stockholders?

Mr. Hall. Absolutely. In other words, as to a minority group of stockholders who are fighting management, I think we should leave some responsibility on them.

Commissioner Purcell. Not at all. Here is a proposal which is going to be made at the meeting and not, as you say, by anyone who is necessarily opposed to the management. More frequently than not, that person is not opposed to the management. He would just as soon have the management continue to manage the corporation. What he wants that management to do is to adopt a policy, if his fellow stockholders agree with him which it shall follow in the management of the company. He has the right to appear at the meeting and to proceed along that line.

Mr. Hall. Right.

Commissioner Purcell. And we give him the right in the rules to put that proposal before all of his fellow stockholders along with all other proposals to be made at that meeting so that they can see then what they are and vote accordingly, according to the way they want to vote and on that as well as any other proposals and not to require one single stockholder to undergo, at his own personal expense in getting out a separate document to endeavor to reach all of the stockholders and go through all of the business of having to get the material mailed out.

Mr. Hall. Well—

Commissioner Purcell (continuing). It is a very small item of expense, so far as the company's funds are concerned and one that can very readily and rightfully be used for the purpose, it seems to us.

Mr. Hall. I see the philosophy behind the whole operation.

Commissioner Purcell. You asked what the philosophy was. I think that is it.

Mr. Hall. I disagree with your philosophy.⁸¹

The allocation of expense is what separated two mechanisms sitting in the same regulation. Purcell was asked whether the company must mail material for an opposition directorate, and whether it mattered if the material ran to a hundred words or a thousand. He answered that the company was required to mail out the opposition proxy material where that material was tendered with the cost of mailing. The company does not endorse or send it out. It merely mails it out. That is the mailing right the Commission created in 1935 and kept. The proposal rule ran the other way, carrying the holder's proposal in management's own material and at the company's expense. The two ran side by side and were distinguished by who paid.⁸²

⁸¹ 1943 Hearings, *supra* note 2, at 171–72.

⁸² 1943 Hearings, *supra* note 2, at 166, 171–72.

The expense question had been raised nine years earlier, as a question about management's own solicitation. It was answered differently then. Huddleston put to Corcoran that the solicitation of proxies is usually made on the corporation's stationery and under stamps belonging to the corporation. It also uses its clerical staffs and carries the color of its authority. The distinct impression on the stockholder, he said, is that by giving his proxy he is doing something to further the interests of the corporation. Corcoran agreed. Asked whether the section touched that aspect, he answered that it permits the Commission to prescribe the form and detail of the proxy by rules and regulations. Asked directly whether it prohibits the solicitation at the expense of the corporation, he answered no. That ought to be done through state law, he said, and it does not. He then supplied the justification for corporate expense himself. One might justify the use of the corporation's clerical help, its time, and its stamps, he said. The ground would be that all of it makes it possible for the stockholders to vote at the meetings.⁸³ The Commission used that ground in 1943 to defend carrying a stockholder's proposal at the issuer's expense. The bill's own draftsman had offered it in 1934 for management's own solicitation, and had left the question to state law.

The character of that justification is harder to pin down than the mechanism. The Commission's witnesses did not confine themselves to procedural access. Purcell read the House committee's fair corporate suffrage language as meaning both adequate and accurate information to stockholders and an opportunity to act on that information. Bane conceded that the ballot requirement was not disclosure. He located its justification in the same report language, which asked that the stockholder be given better suffrage in the affairs of the corporation upon which he had a right to act. Bane described the object as reproducing through the proxy machinery the stockholders' meeting as it had functioned when holders were few and not widely scattered. The contemporaneous editorial he read into the record described the change as a step for the democratic principle.⁸⁴

The framing was nonetheless retrospective rather than expansive. The rights the Commission claimed to be assuring were those it said the stockholder already held under state law, and its stated object was to make them exercisable rather than to create new ones. That framing was itself contested at the hearings. Representative Reece argued that the conduct of a company could not be based altogether on purely democratic theory, and that what rules should protect was the common interest of shareholders rather than the right of the individual.⁸⁵

C. Screening and Enforcement at the Outset

An informal screening practice is on the record at the 1943 hearings. It matters because the no-action process is usually dated to the filing requirements of 1947 and 1948. Commission staff described companies asserting that a proposal was not a proper subject for stockholder action but a matter for the directors. The staff answered that it would raise no objection if the company omitted it. That exchange

⁸³ 1934 House Hearing, *supra* note 49, at 141.

⁸⁴ 1943 Hearings, *supra* note 2, at 12–13, 225–26, 231, 236.

⁸⁵ *Id.* at 172, 231.

is the earliest form in the record of what became both the no-action process and the proper-subject exclusion now at Rule 14a-8(i)(1).⁸⁶

The remedy beyond that was hypothetical rather than established. Purcell was asked what the Commission would do if management refused to carry a supporting statement on advice of counsel that it was libelous. He described a graduated escalation ending in an action for an injunction. Bane said the Commission had never had such a case. The practice of asking a company to support its position with cases, he said, had not arisen under this provision.⁸⁷

The determination of falsity was the Commission's own and not the staff's. Purcell was asked who decided whether a supporting statement was false or misleading. He answered that the Commission decided, and the whole Commission in a close case. He added that Bane would without exception bring such a matter up. Nor was the consequence merely permissive. Purcell said the Commission would tell the company it need not carry the statement. He then said that it would not let the company carry it if it was actually false or misleading.⁸⁸ The Commission also acknowledged a limit on what it would do about an omission. Asked whether it would prevent a solicitation that omitted a stockholder's proposal, Bane answered that it would not and that the rules did not require it. Representative Brown's response was that the rules then really did not mean anything. What the Commission had was the injunction Purcell had described on the same pages. That was a remedy after the fact rather than a bar on the solicitation.⁸⁹

D. Contestation at the Hearings

The 1942 revision was adopted on December 18, 1942, to take effect January 15, 1943. Congress had adjourned two days before adoption. Charges appeared in the press that the Commission had breached an understanding by issuing the rules during a recess. Purcell denied any such understanding and said he had told the committee chairman in advance and received no objection. He noted that Representative Wolverton had written to him in the autumn of 1942, suggesting the committee might wish to consider the proposed revisions. He had offered to appear, and the suggestion was never renewed.⁹⁰ Three bills followed, H.R. 1493, H.R. 1821, and H.R. 2019. They would suspend the

⁸⁶ 1943 Hearings, *supra* note 2, at 117 (statement of Baldwin Bane, describing companies stating that a proposal is not proper, is outside the authority of the stockholders, is a proper subject for the directors, and the staff answering that it would raise no objection).

⁸⁷ 1943 Hearings, *supra* note 2, at 117–18. Purcell described giving great weight to a properly supported opinion of counsel, making the Commission's own inquiry, advising management if it concluded that opinion was clearly erroneous, and suing for an injunction if management persisted. The court would then determine the question definitively.

⁸⁸ 1943 Hearings, *supra* note 2, at 112. The Commission's later account of this exchange is unreliable in three respects. See Statement of Informal Procedures for the Rendering of Staff Advice With Respect to Shareholder Proposals, Exchange Act Release No. 34-12599 (July 7, 1976), 41 Fed. Reg. 29,989, 29,990 n.18 (July 20, 1976). A preliminary point concerns the release's own title. The Federal Register heading at 29,989 prints *Informal Proposals. Procedures* is what CCH and the Second Circuit print, and it is what the release is. First, the release prints, *in the light of the facts that we know that the [100-word] Statement is false or misleading*, where the record reads *that the statement is false or misleading*. The bracketed narrowing is the Commission's own. Second, it prints *if it appears right from the fact of the statements*. The record reads *face*, not *fact*. Third, it ends the quotation at *we will tell the company they need not carry it*, without an ellipsis. Purcell's next sentence reads, *In fact, we will not let them carry it if it is actually false or misleading*. The omitted sentence states a prohibition where the quoted portion states only a dispensation.

⁸⁹ 1943 Hearings, *supra* note 2, at 117–18.

⁹⁰ 1943 Hearings, *supra* note 2, at 16.

Commission's authority under Sections 14(a) and 14(b) during the war emergency. The hearings of June 1943 were held on those bills.⁹¹ None of the three bills would have removed federal proxy regulation.

Industry objection had preceded the rules. At Purcell's own invitation, five signatories met Commission staff on October 7, 1942 and submitted a letter and memorandum dated October 12. They were Lewis H. Brown of Johns-Manville, Charles S. Garland of Alex. Brown and Sons, Edward Hopkinson Jr. of Drexel and Company, Emil Schram of the New York Stock Exchange, and Robert W. White of Union Carbide.⁹² The memorandum's fifth general head asserted that the proposed revision went beyond the scope of the authority granted by Congress. It added that if such regulations were necessary they should be established only after hearings and legislation. Its argument was that Section 14 authority was confined to disclosure and that several proposals were not disclosure measures at all.⁹³ The memorandum also argued from the legislative history, and it made the argument this paper makes about the deletion. It stated that an early draft of Section 14(a) had included a brief description of the information the Commission would be authorized to require. The section as enacted was very general in form. That generality, the signatories said, was due to the difficulty of prescribing precise standards rather than to any intent of Congress to give the Commission unlimited power. The deletion argument is therefore in the record in October 1942, made by the regulated side to the agency itself.⁹⁴ The memorandum went further and quoted the Commission's own account of Section 14 back at it. It set out testimony Purcell had given the same House committee fourteen months earlier. Corporations, he had said, "were also required *under section 14* to use adequate and truthful information in solicitation of proxies." The memorandum marked that passage with the notation *italics supplied*.⁹⁵ The memorandum's objections to the shareholder proposal provision were of a different character. They rested on the risk of libelous or irrelevant matter from a proponent who need buy only a single share, and on the volume that unlimited submissions might produce. Those objections did not invoke the authority question.⁹⁶

The memorandum's other general heads were not about authority. It asserted that information was entirely lacking of any significant demand from stockholders for changes of this character. Before acting, it said, the Commission should have a positive showing that a substantial proportion of stockholders believed the existing rules ineffective. It argued that extending the statutory liabilities to the annual report would constrain corporate officials to hand drafting to lawyers and technical persons. Those persons would be "concerned more with literal compliance with the requirements of rules than

⁹¹ 1943 Hearings, *supra* note 2, at 9–10. Each of the three bills would have preserved the proxy rules as they stood before the December 1942 revision rather than removing proxy regulation. H.R. 1493 and H.R. 1821 would have continued in effect the rules promulgated prior to November 1, 1942; H.R. 2019 would in addition have declared rules and amendments promulgated after that date null and void.

⁹² 1943 Hearings, *supra* note 2, at 149–59. The letter was submitted at Purcell's own request following a meeting on October 7, 1942, and its signatories described themselves as acting in no representative capacity. *Id.* at 149.

⁹³ *Id.* at 150. The statutory authority objection appears in the letter at 150 and is developed at 153. The argument concedes disclosure authority and attacks only the extension beyond it, and its leading illustration is the proposed prohibition on discretionary proxies rather than the shareholder proposal rule. That proposal was not adopted. *Id.* at 19.

⁹⁴ *Id.* at 153. The legislative history argument appears there, forty-six years before Ryan, *supra* note 36, at 136–40, traced the deletion under the heading that the proposed revision goes beyond the scope of the authority granted by Congress.

⁹⁵ 1943 Hearings, *supra* note 2, at 153. The memorandum quotes Purcell's October 1941 testimony to the same committee.

⁹⁶ *Id.* at 159. The objections to the shareholder proposal provision rest on the risk of libelous or irrelevant matter from a proponent who need buy only a single share and on volume. They do not invoke the authority question. The other general heads appear at 151–52. The fourth was that wartime conditions made the revision untimely.

with the need of stockholder understanding.” The report would become “a dry and legalistic document,” and that managements would hesitate to include any matter not required by law. And it argued that the obligations attached to listing could become heavy enough to start a migration away from listing, defeating a principal purpose of the Act. It put figures to that alternative. Not much over 2,000 listed companies against more than 6,000 in Moody’s Manual and an estimated 30,000 issues traded over the counter.⁹⁷

The same interest was pressed on the Commission from inside the committee. Representative Harris asked Bane whether the most general complaint from business was that the Commission “is continually considering rules and regulations and therefore nothing is ever clarified and business does not know where they are, and they do not know what to depend on today and tomorrow or next week.” Bane said he had heard the complaint but would not accept that it was the most general one. He also had heard its opposite, that the Commission “does not take advantage fast enough of some things that its experience shows should be taken advantage of.” Both complaints were on the record in 1943.⁹⁸

The Commission’s witnesses also described how the rule was expected to develop, and the account held across three exchanges. Answering Hall’s demand that the rule be changed, Bane said one advantage of the law as it stood was “that it is so flexible that when the Commission, regardless of what the rule is that it adopts, finds that that rule is working badly or is working unfairly, it can change it; and, it can change it forthwith.” Pressed by Boren on where the limits of the hundred-word statement would be reached, he answered, “I do not know. These things, this, of course, is experimental.” Asked whether he would now vote to withdraw the rule, he said no. His reason was that “we had not had enough experience under this rule to definitely reach an opinion or judgment as to whether and as to how we should change it.” He coupled that with the Commission’s ability “to immediately change when it sees the rule being used so as to produce a real harmful result.” Within that answer he offered the one datum the season had produced. There had been “no statements that anybody has characterized or called scurrilous or libelous.” He offered it in support of a judgment he had just declined to make.⁹⁹

What the Commission offered was a method rather than a defense of the rule’s content: adopt, observe, revise without delay, and defer judgment until experience accumulated. It was offered as the reason legislation was unnecessary, at hearings convened on bills to suspend the Commission’s authority under Section 14(a). Sections VI and VII trace what followed.

The objection found an instance during the first season under the new rules. Representative Hall put the holdings on the record. James Fuller of Hartford, Connecticut held ten shares of common in American Tobacco, ten in Consolidated Edison, ten preferred in Curtiss Publishing, ten in Woolworth, fifteen in Associated Drygoods, fifteen in Gimball Brothers and fourteen in Allied Stores. The total investment was \$4,426.13. Against that he had submitted twenty-nine proposals across the seven companies. Hall’s characterization was that Fuller’s hobby was “making proposals and compelling the corporations to submit them to stockholders under the rules promulgated by your Commission.” The corporation, he said, had to pay for it. Bane answered, “I agree with that last statement.” He then said it

⁹⁷ 1943 Hearings, *supra* note 2, at 151–52. The head on the absence of stockholder demand, the positive-showing suggestion, and the drafting passage are at 151. The listing figures are at 152. The memorandum runs at 149–59, *supra* note 92.

⁹⁸ 1943 Hearings, *supra* note 2, at 228.

⁹⁹ 1943 Hearings, *supra* note 2, at 224, 226, 229.

again in his own words, that Fuller “does seem to have a hobby of submitting such proposals to corporations.” Boren pressed the same point in a different register, asking whether it was democratic to permit a man “to promulgate a statement of idiocy or some ism.”¹⁰⁰

Purcell undertook to put a full breakdown into the record. Bane supplied it later in his own testimony, in answer to a different question, whether he would now vote to withdraw the rule. Through May 7, 1943, the Commission had received 988 proxy statements under the new rules. Proposals appeared in sixteen of them. Hundred-word statements appeared in thirteen. Of those thirteen, Fuller alone accounted for six and was among the proponents in two more. He was therefore concerned in eight of thirteen, not the eleven of thirteen Boren had put to Bane the previous day. At one further company Fuller made two proposals that carried no statement because management accepted them.¹⁰¹

Purcell answered Hall from state law. These proposals, he said, involved rights of stockholders under state law and were to be made at the meeting. The purpose of the rule in this respect was to let every stockholder hear of all proposals fellow stockholders had to make. The stockholder could then decide whether he thought a proposal good, bad or indifferent, and vote accordingly. The answer matters for what came later. The Commission rested the requirement in 1943 on the stockholder’s state-law right to make the proposal at the meeting. Section XI.B sets out the same premise in 2025.¹⁰²

The Commission’s affirmative case quoted the statute and then turned to the committee reports for its content. Purcell noted that Congress had on three separate occasions enacted laws contemplating that the Commission would adopt proxy rules, and he read Section 14(a) into the record. He then quoted the House committee’s statement that fair corporate suffrage is an important right attaching to every equity security bought on a public exchange. The committee’s reasoning was that because only the exchanges make wide distribution possible, their use should carry a corresponding duty of according shareholders fair suffrage. That, on the committee’s account, is why the bill gives the Commission power to control the conditions under which proxies may be solicited. He also quoted the Senate Banking Committee’s view that a stockholder should be enlightened not only as to the financial condition of the corporation but as to the major questions of policy decided at stockholders’ meetings. He quoted its recommendation as well, that solicitation and issuance be left to regulation by the Commission. Purcell read fair corporate suffrage as meaning both adequate and accurate information to stockholders and an opportunity to act on that information. He said it seemed quite unreal to intimate that the Commission had usurped the powers of Congress in doing what it had been told to do. He called the charge wholly unjustified.¹⁰³ The second half of that reading, the opportunity to act, is what carried the ballot requirement and the proposal rule. It is the half the members disputed.

At the hearings the authority question was put to the Commission directly. Representative Winter asked whether the rules had been promulgated solely on the theory that Congress had granted

¹⁰⁰ 1943 Hearings, *supra* note 2, at 224. Boren’s question is at 165. The holdings and proposal counts are Hall’s, given from the floor, and Bane did not confirm them.

¹⁰¹ 1943 Hearings, *supra* note 2, at 229; *id.* at 164–65 (Purcell’s undertaking and Boren’s figure).

¹⁰² 1943 Hearings, *supra* note 2, at 170–71. The passage sits inside Purcell’s account of the first season under the rules. A management had sent its soliciting material without mentioning proposals it knew of and intended to oppose. The Commission regarded that solicitation as misleading and required a supplemental letter disclosing the proposals and the intention to oppose them. *Id.* at 170. Purcell’s answer to Hall is that *these, under State law, under the rights of stockholders, involve proposals that were to be made at the meeting.*

¹⁰³ *Id.* at 12–13 (quoting H.R. Rep. No. 73-1383, at 13–14, and S. Rep. No. 73-792, at 12).

authority as a matter of disclosure. Purcell answered that it was principally on that basis, almost entirely. He explained that requiring a company to place a ballot space on its proxy material could not fairly be described as disclosure. To that limited extent the rules went beyond it. He then asserted that Congress had intended to give more than disclosure authority, resting that on the statute and the committee reports. Pressed on whether the Commission believed it could make any rule it thought necessary to carry out congressional intent, he offered a limiting principle. The rules would have to be reasonably related to the solicitation of proxies and to the improvement of the proxy machinery. The Commission could not go in any old direction. Asked what the crux was, Winter answered his own question. It was just how much authority the Commission has, and how much it should have. Purcell observed that the objection had been raised in magazine and newspaper articles. It had never been raised in a court of law, and never, so far as he had heard, by anyone in Congress. Winter immediately asked whether the committee the Commission had itself convened had not made that very assertion. Purcell conceded that it had.¹⁰⁴

Purcell had made the same concession a day earlier, and gone further. Representative Reece asked whether the Commission based its policy on information only and not on interfering with the management of the corporation. Purcell answered that it did. The Commission had never attempted to interfere, and that its direction had been principally concerned with disclosure. Only in incidentals, he said, such as the providing of a ballot form, had it gone beyond. Reece then put it to him that some in industry would think the hundred-word statement provision went beyond the furnishing of information. Purcell allowed that there could be a strong body of thought to that effect and that he would personally disagree with it. He added that it would not be beyond the Commission's powers as set forth in the statute. Even if the rules were discovered to have slight implications beyond disclosure, he said, the Commission would still be within its authority. The Commission's authority claim went no wider in the hearings.¹⁰⁵

Representative Wolverton pressed the disclosure-only reading from a different position. He had sat on the committee that handled the 1934 bill. He remembered the hearings distinctly, he said, and had asked the proponents directly. They told him the whole theory of the legislation was to put investors in possession of information about the company. On that recollection he argued that the Commission had gone beyond the disclosure theory and taken upon itself a sort of guardianship of the rights of a stockholder. He was careful to say he was not condemning the desire to protect the stockholder but the interpretation. He objected in particular to fixing how shareholders shall vote and in what form. That was so different from established practice in the several States that Congress could not be assumed to have intended it.¹⁰⁶

Baldwin Bane, answering for the Commission, conceded the premise. The proxy rules do in some particulars go beyond mere disclosure, he said, though the particulars are very few and the Commission had largely confined itself to the disclosure principle. He added that Congress did not say disclosure in the statute itself and does not refer in that section to disclosure alone. The reports indicate something further, speaking of control of the conditions under which proxies may be solicited. Pressed

¹⁰⁴ *Id.* at 178–79.

¹⁰⁵ 1943 Hearings, *supra* note 2, at 175 (exchange between Representative Reece and Chairman Purcell, a day before the exchange with Representative Winter at 178–79).

¹⁰⁶ *Id.* at 236–37.

on where the ballot requirement fell within the disclosure theory, Bane conceded that the provision for writing the ballot into the proxy was not disclosure. Its justification, on his account, lay in the committee report's direction. The stockholder was to be given better suffrage in connection with the affairs of the corporation upon which he had a right to act. He closed the point by saying it was not disclosure and he would not attempt to say it was.¹⁰⁷ Wolverton asked whether the language should be clarified if the Commission and the legislative branch differed about its meaning, and recalled a general feeling to the same effect at the January 1943 hearings. Bane answered that there cannot be but one answer to that, and that undoubtedly it should be. The exchange did not end in agreement. Wolverton restated his objection, Bane told him he had overstated what the Commission had done, and the matter was left there.¹⁰⁸ That concession went to the premise of the charge his Chairman had called wholly unjustified.

A separate state-law objection came from Representative Brown, who argued that until the Commission's order he had been free as a shareholder to solicit general proxies from fellow shareholders in his own State. The rules, he said, had taken that away. Purcell disagreed and said the position was stated too strongly.¹⁰⁹

Both sides asked Congress to resolve the question, and Congress did not amend Section 14(a) then. The operative language of the provision is unchanged. The 1964 amendment addressed the range of covered securities rather than the scope of the Commission's authority.¹¹⁰

The dispute the hearings left open was not about which proposals should qualify. It was about whether Section 14(a) reached beyond disclosure at all, and if so on what authority. The Commission's position rested on the committee reports rather than on the statutory text, which supplied no substantive standard, while the members who objected read the same silence the other way. Neither reading prevailed, and the question passed out of the hearings unresolved.

The Commission gave Congress its own account of the rules three years later, and the account is disclosure throughout. In 1946, recommending that the proxy provisions be extended to unregistered securities, it set out what Regulation X-14 required. A proxy must be accompanied by a written statement adequately advising the stockholder concerning matters to be voted upon at the meeting. The annual report must reach stockholders in time to be of practical use. The proxy statement must give the names, security holdings and remuneration of the directors proposed to be elected, the business experience of new nominees, the personal interest of management in any matter to be acted upon, and the interest of directors and nominees in transactions during the past year. Where a special order of business is involved it must state who a remuneration plan is intended to benefit and what it may cost. And if any other action is to be taken, the proxy statement must describe briefly the purpose and general effect of the proposal. What a nonmanagement holder gets appears in two sentences. The rules provide a method for nonmanagement groups at their own expense to solicit proxies in opposition to the management. And proxy statements of the management must disclose proposals intended to be raised at the meeting not only by the management but also by stockholders where known. Neither is an obligation to carry a proposal. The Commission closed by calling its proxy rules quite simple, evolved

¹⁰⁷ 1943 Hearings, *supra* note 2, at 236.

¹⁰⁸ *Id.* at 237–38.

¹⁰⁹ *Id.* at 172.

¹¹⁰ Pub. L. No. 88-467, § 5, 78 Stat. 569 (1964). *See infra* Section XII.D.

gradually in the light of years of experience in their administration, functioning efficiently and smoothly, probably the most useful of all the disclosure devices established by its acts, and an effective contribution to corporate democracy.¹¹¹ The account is a compressed summary of one regulation operating under three statutes, so what it leaves out carries less than an omission from a full account would.

The same pages show where the Commission located its authority. Its account opens on three things. The average stockholder has grown more and more remote from the management of the corporation. The proxy machinery has remained more or less exclusively in the hands of existing management groups. And the proxy instrument serves simply to perpetuate existing management, where the holder is kept in ignorance of the company's business. These considerations, the Commission said, led to the framing of Section 14. The footnote to that sentence cites the House Report at 13–14 and the Senate Report at 12. It cites no statutory text. None of the three pages mentions a holder placing a matter before other holders. The House Report page names the remedy as power to control the conditions under which proxies may be solicited.¹¹²

VI. Narrowing the Rule

A. The Social-Cause Exclusion, 1945 to 1952

The rule's first major doctrinal development came in January 1945, in a letter from the Director of the Division of Corporation Finance, answering a company that had asked whether certain stockholder proposals were proper subjects for action. The proposals asked that dividends be exempt from federal income tax where the underlying income had already been taxed, that the antitrust laws and their enforcement be revised, and that federal legislation providing for the representation of workers and farmers be made to apply equally to investors. The company's position was that the proposals were political and economic in nature and outside the scope of its business.¹¹³

The reasoning of the reply is the part that matters. Speaking generally, the Director wrote, it is the purpose of the rule "to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it is organized." "It was not the intent of Rule X-14A-7," he continued, "to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature. Other forums exist for the presentation of such views." His conclusion was that the proposals were not "proper subjects for action" by the company's stockholders

¹¹¹ Proposal to Safeguard Investors in Unregistered Securities, H.R. Doc. No. 79-672, at 17–18 (1946).

¹¹² *Id.* at 17 & n.28 (citing H.R. Rep. No. 73-1383, at 13–14, and S. Rep. No. 73-792, at 12). Both are discussed in Section III.B.

¹¹³ Letter of the Director of the Corporation Finance Division relating to section 20 and to Rule X-14A-7, Exchange Act Release No. 34-3638 (Jan. 3, 1945), issued identically as Investment Company Act Release No. IC-735, printed at 11 Fed. Reg. 10,995 (Sept. 27, 1946), with an index entry at 10,988, <https://www.govinfo.gov/content/pkg/FR-1946-09-27/pdf/FR-1946-09-27.pdf>. The letter is printed without a signature, as a letter of the Director of the Corporation Finance Division. Baldwin B. Bane held that office and is named as Director in another release printed on the facing page, § 271.446, at 10,994. The attribution to Bane rests on office and on that adjacent release rather than on a signature.

“within the meaning of that phrase as used in Rule X-14A-7.”¹¹⁴ The exclusion was therefore not a freestanding policy about social causes. It was an interpretation of the proper-subject limitation, and the sequence matters. The 1942 rule required management to carry a proposal that was a proper subject for action by the security holders, and said nothing about what made a subject proper. The phrase stood in the rule undefined for three years. This letter is the first statement that it pointed to state law. A proposal is a proper subject if shareholders may act on it under the law of the state where the company is organized. The Commission confirmed as much nine years later, when it amended the rule to say so expressly. It explained that the rule had not previously specified state law as the standard, and that the Commission had so stated in a prior release, naming this letter.¹¹⁵ The Commission had first proposed the opposite. In October 1953 it proposed to delete the proper-subject reference from the rule altogether. In its place would have stood a test of whether the security holder was entitled, under the laws of the issuer’s domicile, to have action taken at the meeting. The phrase was kept at adoption in January 1954, after a public hearing held December 16, 1953.¹¹⁶ The adopting release does not mention the proposed deletion.¹¹⁷

In October 1950 a Greyhound shareholder submitted for the 1951 annual meeting a recommendation that management consider the advisability of abolishing the segregated seating system in the South. It put a different question to that interpretation. Unlike the proposals of 1945, it concerned the company’s own conduct rather than public policy at large. The company told the Commission it would not include the proposal. Its ground was that the proposal was not a proper subject for action under Rule X-14A-8(a), and it cited the 1945 letter. The Assistant Director of Corporation Finance replied that the Commission agreed.¹¹⁸ In 1952 the Commission amended the rule to permit omission of proposals submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes. The adopting release described the amendment as an addition. The previous rules had permitted omission of proposals submitted primarily to enforce a personal claim or redress a personal grievance, and the amended rules also permitted omission of the general-cause proposals.¹¹⁹ The 1952 amendment therefore wrote into the rule text a boundary the

¹¹⁴ Release No. 34-3638, *supra* note 113, 11 Fed. Reg. at 10,995. The Commission reads the letter’s conclusion as reached without reference to the law of the company’s state of incorporation, and as positioning the rule as a federal common law of shareholder voting rights. Exchange Act Release No. 34-106383, *infra* note 473, at 21–22.

¹¹⁵ Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 246.

¹¹⁶ The proposing release is Solicitation of Proxies, Notice of Proposed Rule Making, Exchange Act Release No. 34-4950 (Oct. 9, 1953), 18 Fed. Reg. 6646 (Oct. 20, 1953). The proposed deletion and proposed Rule X-14A-8(c)(1) appear at 6647. <https://www.govinfo.gov/content/pkg/FR-1953-10-20/pdf/FR-1953-10-20.pdf> (complete issue of October 20, 1953). The hearing was noticed at Proxy Rules, Public Hearing on Proposed Amendments, 17 C.F.R. pt. 240, 18 Fed. Reg. 8120 (Dec. 10, 1953), which recites Release No. 34-4950, states that the Commission decided the public interest warranted a hearing after considering the written comments, and sets the hearing for December 16, 1953.

¹¹⁷ See *supra* note 115.

¹¹⁸ *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 680 (S.D.N.Y. 1951). The proposal was submitted by letter of October 23, 1950. The company’s letter to the Commission is dated February 13, 1951 and the Assistant Director’s reply March 8, 1951. The opinion prints the operative sentence of the 1945 letter and records that Rule X-14A-7 had by then become Rule X-14A-8. The court denied a preliminary injunction at 681.

¹¹⁹ Securities Exchange Act Release No. 34-4775 (Dec. 10, 1952), 17 Fed. Reg. 11,431 (Dec. 18, 1952), <https://www.govinfo.gov/content/pkg/FR-1952-12-18/pdf/FR-1952-12-18.pdf>. The amendments were effective December 11, 1952. The amendment appears at 11,433, in § 240.14a-8(c)(1). The release describes the change as an addition rather than as a restatement. The previous rules permitted omission of proposals submitted primarily to enforce a personal claim or redress a personal grievance, and the amended rules also permit omission of proposals submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes. Nothing at 11,431 through 11,437, comprising the

staff had been applying for seven years. The question it settled in writing was which kinds of proposals fall within the governance scope of the rule and which fall outside it. That question had been answered informally since 1945. It has been answered differently in different administrative periods since, without achieving durable settlement.

B. Transamerica and the Retreat from It, 1946 to 1952

In 1946 John Gilbert, holding seventeen shares of Transamerica Corporation, gave notice of four proposals for the annual meeting. Two of them asked that independent auditors be elected by the shareholders and that Bylaw 47 be amended to remove its notice requirement. Bylaw 47 required that notice of any bylaw amendment appear in the notice of the annual meeting, a document management prepared. Transamerica argued that the board therefore had discretion to keep the proposals out, and that the proposals were not proper subjects under Delaware law. The Commission advised the company that it was required to include them, and when the company refused, the Commission sued. The district court largely agreed with Transamerica. It held that the proper-subject question must be answered not by federal but by Delaware law. It held Bylaw 47 valid, and that only the auditor proposal need be circulated. The Third Circuit modified. It held all of Gilbert's proposals proper subjects within Rule X-14A-7. Its ground was that all were subjects on which stockholders had the right to act under the General Corporation Law of Delaware. It reached that conclusion through the state statute, the charter and the bylaws. Only then, and expressly in the alternative, did it turn to federal ground. If the notice provision could be used as management sought to use it, it would "circumvent the intent of Congress in enacting the Securities Exchange Act of 1934." That intent was "to require fair opportunity for the operation of corporate suffrage," and the abuse struck at in Section 14(a) was "[t]he control of great corporations by a very few persons." The court closed the passage by saying that "[t]he power conferred upon the Commission by Congress cannot be frustrated by a corporate by-law."¹²⁰

Two features of the decision matter for what follows. The first is its basis. The holding rests on Delaware law. The earliest judicial construction of the rule therefore stands on the same side as Bane's testimony in 1943 and the Director's letter of January 1945. That was seven years before the Commission wrote the standard into the rule text. The federal ground is not a second holding. The court states its conclusion first and in full. Gilbert's proposals are proper subjects within the rule, because all are subjects on which stockholders have the right to act under the General Corporation Law of Delaware. That disposes of the appeal. The sentence that follows opens on a counterfactual, assuming *arguendo* that this was not so, and the congressional-intent language sits inside it. The passage answers a question the court had just declined to reach. That reading is not universal. Fisch accepts that the court found Delaware law did not prohibit the bylaw, but reads its statement about frustrating the

preamble, Rules 240.14a-1 through 240.14a-10 and Schedule 14A, characterizes the amendment as a codification of existing staff practice, and the release does not refer to the 1945 letter or to the Greyhound proposal.

¹²⁰ SEC v. Transamerica Corp., 163 F.2d 511 (3d Cir. 1947) (Biggs, J.), *cert. denied*, 332 U.S. 847 (1948), *modifying* SEC v. Transamerica Corp., 67 F. Supp. 326 (D. Del. 1946) (Leahy, J.) (decided July 11, 1946; rehearing denied Sept. 9, 1946). Nos. 9240 and 9259, decided September 15, 1947 on cross-appeals. The proper-subject analysis is at 163 F.2d 517–18 and the holding at 518. The alternative federal ground and the quoted phrases are at 518. The district court's statement that the question must be answered not by federal but by Delaware law is at 67 F. Supp. 329. The court's authority for the congressional intent, at 163 F.2d 518 n.12, is H.R. Rep. No. 73-1383, at 13–14, and S. Rep. No. 73-792, at 12. Fisch, *Transamerica*, *supra* note 66, at 50–53.

intent of Congress as an independent federal basis for the holding rather than an alternative one.¹²¹ The reading matters beyond the historical question. In October 2025 SEC Chair Paul Atkins endorsed the view that Rule 14a-8's procedural grounds for exclusion are defaults. They apply, on that view, only where a company has not set its own standards in its governing documents. He also agreed with the treatment of *Transamerica* on which that view depends, that the Third Circuit's decision at most arguably forecloses a company from establishing such standards. On the reading given here the congressional-intent passage is dicta and forecloses nothing. Fisch reads the same passage as an independent federal basis, and on her reading it forecloses a good deal. The two readings differ over one sentence, and a great deal rests on which is right.¹²²

The second is its effect on the forum. The validity of Bylaw 47 was a question of Delaware law, and a Delaware court would ordinarily have decided it. After *Transamerica* it was decided federally. That displacement is the pattern the no-action process would later institutionalize, discussed in Section VI.C.¹²³

The passage acquired its standing by a route worth setting out, because none of it runs through a holding. The phrase is the House Report's. Purcell quoted that report to the House committee in 1943 while defending the rule against bills to suspend it. The Commission quoted it again to Congress in 1946, in a footnote citing the House Report at 13–14 and the Senate Report at 12. The Third Circuit's footnote in 1947 cites the same two reports at the same two pinpoints.¹²⁴ None of the three cites statutory text for the purpose it states. In the seventy-nine years since, three federal courts have quoted the passage. One borrowed the phrase and said so. One gave it as a see also and used the purpose to deny a shareholder standing. The third rested reasoning on it, at the hinge of its analysis, and the Supreme Court vacated that judgment as moot two years later.¹²⁵

¹²¹ Fisch, *Transamerica*, *supra* note 66, at 52 (reading the court as having concluded that issuer-specific limitations on the voting power the rule conferred were improper because they would interfere with the congressional intent to require fair corporate suffrage). The opinion states the holding on the state-law ground: Gilbert's proposals are proper subjects within Rule X-14A-7 since all are subjects on which stockholders have the right to act under the General Corporation Law of Delaware. 163 F.2d at 518. The congressional-intent passage is at 518.

¹²² Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm'n, Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala (Oct. 9, 2025), <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala> (endorsing Mark T. Uyeda, Remarks at the Society for Corporate Governance 2023 National Conference (June 21, 2023), <https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-society-corporate-governance-conference-062123> (that the rule's procedural bases for exclusion should be viewed as default standards applying only if companies decline to establish their own in their governing documents), and agreeing with the treatment of *Transamerica* at Uyeda's note 55).

¹²³ Fisch, *Transamerica*, *supra* note 66, at 53 (making the same point). The validity of Bylaw 47 turned on how far a bylaw may limit the statutory power to amend bylaws, which is a question one would expect the Delaware Chancery court to decide in the first instance, and an obvious alternative to federalizing it was a state-court challenge to the bylaw.

¹²⁴ The Commission's 1946 footnote is at H.R. Doc. No. 672, at 17 n.28 (citing H.R. Rep. No. 73-1383, at 13–14, and S. Rep. No. 73-792, at 12). The court's footnote at 163 F.2d 518 n.12, *supra* note 120, cites the same two reports at the same pages. The reporter's headnote to the passage gives it as a flat proposition of congressional intent, without the arguendo assumption that governs it, and under a field cite reaching Sections 14(a), 21(e), 23(a) and 27, where the sentence in the opinion names Section 14(a) alone.

¹²⁵ *Dyer v. SEC*, 266 F.2d 33, 37 (8th Cir.), *cert. denied*, 361 U.S. 835 (1959) (giving the phrase as borrowed from *Transamerica*); *Werfel v. Kramarsky*, 61 F.R.D. 674, 678 n.3 (S.D.N.Y. 1974) (*see also*, quoting the intent sentence, in support of denying a warrant holder standing under Section 14(a)); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 681 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

Transamerica was the high point. Rule X-14A-7 as it then stood imposed no qualification requirement, no limit on the number of proposals, and no subject-matter limitation beyond proper subject. Within a year the Commission had begun to narrow it. The narrowing did not stop: the social-cause exclusion of 1952, the ordinary business exclusion of 1954, and a succession of further grounds. The Commission never again sued to compel an issuer to include a proposal. In the litigation that followed, in *Medical Committee for Human Rights*, the Commission appeared on the other side, defending exclusions rather than compelling inclusion.¹²⁶

The volume was small from the outset. Proposals appeared in sixteen of the 988 proxy statements filed in the first season under the rule. From 1944 through 1947 they appeared in 91 of 6,380 management proxy statements, 1.4 percent. From 1948 through 1951 they appeared in 177 of 6,755, 2.7 percent, carrying 286 proposals. Voting results were furnished for 232 of those and seven carried. Five of the seven were not opposed, were favored, or drew no management recommendation. The two that carried over opposition came from one proponent at one company, Sparks-Withington, where he filed his own proxy statement and took a majority of the directorships. The Gilbert brothers submitted 137 of the 286, forty-seven percent. By 1955 proposals appeared in 3.1 percent of proxy statements filed with the Commission, and the Gilberts submitted sixty-five percent of all proposals that year. The subjects were governance: cumulative voting, selection of auditors, elimination of staggered boards, and executive compensation. Whatever the rule had become by 1947, it was in the 1950s a mechanism used by very few people. They used it on a narrow range of questions, at a small fraction of companies.¹²⁷

C. The No-Action Infrastructure, 1950s to 1960s

The administrative infrastructure of Rule 14a-8 is usually described as having grown out of staff correspondence. What accumulated was the correspondence, but the obligation that produced it was rule text. The December 1947 amendments imposed a filing requirement on management. A company asserting that a proposal could properly be omitted had to file with the Commission, no later than the date preliminary proxy materials were filed. It had to file a copy of the proposal as received and a statement of the reasons the provisions were deemed not to apply. The Commission gave its own account of what that revision was doing. Among the four purposes its preamble states is to incorporate into the regulation certain administrative interpretations. The statement covers Regulation X-14 as a whole rather than the proposal rule in particular. It is nonetheless the Commission recording in 1947 that some of what it was writing into rule text had been staff practice first. The Commission recorded that mechanism itself, twenty-eight years before the significant social policy doctrine.¹²⁸ The November

¹²⁶ Fisch, *Transamerica*, *supra* note 66, at 53 (noting that *Transamerica* is the only case in which the Commission brought suit to compel an issuer to include a shareholder proposal, and that the Commission thereafter moved from defending shareholder voting rights to defending issuer efforts to exclude proposals).

¹²⁷ Frank D. Emerson & Franklin C. Latham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 812, 828–30 (1952). The volume figures are at 812 and the results and proponent analyses at 828–30. The 1955 figures are Fisch, *Transamerica*, *supra* note 66, at 54. She takes them from Frank D. Emerson, *Some Sociological and Legal Aspects of Institutional and Individual Participation Under the SEC's Shareholder Proposal Rule*, 34 U. DET. L.J. 518, 537, 542 (1957). For the 1943 season see *supra* note 101.

¹²⁸ Solicitations of Proxies, 12 Fed. Reg. 8768, 8770 (Dec. 24, 1947). The Commission acted December 16, 1947, effective December 18, 1947. The filing requirement appears at § 240.14a-8(c), which reaches both an assertion that the proposal is not a proper subject and an assertion that the material and notice were not received a reasonable time before the meeting, and

1948 amendments added that management must at the same time notify the security holder of its intention to omit and advise the reasons.¹²⁹ Companies facing those requirements wrote to the Commission stating that they intended to omit a proposal and giving their reasons, and the replies to those letters became the no-action process. The earliest such exchange in the reported record is Greyhound's. In February 1951 the company wrote that it did not intend to include a shareholder's proposal. In March the Assistant Director of Corporation Finance replied that the Commission agreed. The proposal fell within the 1945 letter and need not be included. The enforcement-recommendation form the process later took is not how it began.¹³⁰

The exclusions arrived by amendment rather than by accumulation. The 1948 amendments permitted omission in three cases. The first was a proposal submitted primarily to enforce a personal claim or redress a personal grievance. The second was a proposal whose proponent had failed without good cause to attend or present a proposal previously included. The third was a proposal that had received less than three percent of votes cast. The Commission gave its reason. The rule required management to include proposals seasonably submitted which were proper subjects for action by security holders. The Commission had found that in a few cases security holders abused this privilege. They used the rule to achieve personal ends not necessarily in the common interest of security holders generally. The amendment placed reasonable limitations without unduly restricting the privilege the rule granted. That is the earliest statement of the abuse rationale, and it echoes the distinction Representative Reece pressed at the 1943 hearings.¹³¹

The 1952 amendments added the general-causes clause to the existing personal-claim ground, as discussed in Section VI.A. The 1954 amendments did four things at once. They wrote the state-law standard into the rule, as discussed in Section V.A. They added the ordinary business exclusion, which reaches a proposal consisting of "a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."¹³² They placed the burden of proof on management to show that a proposal was not proper for inclusion. Where management contended a proposal was not proper under state law, the release said "it will be incumbent upon management to refer to the applicable statute or case law and furnish a supporting opinion of counsel." And they replaced the flat three percent resubmission threshold with a graduated one of three, six and ten percent. A proposal falling below the applicable threshold could be omitted for three years from its last submission if it had been submitted within the previous five. The stated ground was that the flat rule "has resulted in the repetition year after year of proposals which have evoked very modest stockholder interest."¹³³ The Commission also reached *Transamerica* in the same passage. It

provides that compliance with the paragraph does not relieve management of its obligation to comply fully with the section. The document as printed carries no release number. The number 4037 is supplied by the secondary literature. The preamble is at 8768.

¹²⁹ Amendment of Regulation X-14, Solicitation of Proxies, Exchange Act Release No. 34-4185 (Nov. 5, 1948), 13 Fed. Reg. 6678, 6679 (Nov. 13, 1948). The amendments were adopted and effective November 5, 1948. Solicitations commenced before December 15, 1948 could proceed under the prior rules, at the option of the person on whose behalf made. The three grounds appear at 240.14a-8(c)(1) to (3) and the notice requirement at (d). The Commission's statement of reasons appears at 6679.

¹³⁰ *Peck*, 97 F. Supp. at 680.

¹³¹ Release No. 34-4185, *supra* note 129, 13 Fed. Reg. at 6679. The proposing release is Exchange Act Release No. 34-4114 (July 6, 1948), 13 Fed. Reg. 3973 (July 14, 1948).

¹³² Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 247. The ordinary business exclusion appears at 240.14a-8(c)(5).

¹³³ Amendment of Proxy Rules, Exchange Act Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 246-47. The state-law standard appears at 240.14a-8(c)(1) and the graduated resubmission thresholds at (c)(4).

wrote that it “wishes to make it clear that it considers this standard consistent with the decision of the Court of Appeals.” It gave no reasoning. The claim is about the holding and not the congressional intent passage. The court had measured the Gilbert proposals against Delaware law itself, and had used that measure to compel inclusion over a company bylaw. The amended rule took the same measure and made it a ground on which management could seek omission.¹³⁴

The 1954 amendments also moved the management filing to twenty days before the preliminary proxy filing, subject to a shorter period for good cause. They required that the reasons and any opinion of counsel be furnished to the proponent as well as to the Commission. The Commission gave two reasons. The first was that it would have more time to consider the problems involved in such cases. The second was that the security holder would have an opportunity to consider the management’s position and take such action as might be appropriate. That first reason is the Commission describing its own no-action workload as a reason to amend the rule. The same amendments doubled the *prima facie* reasonable time from thirty days to sixty, to give more time for the consideration of security holder proposals. By 1954 the no-action process had its modern shape, a proponent deadline, an advance filing, stated reasons, an opinion of counsel on questions of law, notice to the proponent, and a burden on management. Neither the burden of proof nor the opinion of counsel was proposed. The October 1953 text of paragraph (d) required the filing, the statement of reasons and notice to the proponent, and stopped there. Both appear first at adoption, after the hearing.¹³⁵

What the staff supplied was the answer, not the framework. A no-action letter is advisory correspondence, not an adjudication or a rule, and it binds nobody. But an issuer that received a favorable letter could omit a proposal with a reasonable expectation that no enforcement action would follow, and a proponent who received an unfavorable one had litigation as the only remaining route. Few took it. Through 1990, thirteen reported decisions arose out of what were by then hundreds of exclusions a year, an average of one every four years. Where courts did hear these disputes their review was case-specific and deferential.¹³⁶ The staff’s positions were therefore the operative standards in practice while remaining, in form, advice. The Commission understood this about itself. In 1972 it considered handing the whole question of inclusion to the courts, and declined. Its ground was that abdicating its historic role would cause great confusion in the organization, scheduling and conduct of annual meeting.¹³⁷ Ten years later Commissioner James Treadway put it plainly. The process compelled

¹³⁴ Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 246. The sentence follows the Commission’s statement that the amended rule makes state law the standard of eligibility. The release carries no argument for it. On what the decision held, *see* Section VI.B.

¹³⁵ Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 246–47. The burden of proof, the opinion-of-counsel requirement and the twenty-day filing appear at 240.14a-8(d) and in the accompanying discussion at 246, where the Commission gives both reasons and reserves authority to permit a shorter period for good cause. The sixty-day *prima facie* period appears at 240.14a-8(a) and is discussed at 246. Proposed paragraph (d) is at Release No. 34-4950, *supra* note 116, 18 Fed. Reg. at 6648. It carries neither the burden of proof nor the opinion of counsel.

¹³⁶ Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 881 & nn.7–9 (1994). Palmiter counts eight reported cases in the four years after 1990, roughly two a year and eight times the earlier rate, without a proportional rise in the number of proposals, so the change is in the rate of resort to the courts rather than in the volume of dispute. His first illustration of deferential review is *Peck*, 97 F. Supp. at 680.

¹³⁷ William J. Casey, Chairman, Remarks on New Proxy Rules, Address at the Corporate Law Conference 6–7 (Sept. 21, 1972), <https://www.sec.gov/news/speech/1972/092172casey.pdf>. Casey states at 6 that in issuing no-action letters against multiple-proposal proponents who did not follow through, the Commission conserved its own resources and made it easier for

the staff to arbitrate disputes through no-action positions that were not Commission decisions, were not legal precedent and were not appealable as final agency action. Those disputes were resolved without any realistic avenue of appeal or review beyond the staff decision.¹³⁸ He was describing a release the Commission had published the previous month, and the release went further than the criticism. It put three alternatives out for comment, two of which would have ended the staff's role in whole or in part.¹³⁹ Their terms are at Section X. The Commission was therefore not merely aware that its staff was arbitrating disputes it had no formal authority to decide. It had published for comment two ways of stopping, forty-three years before it did.

The questions the staff answered in these decades were narrow. There were four. Whether a proposal was a proper subject under the law of the state of organization. Whether it was submitted primarily to enforce a personal claim or redress a grievance. Whether it promoted a general cause. And after 1954, whether it related to the conduct of ordinary business operations. Each of those grounds had been established by amendment. What the staff decided was their application to particular proposals, one at a time, without stated reasoning, without any obligation to follow what it had decided before, and, until 1972, without any of the correspondence being available to anyone outside the exchange.¹⁴⁰

D. The Significant Social Policy Doctrine, 1960s to 1970s

The emergence of social-policy shareholder proposals in the 1960s created direct pressure on the exclusions as they then stood, the general-causes ground of 1952 and the ordinary business ground of 1954. Activists used the proposal process to raise concerns about civil rights, military contracting, and

companies to protect themselves from unnecessary cost and trouble. Casey also records at 6 that consideration had been given to passing the whole matter of which proposals should be included over to the courts, and states at 7 that the Commission felt abdicating the role it had historically played in the proxy process would cause great confusion in the organization, scheduling and conduct of annual meeting.

¹³⁸ James C. Treadway, Jr., Commissioner, Speech 2 (Nov. 12, 1982), <https://www.sec.gov/news/speech/1982/111282treadway.pdf> (speaking for himself and not for the Commission). Treadway states at 2 that the current process compels the staff to arbitrate disputes between management and proponents through the mechanism of no-action positions, that those positions are not Commission decisions, are not legal precedent and are not appealable as final agency actions, and that the disputes are resolved without any realistic avenue of appeal or review beyond the staff decision. Treadway gives preliminary figures for the year ended June 1982: 850 proposals submitted to about 300 of roughly 9,000 public companies, ninety-seven percent of companies receiving none, and almost half of all proposals withdrawn or accepted uncontested.

¹³⁹ Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-19135, Public Utility Holding Company Act Release No. 35-22666, Investment Company Act Release No. IC-12734, 47 Fed. Reg. 47,420 (Oct. 26, 1982). The discontinuance question is at 47,421; Proposal III at 47,422 and 47,433. Treadway's own view is at 8.

¹⁴⁰ On the grounds and the dates of their adoption, *see supra* notes 78, 119 & 129. On the form of the response, *see* Palmiter, *supra* note 136, at 881 n.7 (describing the typical letter as stating that on the basis of the facts presented in management's letter the staff will not recommend that the Commission institute enforcement action). On the absence of precedential weight, *see* Treadway, *supra* note 138, at 2. Rule 14a-8 correspondence became publicly available under 17 C.F.R. § 200.82 (2025), adopted at 37 Fed. Reg. 20,558 (Sept. 30, 1972) and unamended since, which reaches the materials filed under Rule 14a-8(d), written communications related thereto received from any person, and each related staff no-action letter, all available to any person upon request. The general no-action availability rule adopted two years earlier, 17 C.F.R. § 200.81 (2025), 35 Fed. Reg. 17,779 (Nov. 19, 1970), did not reach this correspondence. Paragraph (c) excludes communications relating to the accuracy or adequacy of any proxy or information statement, or to whether such a document complies with any applicable requirement. The 1972 rule therefore removed an exclusion rather than extending an existing one, and unlike § 200.81(b), which allowed a requester to seek confidential treatment for up to 120 days and to withdraw rather than have its letter made public, § 200.82 provides no confidentiality option.

corporate involvement in South Africa. The proposals they submitted were ones the existing rule would have been expected to exclude. The Commission met that pressure by changing the exclusions rather than by applying them as they stood.¹⁴¹

The modern era of social-policy shareholder proposals took institutional form in the early 1970s. In 1970 the Project on Corporate Responsibility submitted nine proposals for the General Motors annual meeting. The Project was a nonprofit holding twelve shares of General Motors common stock. Among the nine were one to enlarge the board by three seats and one to create a shareholders committee on corporate responsibility that would report to the shareholders directly.¹⁴² General Motors told the Commission it would carry none of them, and it asserted the grounds together. All nine, it said, promoted a general economic, political, racial, religious, social or similar cause. All but the bylaw amendment were not proper subjects under state law. All but the two amendments related to the conduct of ordinary business operations. And the bylaw amendment related to an election to office. The proponent answered that management could not have it both ways, that a proposal was not both a general social cause and a matter of ordinary business.¹⁴³ The Commission permitted seven to be omitted. On the shareholders committee it divided. Its General Counsel advised inclusion and the Division of Corporation Finance agreed with management. It required inclusion by a vote of two to one, and only on condition that the proposal be revised.¹⁴⁴ Both surviving proposals drew under three percent of the votes cast. Each drew more of the holders voting, at 7.19 and 6.22 percent.¹⁴⁵ Their significance lay not in the vote but in what the episode showed. The process could carry organized advocacy about corporate social conduct, and the exclusions as they then stood could be asserted together against one proposal until one of them held.

Pressure also came from the courts. In July 1970, in *Medical Committee for Human Rights v. SEC*, the D.C. Circuit reviewed the Commission's refusal to object when Dow Chemical omitted a proposal concerning napalm, and said what the exclusions had become. The two grounds Dow had invoked, general causes and ordinary business, could be construed to permit the exclusion of practically any proposal, on the footing that it was either too general or too specific. Dow had asserted both against the same proposal at once.¹⁴⁶ The Division accepted the omission without choosing between them. The court observed that the absence of stated reasons encouraged management to file every argument inventive counsel could contrive, in the hope that one would be accepted.¹⁴⁷ It remanded so that the Commission could reconsider on correct premises and state its reasons.¹⁴⁸ The Supreme Court vacated the judgment as moot in 1972, after Dow carried the proposal in 1971. It drew under three percent, and

¹⁴¹ *Medical Committee*, 432 F.2d at 661–62 and 680. The proposal was submitted to Dow Chemical on March 11, 1968 and asked that napalm not be sold to any buyer without reasonable assurance it would not be used on or against human beings. The court said its own examination raised substantial questions whether an interpretation of Rule 14a-8(c)(2) permitting omission of the proposal as one motivated primarily by general political or social concerns would conflict with the congressional intent underlying section 14(a).

¹⁴² Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 423–26 (1971). Schwartz was counsel to Campaign GM and says so at 421 n.*.

¹⁴³ *Id.* at 451–52.

¹⁴⁴ *Id.* at 453–54.

¹⁴⁵ *Id.* at 430.

¹⁴⁶ *Medical Committee*, 432 F.2d at 679. The court also held the Commission's decision reviewable under Section 25(a) at 672–73 and concluded at 676 that partial review of the legal premises did not intrude on an area committed to agency discretion.

¹⁴⁷ *Id.* at 674.

¹⁴⁸ *Id.* at 682.

the resubmission provision then permitted exclusion for three years.¹⁴⁹ A provision of the rule the case was about therefore erased the judgment, and with it the holding that the Commission must state its reasons. By then the Commission had already proposed the amendment it adopted that September.¹⁵⁰

The response came by rulemaking, in two steps, and the Commission made both. The October 1972 amendments subordinated the categorical ground to a test of significance and control. A proposal could be omitted if it recommended, requested or mandated action on any matter, including a general economic, political, racial, religious, social or similar cause. The matter had to be one that was not significantly related to the business of the issuer or was not within the issuer's control. The stated purpose was to replace the subjective terms of the provision with objective standards. The Commission said the revised paragraph would apply to all proposals and would not be limited to those involving general causes. Subject matter had ceased to be the test.

The Commission had stated both a year earlier, in the proposing release. There it also named the four words it was deleting: clearly appears, primarily, purpose and promoting. The Commission also named what the new test would not reach. The provision, it said, was "not intended to serve as a basis for the omission of traditional shareholder proposals dealing with stockholder relationships with the management, such as cumulative voting, annual meetings, and ratification of auditors, since all these matters can be considered significantly related to the issuer's business or within its control." Those are the subjects the Gilberts had been submitting since the rule's first year, and the ones *Transamerica* was about. The Commission protected them by name in the same breath that it dissolved the categorical ground.¹⁵¹

One change in the same rulemaking was made without notice and comment, and the Commission said so on the face of the release. The proposing release left the sixty-day submission deadline alone. At adoption the Commission advanced it to seventy days, to correspond with a ten-day change it was making to the management filing provision. It found that notice and procedure under the Administrative Procedure Act were not necessary in the public interest or for the protection of investors. Its ground was that the change was technical in nature. The certified-mail requirement was likewise added at adoption and was not proposed. A deadline governing every proponent in the country moved by ten days. It moved inside a notice-and-comment rulemaking, with the notice-and-comment step expressly disclaimed for that provision.¹⁵²

¹⁴⁹ SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972). Dow included the proposal in the 1971 proxy statement while reserving its position, and the Court treated the resubmission bar in Rule 14a-8(c)(4)(i) as making recurrence conjectural. Justice Douglas dissented at 407.

¹⁵⁰ Exchange Act Release No. 34-9432 (Dec. 22, 1971), the text of proposed Rule 14a-8(c)(2) being reproduced in the Douglas dissent at 404 U.S. 410 n.6.

¹⁵¹ Solicitations of Proxies, Exchange Act Release No. 34-9784, 37 Fed. Reg. 23,178 (Oct. 31, 1972), proposed at Exchange Act Release No. 34-9432 (Dec. 22, 1971), 36 Fed. Reg. 25,432 (Dec. 31, 1971). The significance and control test, the statement of objective standards, and the carve-out for traditional proposals are at 23,178–79. The objective-standards purpose and the four deleted words are at 36 Fed. Reg. 25,432, and the all-proposals scope at 25,432–33. The rule discussion in that release ends at 25,433 and the carve-out appears nowhere in it, so the carve-out is new at adoption. The Chairman described the change five weeks before adoption. Casey, *supra* note 137, at 4.

¹⁵² Release No. 34-9784, *supra* note 151, 37 Fed. Reg. at 23,179. The seventy-day deadline, the Administrative Procedure Act finding and the certified-mail note are there. For what the proposing release did and did not contain, see Release No. 34-9432, *supra* note 151, 36 Fed. Reg. at 25,432.

In November 1976 the Commission deleted the reference to general causes altogether as superfluous and unnecessary, saying expressly that no different standard was intended by the deletion. In the same release it announced the doctrine itself. The term ordinary business operations, it said, “has been deemed on occasion to include certain matters which have significant policy, economic or other implications inherent in them.” A proposal that a utility company not construct a proposed nuclear power plant had been treated as excludable under the former provision. In retrospect, the Commission said, “it seems apparent that the economic and safety considerations attendant to nuclear power plants are of such magnitude that a determination whether to construct one is not an ‘ordinary’ business matter.” Proposals of that nature, “as well as others that have major implications, will in the future be considered beyond the realm of an issuer’s ordinary business operations, and future interpretative letters of the Commission’s staff will reflect that view.” The doctrine was the Commission’s, announced in the Federal Register, and the staff was instructed to apply it.¹⁵³

The Commission had tried to write that line into the rule and had concluded it could not be written. It proposed in Release No. 34-12598 to narrow the exclusion to routine, day-to-day matters, because the existing ground had sometimes been used to exclude proposals of considerable importance to security holders. That is the adopting release describing its own proposal, and it understates it. The proposal said the ground had frequently been relied upon to exclude proposals of considerable importance to the issuer and its security holders. It said the Commission was concerned the provision might not be operating completely in accord with the purposes for which Section 14(a) was enacted. It named those purposes as promoting corporate suffrage and limiting the situations in which public corporations are controlled by a small number of persons.¹⁵⁴ A large majority of the commenters who addressed the proposed standard objected to it. They said shareholders lack the business expertise to decide complex questions, and that the new standard would be difficult to administer because of the subjective judgments it required. The Commission agreed with the second objection. It did not adopt the proposal. There was no reasonable means, it said, of distinguishing routine business matters from important ones. The test it had itself suggested was whether the board was required to act on the matter. That would be applied inconsistently, because practices on delegating authority to management vary greatly from company to company. The inconsistency it called a fatal drawback. Since no other

¹⁵³ Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-12999 (Nov. 22, 1976), 41 Fed. Reg. 52,994 (Dec. 3, 1976). The amendments applied to proposals submitted to issuers filing preliminary proxy material on or after February 1, 1977. The new timeliness requirements of subparagraph (a)(3) and paragraph (d) applied only from May 1, 1977. The retention of the significance standard at subparagraph (c)(5), the deletion of the reference to general causes as superfluous and unnecessary, and the statement that no different standard was intended appear at 52,997. The ordinary business discussion and the nuclear power plant example appear at 52,998. The Commission declined to hinge subparagraph (c)(5) solely on the economic relativity of a proposal, saying cumulative voting and ratification of auditors may not be economically significant yet have a significance to security holders, and that ethical issues such as political contributions may be significant viewed from a standpoint other than a purely economic one. It retained ordinary business at (c)(7) rather than adopting the standard proposed in Proposed Amendments to Rule 14a-8, Exchange Act Release No. 34-12598 (July 7, 1976), 41 Fed. Reg. 29,982 (July 20, 1976), which it considered would be difficult if not impossible to administer.

¹⁵⁴ Release No. 34-12598, *supra* note 153, 41 Fed. Reg. at 29,984 and note 4. The proposing release says the provision frequently has been relied upon by issuers to exclude proposals that involve matters of considerable importance to the issuer and its security holders. The adopting release reports the same point as occasional. Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997. The purposes are sourced to H.R. Rep. No. 73-1383, at 13–14, and S. Rep. No. 73-792, at 12. The release also quotes *Medical Committee*, 432 F.2d at 680–81, for the overriding purpose of section 14(a), in a footnote recording that the decision was vacated and dismissed as moot.

reasonable standard was readily apparent, the provision would be difficult if not impossible to administer. So it kept the old words and said they would be interpreted more flexibly than in the past.¹⁵⁵

What the Commission could not write as a rule it assigned to interpretation, and interpretation was correspondence. Section VII traces what that produced, and Section IX.C traces what the ground then became.

The same 1976 release did a second thing, and it has proved more consequential than the first. The Commission observed that proposals directing the board to take action might constitute an unlawful intrusion on the board's discretionary authority under the typical state statute. Proposals that merely recommend or request board action would not appear contrary to the typical statute, because they are advisory and do not bind even if adopted.¹⁵⁶ It added a note to the rule to that effect. The distinction was not new in 1976. It had been attributed to Louis Loss.¹⁵⁷ It rested substantially on a single 1954 decision of the New York Court of Appeals, *Auer v. Dressel*,¹⁵⁸ holding that there was nothing invalid in stockholders expressing themselves and putting directors on notice. The release wrote into the rule a form requirement the Commission had been applying. The effect was to channel almost all shareholder proposals into the precatory form. The estimate in circulation is that roughly ninety-eight percent of the proposals appearing on proxy statements are recommendations or requests rather than binding measures.¹⁵⁹ The Division was still directing that traffic twenty-five years later. In the first Staff Legal Bulletin it told shareholders that when drafting a proposal they should consider whether it would be binding if approved. In its experience, it said, proposals that are binding on the company face a much greater likelihood of being improper under state law and therefore excludable under Rule 14a-8(i)(1).¹⁶⁰

Whether the precatory form rests on any state-law entitlement is the question the whole framework had avoided. The Commission's stated position was that the proper-subject limitation takes its content from state law. By 1976 it was determining what state law permitted in an area where state

¹⁵⁵ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997–98. The Commission also gave as a reason for keeping the provision that it had been in operation for over twenty-two years and had not, until the past year or so, generated a significant amount of controversy.

¹⁵⁶ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,996. The Commission's reasoning is that the laws of most states do not for the most part explicitly indicate which matters are proper for security holders to act upon, providing instead that the business and affairs of the corporation shall be managed by its board.

¹⁵⁷ The distinction is generally attributed to Louis Loss, formerly associate general counsel of the Commission. See Jill Fisch, Sarah Haan, Ann M. Lipton & Amelia Miazad, *Stockholder Proposals: Law and Policy Considerations*, Harv. L. Sch. F. on Corp. Governance (Dec. 9, 2025), <https://corpgov.law.harvard.edu/2025/12/09/stockholder-proposals-law-and-policy-considerations/> (describing the 1976 release as formalizing what Loss had conceptualized).

¹⁵⁸ *Auer v. Dressel*, 306 N.Y. 427, 432, 118 N.E.2d 590 (1954). On the weight the decision has borne, see John C. Coffee, Jr., *The SEC and the Institutional Investor: A Half-Time Report*, 15 CARDOZO L. REV. 837, 883 (1994) (describing the judgment that shareholders had a legal right to address precatory recommendations to the board as largely rested on a forty-year-old New York decision); Palmiter, *supra* note 136, at 915; and Kyle A. Pinder, *The Non-Binding Bind: Reframing Precatory Stockholder Proposals Under Delaware Law*, 15 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 5 (2026), <https://repository.law.umich.edu/mblr/vol15/iss1/2/>.

¹⁵⁹ CONG. RSCH. SERV., *supra* note 74 (reporting that according to some estimates precatory proposals constitute roughly ninety-eight percent of proposals submitted in a typical proxy season). The estimate is the one on which the Chairman's October 2025 remarks rely. The estimate traces to a single measurement of the 2007 season, which found that two percent of the shareholder proposals appearing on proxy statements that season were binding. RISKMETRICS GROUP, 2007 POSTSEASON REPORT: A CLOSER LOOK AT ACCOUNTABILITY AND ENGAGEMENT 5 (Oct. 2007). It counts proposals that appeared and not proposals submitted, and the two populations differ by whatever was excluded or withdrawn.

¹⁶⁰ Staff Legal Bulletin No. 14 (CF), Shareholder Proposals (July 13, 2001), at G, substantive issues item 1, <https://www.sec.gov/interp/leg/cfs14.htm>.

law was largely silent. The leading treatise put the point directly. The Commission was purporting to find and apply a generally nonexistent state law. In doing so it had been building up a common law of its own as to what constitutes a proper subject for shareholder action. It would yield, as it should, to a contrary decision of the particular state court. But it was perhaps equally likely to influence the state courts themselves when the rare cases came to them. That was written in 1961, and a court of appeals quoted it in 1970. The current edition adds that the Commission here is normally its staff. It is the subject of open dispute in 2025 and 2026, discussed in Section XI.B.¹⁶¹

E. The Anti-Apartheid Campaign and Doctrinal Consolidation, 1970s to 1990s

Religious institutional investors were regular proponents under the rule from the mid-1970s into the 1990s. Catholic religious orders and mainline Protestant denominations appear as proponents on the face of the reported decisions of the period. Religious organizations, sponsoring individually or through the Interfaith Center on Corporate Responsibility, accounted for 96 to 122 proposals a season from 1979-80 through 1982-83, between 10.07 and 14.02 percent of all proposals submitted. The wider pattern is concentration. Proponents filing more than one proposal accounted for between 57.71 and 66.30 percent of submissions in those seasons, and the individual shareholders and coordinated groups among them, church sponsors aside, numbered five to seven.¹⁶²

The anti-apartheid campaign moved the ordinary business ground twice. In 1976 the Commission stated that matters carrying significant policy, economic or other implications would no longer be treated as within an issuer's ordinary business operations. Staff interpretive letters, it said, would reflect that view. From 1976 until 1992 the Commission and its staff applied that standard to proposals concerning companies' equal employment opportunity policies. Staff took that position on at least seven occasions between 1978 and January 1992. The proposals urged companies to adopt equal employment opportunity policies for their employees in South Africa and Northern Ireland. None could be excluded as ordinary business.¹⁶³ The practice was consistent rather than expanding, and the Division ended it on October 13, 1992. In the *Cracker Barrel* no-action letter it reversed that. A proposal on "a company's employment policies and practices for the general workforce" was ordinary business. Being tied to a social issue would no longer take it out of "the realm of ordinary business operations." Its

¹⁶¹ 2 LOUIS LOSS, *SECURITIES REGULATION* 906 (2d ed. 1961), *quoted in Medical Committee*, 432 F.2d at 680 n.29. The passage is carried forward at 4 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 513-14 (4th ed. 2009), which adds that the Commission here is normally its staff.

¹⁶² *United Church Bd. for World Ministries v. SEC*, 617 F. Supp. 837, 838 & n.1 (D.D.C. 1985) (naming the American Baptist Home Mission Society, the General Synod of the Reformed Church in America, the Sisters of St. Dominic of Blauvelt, the Oregon Province of the Society of Jesus and the United Church Board for World Ministries as the proponents before the court). Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 468 (1984), Appendix Table 2 (tabulating the American Society of Corporate Secretaries reports on shareholder proposals). The table defines church-sponsored proposals as sponsored by religious organizations either individually or coordinated through the Interfaith Center on Corporate Responsibility.

¹⁶³ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,998. The Commission's application of that standard, and the seven no-action matters, are set out in *N.Y.C. Emps.' Ret. Sys. v. SEC*, 843 F. Supp. 858, 865 (S.D.N.Y. 1994), *rev'd*, 45 F.3d 7 (2d Cir. 1995), which lists Dow Chemical Co. (Mar. 1, 1978), Dresser Industries, Inc. (Jan. 3, 1980), Texaco, Inc. (Feb. 28, 1984), Texaco, Inc. (Mar. 15, 1985), TRW, Inc. (Jan. 28, 1986), Mobil Oil Corp. (Feb. 7, 1990), and Mobil Oil Corp. (Jan. 14, 1992), each cited as the court reports it. The court notes at footnote 7, on the authority of *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 887-88 (S.D.N.Y. 1993), that not all equal employment and affirmative action proposals were treated as includable, early letters having required inclusion of proposals requesting affirmative action data and reports while in 1991 the Commission apparently decided they were too mundane to require it.

ground was that the standard had proved hard to apply, and it recorded that the resulting decisions were “characterized by many as tenuous, without substance and effectively nullifying the application of the ordinary business exclusion to employment related proposals.” The Commission affirmed on review.¹⁶⁴

VII. The Instrument That Decided Everything

The administrative history of Rule 14a-8 runs through four instruments with different legal characters, and the differences matter for how the rule has changed. Formal rulemaking under notice-and-comment procedure established and repeatedly revised the rule’s substantive provisions, including in 1942, 1947, 1948, 1952, 1954, 1967, 1972, 1976, 1978, 1983, 1998, 2007 and 2020, and it carries the force of law.¹⁶⁵ Commission-level interpretive releases, including those of 1976 and 1998, state framework interpretation with the Commission’s own endorsement. Staff Legal Bulletins, issued by the Division of Corporation Finance from 2001, state the views of the staff and disclaim Commission endorsement in their own terms. Staff no-action letters answer individual exclusion requests, bind nobody, and are not precedent for later cases. Formal rulemaking built the exclusion grounds and the procedural architecture. The no-action correspondence supplied the application. The bulletins, from 2001, then moved what that correspondence said, and Section IX traces how.

A. The No-Action Process

Section VI.C traces how the process began. Its modern mechanics are these. Companies seeking to exclude shareholder proposals submit requests to Commission staff identifying the grounds for exclusion under the applicable rule provisions.¹⁶⁶ Staff indicate informally, without formal legal effect, whether they would recommend enforcement action if the company proceeds to exclude the proposal.

¹⁶⁴ *N.Y.C. Emps.’ Ret. Sys.*, 45 F.3d at 10 (quoting Cracker Barrel Old Country Store, Inc., SEC No-Action Letter (Oct. 13, 1992)). The scope of the position and the ground the Division gave for it are at *N.Y.C. Emps.’ Ret. Sys.*, 843 F. Supp. at 862, which gives the position as reaching all employment-based proposals that do not involve senior executives or directors. The Commission affirmed the staff letter on January 15, 1993. *Id.* at 865.

¹⁶⁵ Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-15384 (Dec. 6, 1978), 43 Fed. Reg. 58,522 (Dec. 14, 1978), added paragraph (e), which gives a proponent an opportunity to review management’s statement in opposition before the proxy materials are mailed. 1980 Staff Report, *supra* note 37, at 154. The 2007 amendment is Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56914, Investment Company Act Release No. IC-28075, 72 Fed. Reg. 70,450 (Dec. 11, 2007). The rule’s source credit records further amendments at 72 Fed. Reg. 4,168 (Jan. 29, 2007), 73 Fed. Reg. 977 (Jan. 4, 2008), 75 Fed. Reg. 56,782 (Sept. 16, 2010), 76 Fed. Reg. 6,045 (Feb. 2, 2011) and 90 Fed. Reg. 9,689 (Feb. 18, 2025). The last is a technical amendment adopted without notice and comment.

¹⁶⁶ The practice originated in the rule’s earliest years. Commission witnesses described companies asserting that a proposal was not a proper subject for stockholder action and staff responding that it would raise no objection to omission. 1943 Hearings, *supra* note 2, at 117–18; see Section V.C. For the modern process, see *Roosevelt v. E.I. du Pont de Nemours & Co.*, 958 F.2d 416, 423 (D.C. Cir. 1992) (describing the sequence from the company’s rule-required notification of the Commission and the proponent, through the proponent’s submissions, to the staff’s response); and *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 256 (2d Cir. 1994) [*hereinafter ACTWU*] (reproducing the notice the staff routinely includes in its responses, that the determination does not and cannot purport to adjudicate the merits and only a court such as a U.S. District Court can decide whether a company is obliged to include a proposal). On the character of that response, *Roosevelt*, 958 F.2d at 423, says the review is quick and informal and that any advice given is nonbinding for all concerned. It says the procedure is advisory and yields no definitive ruling. Neither the staff’s letter nor the Commission’s refusal to review it produces an order amenable to judicial review.

Shareholders may submit responses contesting the company's position. Either side may then ask the Commission to review the staff's position, and the Commission infrequently grants the request. The Commission put the scale of this to a court in 1992. It gave roughly 350 requests a year relating to shareholder proposals, about two thirds of them requiring an answer between December and March.¹⁶⁷

The process has a statutory scaffolding that is easy to miss because it is described in the literature as informal. The obligation to come to the Commission is rule text. Section VI.C sets out the three amendments that built it, in December 1947, November 1948 and January 1954, and the reasons the Commission gave for each. The last of them placed the burden of proof on management and required a supporting opinion of counsel where the asserted ground turns on a question of law. That is the one the Chair invoked in October 2025 in stating that a company excluding a precatory proposal under Rule 14a-8(i)(1) should support the request with a Delaware law opinion.¹⁶⁸ The Division has said how it weighs such an opinion, and that statement is the only account of it in the record. Companies should provide a supporting opinion of counsel where the reasons for exclusion rest on matters of state or foreign law. In determining how much weight to afford these opinions, it wrote, one factor it considers is whether counsel is licensed to practice law in the jurisdiction whose law is at issue. A shareholder contesting such an opinion may submit one and is not required to.¹⁶⁹ In 1957 the Commission told a Senate subcommittee how it treats a close case. Where management fails to establish that a proposal is not a proper subject for stockholder action, doubts are resolved in favor of the stockholder.¹⁷⁰ What is informal is the staff's answer, not the company's obligation to ask.¹⁷¹

That a staff letter binds nobody, and that litigation remains formally open to either side, is established at Section VI.C. That freedom was tested early, and the result ran the other way. When a Greyhound shareholder sued to compel inclusion, the court declined to disturb the Assistant Director's letter. It reasoned that a rule is best interpreted in the first instance by the agency entrusted with writing it. It noted also that the letter did not appear to be a formal ruling by the Commission, and that the shareholder had not pursued administrative review. A court in 1951 therefore gave an informal reply the practical effect of a determination while recording that its status was unclear, half a century before the Supreme Court reached the same instrument in *United States v. Mead Corp.*¹⁷² Not binding is not the same as carrying no weight. There the Court addressed a closely comparable instrument, the Customs ruling letter. It issued in the thousands each year across scattered offices and was not preceded by notice and comment. It bound only as between the agency and the party addressed, and other parties were warned against relying on it. The Court held that such a letter has no claim to *Chevron*

¹⁶⁷ *Roosevelt*, 958 F.2d at 424 (quoting the Commission's amicus curiae brief at 27 n.22). The brief gives approximately 350 requests for no-action letters relating to shareholder proposals each year, with approximately two thirds requiring a response between December and March.

¹⁶⁸ *Atkins*, *supra* note 122.

¹⁶⁹ Staff Legal Bulletin No. 14, *supra* note 160, at G, substantive issues item 5.

¹⁷⁰ Report of the Securities and Exchange Commission in Response to Questions Raised by Senator Herbert H. Lehman in His Letter of July 10, 1956, in SEC Enforcement Problems, Hearing Before a Subcomm. of the S. Comm. on Banking & Currency, 85th Cong., pt. 1, at 118 (1957) [*hereinafter* 1957 Lehman Report] (answering question 26). The report begins at 109 and answers thirty questions put by Senator Lehman. It was transmitted over the signature of Chairman J. Sinclair Armstrong, and the answers are the Commission's.

¹⁷¹ Releases Nos. 4037, 4185 and 4979, *supra* notes 128, 129 & 80. The twenty-day filing, the statement of reasons, the opinion of counsel on questions of law, notice to the proponent and the burden on management are all rule text by January 1954.

¹⁷² *Peck*, 97 F. Supp. at 681. The court denied the preliminary injunction on the agency-interpretation ground and, alternatively, on failure to show irreparable harm.

deference but is “eligible to claim respect according to its persuasiveness,” and may claim the merit of its writer’s “thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.”¹⁷³ That measure descends from *Skidmore v. Swift & Co.*, and the Supreme Court preserved it expressly in *Loper Bright Enterprises v. Raimondo* when it ended *Chevron* deference in 2024. Staff no-action letters were outside *Chevron* in any event, so what changed in 2024 was the doctrine around them rather than their own standing.

Schwartz and Weiss set the reasons out together in 1976. Nobody goes to court. A district court that is asked defers to the agency construing its own rule, which is what happened in *Peck* and in *Brooks*. And where the Commission declines to review a staff opinion there is no reviewable agency action, so declining review keeps the question out of a court of appeals. That last point is *Kixmiller v. SEC*, decided in 1974. The review either side may ask for is therefore closed by the Commission’s own practice of not granting it.¹⁷⁴

A court of appeals did the same in 2015 and said what it was doing. Wal-Mart argued that the staff’s letter deserved deference because it was consistent with the Commission’s guidance and with the staff’s prior letters. The Third Circuit rejected that as to the letter itself. It nonetheless gave the accumulated body of no-action letters careful consideration, as representing the views of persons continuously working with the provisions. It rested its own reading of the ordinary business ground on what it called a well-established line of them.¹⁷⁵

Three structural features of this arrangement have proved consequential. First, because no-action letters are not formal rules, they can be issued, revised and effectively reversed without the procedural requirements applicable to rulemaking. There is no notice and comment, no obligation to address prior interpretations, and no reasoned explanation responsive to public objections. This has made the operative standards of Rule 14a-8 more variable across administrations and more susceptible to revision based on changes in administrative priorities than the formal rule text alone would suggest. The courts have confirmed the premise. The Second Circuit held in the *Cracker Barrel* litigation that a no-action letter is an interpretive rather than a legislative rule and so not subject to notice and comment.¹⁷⁶

¹⁷³ *United States v. Mead Corp.*, 533 U.S. 218, 221, 226–27, 231–34, 234–39 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394, 412–13 (2024); *Roosevelt*, 958 F.2d at 427 n.19 (holding *Chevron* inapplicable to a staff no-action letter or a Commission brief).

¹⁷⁴ Donald E. Schwartz & Elliott J. Weiss, *An Assessment of the SEC Shareholder Proposal Rule*, 65 GEO. L.J. 635, 651–52 & nn.79–86 (1976). For the third reason see *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974).

¹⁷⁵ *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 342–43 & n.11 (3d Cir. 2015). The court takes the formulation from an unreported district court decision and from Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in S.E.C. No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 1002 (1998), which reasons that a regulatory interpretation consistently maintained in no-action letters over a long period may merit some deference. The court treated the Commission’s interpretive releases on the ordinary business ground differently. Each “was adopted after notice and comment and thus merits our deference.” *Trinity*, 792 F.3d at 337 n.9 (citing *Fed. Express v. Holowecki*, 552 U.S. 389, 397 (2008), and, under a *see also* signal, *Dep’t of Labor v. E. Associated Coal Corp.*, 54 F.3d 141, 147 (3d Cir. 1995)). *Eastern Associated Coal* states the limit in its statement of the standard of review, quoting *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3d Cir. 1978) for the adversary-proceeding clause and *Director, OWCP v. Gardner*, 882 F.2d 67, 70 (3d Cir. 1989) for the duty to insure independently.

¹⁷⁶ *N.Y.C. Emps.’ Ret. Sys. v. SEC*, 45 F.3d 7, 12–14 (2d Cir. 1995) (reversing the judgment described *supra* note 163). The court held the letter interpretive because it binds nobody: the Commission may still sue the company, a company need not include a proposal even where the staff says it should, and a court may find a violation despite the letter. It drew the corollary that a rule announced in a no-action letter has no binding authority and therefore cannot amend a legislative rule. It rested on *ACTWU*, 15

The D.C. Circuit has held that *Chevron* deference does not apply to a staff no-action letter or to a Commission brief, because neither ranks as an adjudication or a rulemaking.¹⁷⁷ The Commission had demonstrated the point long before either decision. In November 1948 it withdrew a proposed amendment to the form-of-proxy rule as likely to create administrative difficulties, and in the same document announced how it would administer the provision it had declined to amend.¹⁷⁸ The Second Circuit heard that objection in the *Cracker Barrel* litigation and rejected it. The plaintiffs there argued that if a letter abandoning the Commission's own standard counted as interpretive, the Commission could rewrite the rule without procedure. The court's answer was that staff at every level act under the shadow of judicial review, and that a rule which skipped notice and comment draws closer scrutiny from a court than one that has not. That is a rule about deference, not about procedure. It obliges the Division to explain nothing. And the reason the letter escaped notice and comment, that it binds nobody, is the same reason nothing constrains what it says. Only the shadow remained. Section VI.C records thirteen reported decisions through 1990, and Section XI.A six proponent suits in the whole of the 2026 season.¹⁷⁹

Second, the no-action process places interpretive authority in staff rather than in formal Commission action. Staff letters reflect staff views and are not Commission determinations. But the staff does not operate apart from the Commission. The Chair sets the policy framework within which the Division works, the Division Director reports to the Chair, and positions taken on politically salient grounds reflect that direction. What is absent is not accountability but formality. The choices are made without a Commission vote, without notice and comment, and without the reasoned explanation a rulemaking would require. They are subject to revision by an incoming administration's staff on the same terms. Those choices are also made against the proxy calendar, in volume and on compressed timelines. *Skidmore* answers part of that and has to be met. Policies not reached by trial in adversary form are still entitled to respect, and the Court has given interpretative rulings of no adversary origin considerable and sometimes decisive weight. So informality is not the objection. But *Skidmore* also supplies the measure, and one of its factors is consistency with earlier and later pronouncements.¹⁸⁰ Guidance whose documents rescind one another by name and then reinstate the rescinded text word for word does not meet it. Section IX sets that sequence out document by document. The Commission's own account of the process fails the same test. In 1957 it told a Senate subcommittee that in a number of cases it had heard oral argument from one or both parties. Briefs followed, to aid its determination of the question.¹⁸¹ In 1970 it told the D.C. Circuit that a shareholder proposal differs from an ordinary no-action matter. There are two interested private parties, it said, and Rule 14a-8(d) gives a procedure for both. The court took the concession and held the process formal enough to review. Six years later the Statement of Informal Procedures said that receiving a proponent's submissions does not turn the

F.3d at 257, which held that such a letter fixes no legal relationship among the company, the proponent and the Commission and so is not a final order reviewable under Section 25(a)(1).

¹⁷⁷ *Roosevelt*, 958 F.2d at 427 n.19.

¹⁷⁸ Statement of the Commission accompanying the November 5, 1948 revision of Regulation X-14, 17 C.F.R. § 241.4185 (2025), 13 Fed. Reg. 6680 (Nov. 13, 1948).

¹⁷⁹ *N.Y.C. Emps.' Ret. Sys.*, 45 F.3d at 14 (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993)). Release No. 34-12599, *supra* note 88, 41 Fed. Reg. at 29,991, for the staff's license to change its views and for the absence of precedential value.

¹⁸⁰ *Skidmore*, 323 U.S. at 140.

¹⁸¹ 1957 Lehman Report, *supra* note 170, at 118. The statement closes the answer to question 26.

staff's procedures into a formal or adversary one.¹⁸² The objection is not that the instrument was informal. It is that nothing in the process required it to earn the respect *Skidmore* makes available.¹⁸³

Third, the process this section has described no longer operates. The Division announced on November 17, 2025 that for the 2025-26 proxy season it would not respond to no-action requests or express any view on a company's intended reliance on any ground for exclusion. One exception was made, for requests asserting Rule 14a-8(i)(1).¹⁸⁴ In place of a substantive answer it offered a procedure of a different character. A company could include in its Rule 14a-8(j) notice an unqualified representation that it had a reasonable basis to exclude the proposal under the rule, prior published guidance or judicial decisions. The Division would then reply that on the basis of that representation alone it would not object, without evaluating the representation or expressing any view on the basis relied on. The staff's answer was thereby keyed to the company's own assertion rather than to any review of it. On August 14, 2026 the Division discontinued responding to Rule 14a-8 no-action requests entirely, including requests under (i)(1). It did so effective immediately and unless and until it announces otherwise, and it stopped issuing the representation letters as well. The same statement records that the staff of the Division of Investment Management, which reviews Rule 14a-8 requests related to investment companies, will "take a substantially similar approach." The obligation is all that survives. Companies must still file the Rule 14a-8(j) notice when they intend to omit a proposal, no later than eighty calendar days before the definitive proxy statement and now through an online form. The asymmetry set out earlier in this section is complete. The duty to ask is rule text, and there is no longer an answer of any kind.¹⁸⁵

Declining to express a view was not itself new. In fiscal 1977 the Division processed 333 contested proposals through the no-action procedure. It expressed no position on twelve of them. What was new in 2025 was the scale, the announcement in advance, and the single ground carved out of it.¹⁸⁶

¹⁸² *Medical Committee*, 432 F.2d at 669–71 (quoting the Commission's Supplementary Memorandum at 10). The judgment was vacated as moot and the Commission's characterization of its own procedures is unaffected by that. Release No. 34-12599, *supra* note 88, 41 Fed. Reg. at 29,991.

¹⁸³ *Skidmore*, 323 U.S. at 140. The Commission stated the disclaimer itself. Considering a shareholder's response does not turn its informal procedures and proxy review into a formal or adversary procedure. *ACTWU*, 15 F.3d at 256 (reproducing Informal Procedures Regarding Shareholders Proposals).

¹⁸⁴ Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Statement Regarding the Division of Corporation Finance's Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season (Nov. 17, 2025), <https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finance-role-exchange-act-rule-14a-8-process-current-proxy-season> (applying to the proxy season running October 1, 2025 to September 30, 2026 and to earlier requests not yet answered, and giving as its reasons resource and timing considerations following the lengthy government shutdown, the volume of registration statements and other filings requiring prompt staff attention, and the extensive body of guidance from the Commission and the staff already available).

¹⁸⁵ Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Updated Statement Regarding the Division of Corporation Finance's Role in the Exchange Act Rule 14a-8 Process (Aug. 14, 2026), <https://www.sec.gov/newsroom/speeches-statements/corpfin-statement-rule-14a-8-process-081426> (discontinuing responses entirely, including under Rule 14a-8(i)(1), and giving as its reasons the focus of Division resources on Securities Act and Exchange Act filing reviews, including those statutorily required, and the extensive body of guidance already available); *id.* at note 2 (recording that no request to exclude under Rule 14a-8(i)(1) was received during the 2025-26 proxy season). The eighty-day deadline is Rule 14a-8(j)(1), 17 C.F.R. § 240.14a-8(j)(1) (2025).

¹⁸⁶ 1980 Staff Report, *supra* note 37, at 155. The figures are for fiscal 1977, which the report gives as the last year for which such figures were available. Of 731 proposals submitted to 390 companies by 279 stockholders, 333 were contested and processed through the no-action procedure. Of those, 94 were included, 199 excluded, 28 withdrawn, and no position was expressed as to 12.

Two features of that withdrawal bear on what this section has argued. The first is the authority the Division invoked, which was a Commission release the process had rested on from the start. The 1976 Statement of Informal Procedures records that the staff “has for many years engaged in the informal practice of expressing its enforcement position on such submissions,” and that “[n]o response or other action by the Commission or its staff is required in regard to such communications.” The instrument that gave the no-action process its published form also said that nothing obliged the Commission to operate it. A court had already used it the same way. The Second Circuit held the *Cracker Barrel* letter interpretive and quoted this release in doing so. It took the Commission’s own words, that the Commission and its staff “do not purport in any way to issue ‘rulings’ or ‘decisions’ on shareholder proposals management indicates it intends to omit, and they do not adjudicate the merits of a management’s posture concerning such a proposal.” So the instrument that authorized the process also supplied the reason a court gave its output no legal effect. It is now the authority the Division used to stop operating it.¹⁸⁷

The second is what the Division said the accumulated correspondence was worth to a company now obliged to form a reasonable basis for itself. Staff responses to earlier requests are not binding and reflect only informal staff views. The absence of a prior response agreeing that some basis existed does not prevent a company forming a reasonable basis. Neither does a prior response declining to concur, where the company seeks to exclude the same or a similar proposal. The body of letters this section has described as the operative standard was disclaimed in both directions by the Division that produced it, in the same document that stopped adding to it.¹⁸⁸

The Commission was never obliged to answer. Some of what it said in 1976 still bound people. Both courts in the *Cracker Barrel* litigation held that the interpretation the Commission announced in its November 1976 release was a legislative rule. The district court reasoned that the Commission had acted under its rulemaking authority and drawn on twenty-two years of experience to fill gaps rather than to construe particular terms. The Second Circuit agreed, because a standard that provides a basis for enforcement is legislative in character. The Commission’s own statement of informal procedures and its announcement of the ordinary business doctrine issued four months apart in the same year. They are instruments of different legal weight.¹⁸⁹ Why the (i)(1) exception was preserved, and what became of it, are discussed in Section XI.B. What replaced the process in the 2026 season is discussed in Section XI.A.

B. Ownership Thresholds, Resubmission Standards and Other Structural Provisions

¹⁸⁷ *N.Y.C. Emps.’ Ret. Sys.*, 45 F.3d at 13. The passage the court quotes, and the two the paragraph takes above, are at Release No. 34-12599, *supra* note 88, 41 Fed. Reg. at 29,990.

¹⁸⁸ Statement Regarding the Division of Corporation Finance’s Role, *supra* note 184, at note 1 (citing Release No. 34-12599, *supra* note 88, for the propositions that the Rule 14a-8(j) notification is informational only, that no company need seek the staff’s views, and that no response from the staff is required), and at note 3 (disclaiming the force of prior staff responses in both directions).

¹⁸⁹ *N.Y.C. Emps.’ Ret. Sys. v. SEC*, 843 F. Supp. at 877–81 (holding that the 1976 Explanation was a legislative rule), *rev’d* on other grounds, 45 F.3d at 13 (agreeing that the significant policy implications standard announced in the 1976 adoption was a legislative rule, and reversing on the separate proposition that a no-action letter could amend it). The Statement of Informal Procedures is Release No. 34-12599, *supra* note 88, of July 7, 1976. The adopting release is Release No. 34-12999, *supra* note 153, of November 22, 1976.

Rule 14a-8 carries structural provisions on ownership thresholds, holding period requirements, proposal length limits and resubmission standards.¹⁹⁰ Critics have argued from both directions. Low thresholds admit shareholders whose primary interest is advocacy rather than investment, and high thresholds exclude shareholders with legitimate governance concerns. Rule 14a-8's eligibility requirements do not condition access on the proponent's primary institutional purpose. Section VI.E gives the share of proposals that religious sponsors filed across four seasons.

The concern the threshold answers, and the mechanism itself, were both put on the record before any threshold existed. The 1942 rule imposed no qualification requirement of any kind. At the 1943 hearings, pressed on a single proponent who had submitted twenty-nine proposals at seven companies against a total investment of \$4,426.13, Bane suggested that the right to the hundred-word statement might be limited "to a certain percentage, that requires a man to hold a certain percentage of stocks, or requires that a certain number of stockholders should join with him," and said these were things the Commission "might have to come to." He then objected to his own suggestion. Such limits would "violate, to some extent, the principle that one stockholder has a right to say and has a right to present to his fellow stockholders anything he wants to." He returned to it, allowing that cutting the right down "to a percentage or a ratio of stockholders" might produce something workable, while saying that as matters stood there was no right "in fairness to the other stockholders to allow one man to do this."¹⁹¹ In 1957 the Commission told a Senate subcommittee that there was no limit on the number of proposals a single stockholder might insert, other than the exercise of discretion. It added that management "has as much or more advantage by reason of being in control of the proxy machinery and having access to the corporate funds with which to combat the proposal."¹⁹²

The Commission took the question up in 1976 and declined it. Commentators had urged that a proponent be required to have held the security for a minimum period, six months or a year, or to own a minimum investment interest measured either in shares or in dollars. The Commission considered the recommendations and found no sufficient justification for them. It noted among other things that the existing eligibility requirements had been in operation for many years and generally had not been abused.¹⁹³ It was not declining to qualify access as such. The same release capped a proponent at two proposals of no more than three hundred words each and required continued ownership of the security through the date of the meeting. Management could exclude a later proposal for the following two calendar years if that ownership lapsed.¹⁹⁴ What the Commission refused was a qualification tied to the size or the duration of a holding.

The Commission adopted that qualification seven years later. The 1983 amendments required a proponent to own one percent or \$1,000 in market value and to have held it for a year. A majority of the

¹⁹⁰ Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Exchange Act Release No. 34-89964 (Sept. 23, 2020), 85 Fed. Reg. 70,240 (Nov. 4, 2020), <https://www.sec.gov/files/rules/final/2020/34-89964.pdf> (revising ownership thresholds, holding periods, and resubmission standards).

¹⁹¹ 1943 Hearings, *supra* note 2, at 225, 227. The exchange is discussed in Section V.D. The first ownership threshold was adopted in 1983. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-20091 (Aug. 16, 1983), 48 Fed. Reg. 38,218, 38,219, 38,222 (Aug. 23, 1983).

¹⁹² 1957 Lehman Report, *supra* note 170, at 120 (answering question 30). The answer adds that there is no limit to the number of stockholders who may put proposals in management's statement. The report does not say whose discretion.

¹⁹³ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,994.

¹⁹⁴ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,994, 52,996.

commenters addressing the question supported a minimum investment or a holding period. Many of them said abuse could be curtailed by requiring a measured economic stake from a proponent who puts the company and other shareholders to the expense of inclusion. The Commission found merit in those views. It did not say what had changed since 1976, when it had refused because the existing requirements had generally not been abused.¹⁹⁵

Resubmission thresholds specify the minimum vote percentage a previously submitted proposal must receive before it can be resubmitted in subsequent years. Proponents of social-policy proposals have argued that initial vote results often reflect management solicitation advantages rather than genuine shareholder sentiment, and that the thresholds disadvantage proposals addressing issues not yet recognized as financially material. They have also argued that support for a novel proposal builds across successive seasons until it carries. The Commission measured that claim in 2020, against proposals that had never drawn majority support, had fallen by ten percent or more, and remained eligible for resubmission. It found 264 such proposals, of which 139 were in fact resubmitted. Eighty-three of those rose and fifty-six fell further. Two carried.¹⁹⁶

The 1976 release carried the rule's resubmission figures forward unchanged. A proposal could be omitted for three calendar years on the strength of its latest submission within the preceding five. The threshold was less than three percent of the votes cast, less than six percent where it had been submitted twice, and less than ten percent where it had been submitted three times or more.¹⁹⁷ The Commission had proposed replacing the existing test, whether a proposal was substantially the same as an earlier one, with a broader test of substantially the same subject matter. It dropped the proposal after comment. Commenters put three objections. The first was that abuse of the existing provision had been rare and did not justify so radical a revision. The second was that the broader standard would be almost impossible to administer, because of the subjective determinations it required. The third was that it would unduly constrain shareholder suffrage through an umbrella effect, reaching proposals only vaguely related to an earlier one that had polled badly. The Commission adopted the objections without restating them. It wrote only that the drawbacks outweighed the benefits. It nonetheless instructed its staff to watch for proponents putting essentially the same proposal year after year, and to take appropriate action where that was happening and the proposal kept falling short of the rule's percentages. A no-action letter is the example it gave.¹⁹⁸

The Commission adopted that broader test in 1983. A proposal could be omitted if it dealt with substantially the same subject matter as a prior one. The Commission called the change a clean break from the strict interpretation of the existing provision. It also acknowledged that the new provision

¹⁹⁵ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,219, 38,222. The commenters' view and the Commission's finding of merit are at 38,219. The rule text is at 38,222, in subparagraph (a)(1)(i).

¹⁹⁶ Release No. 34-89964, *supra* note 190, 85 Fed. Reg. at 70,289 & n.468. The Commission gives the figures in answer to commenters who argued that a ten percent decline does not imply a persistent waning of support. Among the fifty-six that fell further the average fall was sixteen percent, and among the eighty-three that rose the average rise was thirty-five percent. The two that carried are one percent of the 139. The passage sits in the economic analysis, on the Momentum Requirement the Commission proposed in 2019 and did not adopt.

¹⁹⁷ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 53,001.

¹⁹⁸ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,999.

would continue to involve difficult subjective judgments. That was the objection on which it had dropped the same proposal seven years earlier.¹⁹⁹

Those figures did not stay. In 1983 the Commission raised the first two thresholds to five and eight percent and kept ten percent thereafter. Its stated reason was the increased voting activities of institutional investors and the greater potential support for such proposals.²⁰⁰ Several religious shareholder proponents sued. In September 1985 a federal district court vacated the higher thresholds and ordered the Commission to reinstate three and six percent. The Commission did so effective November 22, 1985.²⁰¹ The court's ground was inadequate notice. Its finding about the comment file is the part that bears here. Sixty-six comments addressed the percentage thresholds, and forty-three of them came from issuers. Nobody proposed raising the percentages because institutional investors were voting more. Only one commenter mentioned institutional investors, and that commenter proposed lowering the percentages. The court concluded that the decision rested on assumptions the Commission had formed earlier and had not revealed for public scrutiny.²⁰²

Whether the reinstated figures still screened anything is a question the record answers only through a practitioner. Cary Klafter, corporate secretary of Intel, told the Commission's 2007 roundtable that three percent had become old news. In the olden days, he said, a proponent worried about that threshold and about whether a proposal could be resubmitted. On his account, by 2007 only the most marginal proposals drew three percent or less, and proposals were drawing twenty, thirty and forty percent. He set that against a time when ten or fifteen percent had been giant news. The observation is his, and it is dated to May 2007. On that account the lowest of the three tiers had stopped screening, twenty-two years after the court restored it.²⁰³

Section VII opens by distinguishing rulemaking from the instruments that carry no reasoned explanation of that kind. The distinction holds, and these episodes qualify it. Notice and comment produced a record in both years. In 1976 the Commission gave a conclusion, so it left nothing of its own to test. In 1983 it gave a reason, and a court read that reason against the file and found it unsupported. The record is what made the second possible. Neither the record nor the reason is available where the standard moves by staff bulletin.

VIII. The Thirteen Grounds

A. The Architecture

¹⁹⁹ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,221, 38,223. The adoption and both statements are at 38,221. The rule text is at 38,223, in subparagraph (c)(12).

²⁰⁰ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,221.

²⁰¹ *United Church Bd.*, 617 F. Supp. at 837, 841. The order vacating the amendment issued September 13, 1985, and the opinion is dated September 16. The Commission acted on the order in Proposals of Security Holders, Exchange Act Release Nos. 34-22625, 35-23904 and IC-14795 (Nov. 14, 1985), 50 Fed. Reg. 48,180, 48,181 (Nov. 22, 1985), which is headed Reinstatement of Rule and states that it acts in conformance with the court order.

²⁰² *United Church Bd.*, 617 F. Supp. at 839–40.

²⁰³ Unofficial Transcript, Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law, U.S. Sec. & Exch. Comm'n 165 (May 7, 2007) [*hereinafter* 2007 Roundtable]. Cary Klafter was vice president for legal and corporate affairs and corporate secretary of Intel Corporation, appearing on the afternoon panel on non-binding proposals.

The rule permits a company to omit a proposal on thirteen substantive grounds, at Rule 14a-8(i)(1) through (i)(13).²⁰⁴ The count was fixed in a single document. Paragraph (c) of the rule as revised in November 1976 contains, in the Commission's own words, thirteen separate grounds for omitting a proposal. The release discusses each in the order in which it appears.²⁰⁵ Nothing has been added in the fifty years since. The 1998 restatement recast the rule into question and answer form, and the thirteen grounds became the paragraphs under Question 9. The Commission said that none of the revisions was intended to signal a change in its current interpretations unless it said otherwise. Two grounds took new language. The list was reformatted, not enlarged.²⁰⁶

The thirteen came from four places. Five of the thirteen were carried forward from the rule as it stood. One was split out of a provision that had carried two tests. Five were new. Two restated limits that had sat in the rule's opening paragraph rather than among the grounds for omission.²⁰⁷ Every one of the thirteen was adopted by rulemaking, on notice and comment, with published reasons. That is the distinction Section VII draws between the instruments, and it holds across the whole list. But adoption is not origin. When the Commission proposed the list it said that many of the additional grounds were not new, because they reasonably may have been implied from the existing rule. It said that of five of them. Of one it said something narrower. There it was formalizing a view its staff had expressed informally on numerous occasions. Rulemaking ratified content that practice had already supplied, and the Commission recorded the sequence as it went.²⁰⁸

The thirteen were never designed as a set. They accreted from 1948 onward, each answering a difficulty as it arose. The 1976 release gathered them into a numbered list without reconciling them with one another. The Division gave the same account at the Commission's own roundtable in 2007. Martin Dunn of the Division of Corporation Finance said the rule as first adopted carried one standard, whether a proposal was appropriate for shareholder action. Demands for certainty followed. The rule as it then stood kept that standard in its first two tests, and eleven further grounds had been added over the years.²⁰⁹ The D.C. Circuit named the consequence in *Medical Committee*, before the list took its present form. Two grounds could be construed to permit the exclusion of practically any proposal, and a company had asserted both against the same proposal at once.²¹⁰ A company needs one ground to hold, not all of them.

²⁰⁴ 17 C.F.R. § 240.14a-8(i) (2025).

²⁰⁵ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,996.

²⁰⁶ Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998), 63 Fed. Reg. 29,106 (May 28, 1998), effective June 29, 1998. The release refers to the grounds for omission as the paragraphs under Question 9 and gives the former paragraph (c) designation for each. Its note 13 states the limit on what the recasting was meant to do. The reference in former (c)(1) to the state of the company's incorporation became the laws of the jurisdiction of the company's organization, because some entities subject to the rule are not incorporated, and former (c)(9) became a proposal that directly conflicts with one of the company's own proposals.

²⁰⁷ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,996–99.

²⁰⁸ Release No. 34-12598, *supra* note 153, 41 Fed. Reg. at 29,983. The five are the federal law ground, the proxy rules ground and the ground for matters beyond the issuer's power, all at 29,984, plus the mootness ground and the duplication ground at 29,985. The federal law ground is the one the Commission attributes to its staff.

²⁰⁹ 2007 Roundtable, *supra* note 203, at 228–29. Dunn dates the original standard to 1942 and the eleven additions to the years after, which is consistent with the accretion this Section traces from 1948.

²¹⁰ *Medical Committee*, 432 F.2d at 679. See Section VI.D.

B. The Grounds Built Before 1976

Five grounds stood among the bases for omission before the 1976 revision. Four are treated elsewhere in this paper, because their history is the rule's history. The proper subject limitation at (i)(1) took its content from state law in January 1954. Sections V.A and VI.A trace how. The ordinary business ground at (i)(7) was adopted in the same release, and the economic relevance ground at (i)(5) descends from the general causes clause of December 1952. Section IX sets out both. The resubmission ground at (i)(12) is at Section VII.B. One remains.

The personal grievance ground at (i)(4) is the oldest of the substantive grounds, adopted on November 5, 1948.²¹¹ Section VI.C sets out its terms, the Commission's abuse rationale, and the distinction Representative Reece pressed at the 1943 hearings. The ground reached the issuer and its management alone until October 1972. The Commission then extended it to a claim or grievance against any other person. It made no finding of abuse to support the extension. It said only that any proposal relating to such matters is inappropriate for shareholder consideration.²¹² In 1976 it carried the ground forward intact and said so.²¹³ The second limb of the present text is not in the 1976 rule. It entered in 1983, and on the Commission's own account the wording was the commenters' and not its own.²¹⁴

C. The Grounds Adopted in 1976

The violation of law ground at (i)(2) was proposed as reaching federal law only, and framed in terms of the proposal rather than its implementation. Commentators pointed out that the release's explanatory text was clearer than the rule text it accompanied, and urged extension to any applicable law. The Commission agreed on both points. It adopted the broader form, keyed to implementation and reaching state, federal and foreign law. Foreign law could not defeat compliance with domestic law.²¹⁵ It used the occasion to restate two things that apply across the rule. Management carries the burden under this or any other provision. Where the asserted ground rests on matters of law, an opinion of counsel must go both to the Commission and to the proponent.²¹⁶

The proxy rules ground at (i)(3) was new, and the Commission described it as doing nothing new. It simply formalized a ground the Commission believed had been inherent in the proxy rules all along.²¹⁷ Section IX.B sets out what that ground became in operation.

The absence of power ground at (i)(6) is not new. The 1972 provision had two halves, a matter not significantly related to the issuer's business and a matter not within the issuer's control. In 1976 the

²¹¹ Release No. 34-4185, *supra* note 129, 13 Fed. Reg. at 6678, 6679.

²¹² Release No. 34-9784, *supra* note 151, 37 Fed. Reg. at 23,178–79. The former text reached the issuer or its management alone. The amended text is at 23,179, in subparagraph (c)(2)(i).

²¹³ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997. The release describes the provision as identical to subparagraph (c)(2)(i) of the former rule and carried forward intact.

²¹⁴ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,220. Commentators objected that the personal interest ground as proposed could reach a proposal on an issue in which the proponent was personally committed or intellectually and emotionally interested. The Commission said that was not its intent and adopted the revision those commentators suggested. The adopted text is at 38,222–23.

²¹⁵ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,996–97.

²¹⁶ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997.

²¹⁷ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997.

Commission made each half a ground of its own. The control half became (i)(6), restated as a matter beyond the issuer's power to effectuate, and the significance half became the economic relevance ground at (i)(5). The Commission said the new subparagraph was unchanged in scope and effect. The former Note had done nothing but define control, so it was folded into the subparagraph.²¹⁸

The elections ground at (i)(8) is older than the list. It sat as the final sentence of paragraph (a), stating that the section did not apply to elections to office. It is in the rule text as it stood in 1952 and in 1954.²¹⁹ In 1976 the Commission restated it as a substantive ground reaching a proposal that relates to an election to office. It deleted from the proposed text the words corporate, political or other, because their presence had led commentators to believe the Commission meant to expand the exclusion to reach cumulative voting rights, general qualifications for directors, and political contributions by the issuer. It said expressly that it did not.²²⁰ What the ground keeps off the ballot was put concretely at the 2007 roundtable. A practitioner on the panel said Maryland law lets shareholders remove a director at any time, with or without cause. The vote required is a majority of the shares entitled to vote in the election of directors, unless the charter provides otherwise. A shareholder could propose it at an annual meeting, subject to the advance notice bylaws.²²¹ Chairman Cox said that was clearly legal under state law and asked what kicked it out of Rule 14a-8. The answer from the table was that it relates to the election of directors.²²²

The counter proposal ground at (i)(9) came out of the same sentence in the same act. The Commission said it merely restated a ground already set forth in the existing rule, the last sentence of former paragraph (a). That sentence had said the rule did not apply to elections to office or to counter proposals to matters to be submitted by management.²²³ That clause is not in the text of paragraph (a) as adopted in 1954. It was added in December 1967 by an amendment that extended the same sentence. The 1976 release restated it without change.²²⁴

The mootness ground at (i)(10) was adopted as one that had not been formally stated in the rule but had informally been deemed to exist. The Commission dropped from the proposed text the qualification that mootness be caused by the actions of management, after commentators pointed to

²¹⁸ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997.

²¹⁹ Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-4979 (Jan. 5, 1954), 19 Fed. Reg. 246, 247 (Jan. 14, 1954); Amendment of Proxy Rules, Exchange Act Release No. 34-4775 (Dec. 10, 1952), 17 Fed. Reg. 11,431, 11,433 (Dec. 18, 1952).

²²⁰ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,998.

²²¹ 2007 Roundtable, *supra* note 203, at 218–19. The proposition was put by James J. Hanks, Jr. of Venable LLP. The statute is to the same effect on the default rule. Stockholders may remove any director with or without cause, by a majority of all votes entitled to be cast generally for the election of directors, unless the charter provides otherwise. Md. Code Ann., Corps. & Ass'ns § 2-406(a), <https://mgaleg.maryland.gov/mgaweb/Laws/StatuteText?article=gca§ion=2-406>. Two qualifications were not stated at the roundtable. The statute measures the vote in votes and not in shares. And subsection (b) withholds removal without cause where the board is classified, where the director was elected separately by a class or series, and where cumulative voting would still elect the director. Subsection (a)(3) excepts a corporation that has elected to be subject to § 3-804(a).

²²² 2007 Roundtable, *supra* note 203, at 234–35. The reason was given by Hanks and by John White of the Division of Corporation Finance, in overlapping speech as the reporter prints it.

²²³ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,998.

²²⁴ Adoption of Amendments to Proxy Rules and Information Rules, Exchange Act Release No. 34-8206 (Dec. 14, 1967), 32 Fed. Reg. 20,960, 20,961 (Dec. 29, 1967). The Commission records that paragraph (a) had provided the rule does not apply to elections to office, and had been further amended to provide also that it does not apply to counter proposals to any matter to be submitted by the management. The amended text is at 20,964.

statutory enactments, court decisions, business changes and supervening corporate events.²²⁵ It became substantial implementation by interpretation seven years later. That is at Section IX.C.

The duplication ground at (i)(11) formalized a third ground that the Commission said had existed solely on an informal basis. Its purpose was to spare shareholders two or more substantially identical proposals submitted by proponents acting independently of each other.²²⁶ Two limits sit in the rule text and are easily missed. A company cannot choose between duplicative proposals, because the ground is available only where the earlier proposal will itself be included. And the duplication must be with a proposal from another proponent.

The dividends ground at (i)(13) was wholly new, and its stated purpose was narrow. It was to prevent security holders from being burdened with a multitude of conflicting proposals from proponents independently asking that differing amounts be paid.²²⁷ The Commission had been excluding dividend proposals under the ordinary business ground until that same release. Why it then needed a separate ground is at Section IX.C. It did not take the further step urged on it. Commentators argued that dividends were traditionally within the exclusive province of the board and that shareholders should not be able to submit proposals on them at all. The Commission was not persuaded.²²⁸

D. What the List Shows

Five of the thirteen were adopted as formalizations of positions the Commission said already existed. The federal law ground was implied by the state law ground, because both bodies of law apply in an issuer's domicile. The proxy rules ground was inherent in the existing rule. Absence of power came from the provision it was split from, unchanged in scope and effect. Mootness was implied but not specifically stated. Duplication was not mentioned but reasonably implied. That is the mechanism Section VI.C traces from the 1947 preamble forward. Staff practice first, rule text after, with the release recording the sequence. The Commission has been candid about it each time. What the record does not support is the inverse claim, that the grounds themselves grew out of correspondence.

Only two of the thirteen turn on an evaluative judgment about the subject matter of a proposal, the ordinary business ground at (i)(7) and the economic relevance ground at (i)(5). Eleven are close to mechanical in operation. They ask whether a proposal is lawful, whether it duplicates another, whether the company can carry it out, whether it drew enough votes last time. Almost all of the controversy in the rule's modern history has attached to those two. The instability is not distributed across the rule. It is concentrated where the Commission declined to write a standard.

That gives the 1982 alternatives a different look. Proposal III would have eliminated eleven of the thirteen grounds and kept a different two, the proper subject ground and the elections ground.²²⁹ Those are the only two in the list that are not screens on the content of a proposal. One asks whether shareholders may act on the matter under the law that governs the company. The other reserves the

²²⁵ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,998.

²²⁶ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,998–99.

²²⁷ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,999.

²²⁸ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,999.

²²⁹ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,422, 47,433. See Section VII.A.

election of directors to the rules that govern it. Everything else in the list is the Commission judging proposals.

IX. The Bulletin Era, 2001 to 2025

A. *The Instrument*

Every Staff Legal Bulletin in the series says the same three things about itself. The statements represent the views of the Division of Corporation Finance. The bulletin is not a rule, regulation or statement of the Commission. The Commission has neither approved nor disapproved its content.²³⁰ All fourteen carry them, from July 2001 to February 2025. The last three, from October 2019, go further. Like all staff guidance, the bulletin has no legal force or effect. It does not alter or amend applicable law. It creates no new or additional obligations for any person.²³¹

These are not inherited boilerplate. The first bulletin said more, and said it in answer to a direct question. Asked whether it was required to respond to a no-action request at all, the Division answered that it was not. It had engaged in the informal practice of expressing its enforcement position as a convenience to companies and shareholders.²³² The words are the 1976 Statement's, which Section VII.A sets out. The Division restated the Commission's own off-switch at the head of the bulletin era, twenty-four years before it used it. Asked what its responses accomplished, it answered that they reflected only its informal views. It did not claim to issue rulings or decisions. Its determinations did not and could not adjudicate the merits of a company's position.²³³

It also said what happens when the process is not followed, and it put the cause on the parties. The rule envisions a structured process. The company submits the request, the shareholder may reply, and the Division issues its response. Where companies and shareholders deviate from that structure or cannot resolve their differences, the Division wrote, its time and resources are diverted and the process breaks down. In its experience this most often results from friction between the two and their inability to compromise. The operation of the rule, and the no-action process with it, suffers when the Division's role changes from an issuer of responses to an arbiter of disputes.²³⁴

The Division disclosed the volume itself, in the document that introduced the instrument. During the December to February peak it often received seventy to eighty requests a week and could answer at most thirty to forty.²³⁵ It processed hundreds each year.²³⁶

²³⁰ Staff Legal Bulletin No. 14, *supra* note 160, Supplementary Information. The same three statements appear in the Supplementary Information block of each of the fourteen bulletins in the series, from No. 14 through No. 14M (CF) (Feb. 12, 2025).

²³¹ Staff Legal Bulletin No. 14K (CF), Shareholder Proposals (Oct. 16, 2019), Supplementary Information, <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals>. The sentence recurs in Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) and Staff Legal Bulletin No. 14M (CF) (Feb. 12, 2025). It appears in no bulletin before No. 14K.

²³² Staff Legal Bulletin No. 14, *supra* note 160, at B.8.

²³³ *Id.* at B.11.

²³⁴ *Id.* at B.12.

²³⁵ *Id.* at G.6.

²³⁶ *Id.* at A.

The fourteen bulletins do not move the rule evenly. Of the thirteen that follow the first, nine move the ordinary business ground. Three of those nine move economic relevance as well. One of the nine moves a third ground. Staff Legal Bulletin No. 14H replaced the standard for the conflicting proposals ground at (i)(9), after Chair Mary Jo White directed the Division to review it. The remaining four take one subject each. They are the proxy rules ground, the state law grounds as they bear on charter amendments, proof of ownership, and website references.²³⁷ Staff Legal Bulletin No. 14B moved a ground once and decisively.²³⁸ The two grounds that carry the contested subject matter were moved twelve times in twenty-four years.

B. What the Division Did to Itself

Three times in the series the Division reversed a position and said the earlier position had been wrong. The first was mechanical. Staff Legal Bulletin No. 14 had discussed the ground permitting exclusion where a proposal or supporting statement is contrary to the proxy rules. The discussion was aimed at proposals requiring detailed and extensive editing.²³⁹ Companies read it more broadly. Many began asserting deficiencies in virtually every line of a supporting statement in order to justify excluding the proposal entirely. In the last proxy season before the Division wrote, nearly half the no-action requests it received asserted that one ground.²⁴⁰

Staff Legal Bulletin No. 14B reversed it. The Division wrote that its own earlier discussion had caused the process to evolve well beyond its original intent. It called the result an unintended and unwarranted extension of the provision.²⁴¹ It then listed four objections companies could no longer make and four circumstances in which exclusion might still be appropriate. It said the staff would concur only where a company had demonstrated objectively that a statement was materially false or misleading.²⁴² No rule text changed between 1998 and 2007. Four bulletins issued inside that window.²⁴³ No vote was taken and no comment was invited. A staff document moved the working reach of an exclusion ground far enough to drive half a season's requests. A second staff document moved it back. Nothing has reopened what the second document settled.

²³⁷ The ordinary business ground is moved by Staff Legal Bulletins Nos. 14A, 14C, 14E, 14H, 14I, 14J, 14K, 14L and 14M. Of those, Nos. 14I, 14L and 14M also move the economic relevance ground, at sections C, C and B respectively. Of the remaining four, No. 14B addresses the proxy rules ground, No. 14D the availability of Rules 14a-8(i)(1), (i)(2) and (i)(6) against proposals to amend a charter, No. 14F proof of ownership and revised proposals, and No. 14G proof of ownership and website references. No. 14H also moves the conflicting proposals ground, at B. The former formulation turned on alternative and conflicting decisions and inconsistent and ambiguous results. The standard it adopted asks whether a reasonable shareholder could logically vote for both proposals. The Chair's direction is recorded in the bulletin itself, which states that questions arose during the most recent proxy season about the Division's interpretation of Rule 14a-8(i)(9), and that in light of them Chair Mary Jo White directed the Division to review the proper scope and application of the rule, citing her statement of January 16, 2015.

²³⁸ Staff Legal Bulletin No. 14B (CF), Shareholder Proposals (Sept. 15, 2004), at B.4, <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14b-cf>. No later bulletin revisits the standard set there.

²³⁹ Staff Legal Bulletin No. 14, *supra* note 160, at E.1.

²⁴⁰ Staff Legal Bulletin No. 14B, *supra* note 238, at B.3.

²⁴¹ *Id.*

²⁴² *Id.* at B.4.

²⁴³ 17 C.F.R. § 240.14a-8 (2025), source credit. The rule was adopted at 63 Fed. Reg. 29,119 (May 28, 1998) and corrected at 63 Fed. Reg. 50,622, 50,623 (Sept. 22, 1998). The next amendment is at 72 Fed. Reg. 4,168 (Jan. 29, 2007).

The second concession was substantive. Staff Legal Bulletin No. 14C drew a line for proposals touching the environment and public health. Where a proposal focused on a company conducting an internal assessment of risks arising from its operations, the Division would concur in exclusion as relating to an evaluation of risk. Where it focused on minimizing or eliminating those operations, it would not.²⁴⁴

Staff Legal Bulletin No. 14E abandoned that framework. The Division said it was concerned about its application of the earlier approach. That application might have resulted in the unwarranted exclusion of proposals relating to the evaluation of risk but focusing on significant policy issues. Since most corporate decisions involve some evaluation of risk, it reasoned, risk evaluation should not be viewed as an end in itself. It would look instead to the subject matter giving rise to the risk.²⁴⁵ The same document reversed a second position, on chief executive succession planning, which the Division had treated for two seasons as the ordinary business of hiring and promotion.²⁴⁶ A doctrine was created by staff document in 2005 and abandoned by staff document in 2009. The Division said the interim position may have produced wrong outcomes, in the document abandoning that position.

The third concession was the largest. Staff Legal Bulletin No. 14I addressed the economic relevance ground. That ground permits exclusion where a proposal relates to operations below five percent of assets, earnings and sales, and is not otherwise significantly related to the company's business. The Division's account of its own practice is unusually frank. It had not agreed with exclusion where the company conducted any business related to the issue raised, no matter how small. Its analysis had not focused on the proposal's significance to the company's business. As a result, it wrote, its analysis had been similar to the one it made before 1983, with which the Commission had expressed concern. Its application had unduly limited the exclusion's availability.²⁴⁷ That is the Division stating that for more than three decades it had administered a ground as though the Commission's amendment to it had not occurred.

A fourth reversal was never conceded, and the account of it came from the Commission rather than the Division. In 1980 the Division recommended in print that the Commission issue an interpretive release on the elections ground. The release was to say that proposals recommending procedures to accommodate shareholder nominations must not be excluded as relating to the election of directors.²⁴⁸ No such release issued. The staff nonetheless held that position in practice through the 1980s, declining to concur in exclusion in the cases that raised it. In 1990 it stated the opposite position, and it did so without mentioning the earlier decisions. The Commission set both facts out seventeen years later, in

²⁴⁴ Staff Legal Bulletin No. 14C (CF), Shareholder Proposals (June 28, 2005), at D.2, <https://www.sec.gov/corpfin/staff-legal-bulletin-14c-shareholder-proposals>.

²⁴⁵ Staff Legal Bulletin No. 14E (CF), Shareholder Proposals (Oct. 27, 2009), at B, <https://www.sec.gov/interps/legal/cfs14e.htm>.

²⁴⁶ *Id.* at C.

²⁴⁷ Staff Legal Bulletin No. 14I (CF), Shareholder Proposals (Nov. 1, 2017), at C.3, <https://www.sec.gov/interps/legal/cfs14i.htm>.

²⁴⁸ 1980 Staff Report, *supra* note 37, at 225 ("An interpretive release on Rule 14a-8(c)(8) should be issued, indicating that shareholder proposals which recommend establishment of procedures to accommodate shareholder nominations shall not be excluded as 'relating to the election of directors.'").

the release that amended the rule text to reach a procedure for nomination or election.²⁴⁹ The Division had reversed a recommendation published under its own name, and it never said so.

The inconsistency was visible from the Commission's own dais while the series was running. At a public roundtable in May 2007, Commissioner Paul Atkins said that some of the staff's determinations had not been consistent. He said it to a panel of the practitioners who dealt with them. He dated a change of approach to about six years earlier, when the staff had settled on looking only at the four corners of a company's submission.²⁵⁰ Two of the practitioners answered on the same footing. One said the body of letters was an imperfect pattern, where one letter seemed to say one thing and another seemed to say something else.²⁵¹ The other said the staff indicated whether an exclusion applied without giving a reason, so that the Commission looked arbitrary and capricious to the boards advised on it.²⁵² The Division's deputy director answered why. A reasoned response would be challenged as adopting a new rule.²⁵³

C. The Ordinary Business Ground

Rule 14a-8(i)(7), the ordinary business exclusion, permits companies to exclude proposals dealing with matters relating to the company's ordinary business operations.²⁵⁴ The ground was adopted in January 1954. The adopting release gave no reason for it. It states the exclusion in a single sentence, appended to the paragraph that wrote the state law standard into the rule. It says nothing about what the ground was meant to reach. The proposing release of October 1953 did give one. It proposed the ground in order to relieve management of including proposals relating to matters falling within the province of the management. The explanation sat in the proposal and not in the adoption.²⁵⁵ The first case on the ground came the same year, and it did not construe it. A shareholder sought to enjoin AT&T's annual meeting over a pension plan proposal. The court denied a preliminary injunction on the balance of hardships and because it could not say the Commission's reading of its recently promulgated rule was clearly erroneous. It never mentioned ordinary business operations or New York law.²⁵⁶ Three years later the Commission told a Senate subcommittee that the decision had held the rule

²⁴⁹ Release No. 34-56914, *supra* note 165, 72 Fed. Reg. at 70,451. The release records that between 1976 and 1990 the staff did not concur in exclusion in the cases raising the question, citing Mobil Corp. (Mar. 3, 1981), Union Oil Co. of California (Feb. 24, 1983) and Pan American World Airways (Mar. 22, 1985). It records that in 1990 the staff stated the opposite position, in Amoco Corp. (Feb. 14, 1990), without mentioning the earlier decisions.

²⁵⁰ 2007 Roundtable, *supra* note 203, at 173–74. Six years before May 2007 is 2001.

²⁵¹ 2007 Roundtable, *supra* note 203, at 174–75, Klafter.

²⁵² 2007 Roundtable, *supra* note 203, at 176, Amy Goodman of Gibson, Dunn & Crutcher.

²⁵³ 2007 Roundtable, *supra* note 203, at 177–78, Dunn (answering the suggestion that staff responses carry a short statement of reasoning).

²⁵⁴ 17 C.F.R. § 240.14a-8(i)(7) (2025).

²⁵⁵ Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 246. The exclusion is stated at 246 and appears in the rule text at 247, as Rule X-14A-8(c)(5), in the form of a recommendation or request that management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer. The rationale is at Release No. 34-4950, *supra* note 116, 18 Fed. Reg. at 6647, and the proposed ground at 6647–48.

²⁵⁶ *Curtin v. Am. Tel. & Tel. Co.*, 124 F. Supp. 197 (S.D.N.Y. 1954) (Knox, C.J.). The court denied the injunction because enjoining the meeting would upset the plans of one of the world's largest corporations at the behest of the owner of a single share, and because it could not fairly be said that the Commission's interpretation of one of its recently promulgated rules was clearly erroneous. *Id.* at 197. The sentence the Commission later quoted, that the rights of pensioners are matters primarily the responsibility and concern of corporate management and its directors rather than of its stockholders, appears at 198 in the

did not require inclusion. It also said the court had upheld the Commission's position that under New York law pension plans fall within ordinary business operations.²⁵⁷ The D.C. Circuit surveyed the same history in 1970 and said no administrative interpretation of the exception had yet been scrutinized by the courts.²⁵⁸

The rationale now attached to it is a different one, and it came later and from outside the rulemaking. Its familiar form is the Commission's own, in 1998. The general underlying policy of the exclusion, it wrote, is consistent with the policy of most state corporate laws. That policy is to confine the resolution of ordinary business problems to management and the board, because it is impracticable for shareholders to decide how to solve such problems at an annual meeting.²⁵⁹ Five of the fourteen bulletins quote that passage and place it in the 1998 release, correctly. It did not originate there. The Commission's own 1982 release traces it to testimony given by Chairman J. Sinclair Armstrong to a Senate subcommittee in 1957, three years after the ground was adopted.²⁶⁰ The same answer carried a warning. The premise of the rule, the Commission said, is that propriety is determined in general by the law of the state of incorporation, and consistency with that premise requires ordinary business operations to take its meaning from state law. To hold otherwise would introduce the possibility of endless and narrow interpretations resting on no ascertainable standards.²⁶¹ Twenty-five years later the Commission conceded the premise. State law precedent, it wrote in 1982, is rarely conclusive as to what is or is not ordinary business. The staff has generally had to make its own determination whether a proposal involves an activity relating to the issuer's ordinary business.²⁶² The policy passage itself is a year older than the 1998 release. The Commission wrote it in its 1997 proposal, in the same words, and cited the same 1957 source in its note. That proposal also states the ground's relation to state law more directly than the paper's other sources do. The ordinary business exclusion, it says, rests in part on state corporate law. That law establishes spheres of authority for the board on one hand and the shareholders on the other.²⁶³

discussion of irreparable harm. The phrase ordinary business operations appears nowhere in the opinion, and the opinion makes no determination of New York law. The reported decision carries no subsequent history.

²⁵⁷ 1957 Lehman Report, *supra* note 170, at 109 (answering question 1). The report states the decision as a holding that the rule did not require inclusion, and states that the decision upheld the position taken administratively by the Commission that under the laws of the State of New York pension plans fall within the ordinary business operations of the company.

²⁵⁸ *Medical Committee*, 432 F.2d at 679.

²⁵⁹ Release No. 34-40018, *supra* note 206, 63 Fed. Reg. at 29,108.

²⁶⁰ 1957 Lehman Report, *supra* note 170, at 118 (answering question 27). The formulation confines the solution of ordinary business problems to the board of directors, and places such problems beyond the competence and direction of the shareholders. The stated reason is that it is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings. The 1998 release confines the resolution of such problems to management and the board, and does not carry the competence clause. The formulation appears in Staff Legal Bulletins Nos. 14I, 14J, 14K, 14L and 14M, each citing the 1998 release. Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,428 n.45, quotes this passage and gives the page as 119. The answer to question 27 begins and ends on 118. That release also attributes the passage to Armstrong personally, where the document is a report of the Commission transmitted over his signature as Chairman.

²⁶¹ *Id.* The warning closes the same answer. *Medical Committee*, 432 F.2d at 678-79, quotes it, and omits the Commission's own reference to page 2 of Release No. 34-4979.

²⁶² Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,429.

²⁶³ Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, 62 Fed. Reg. 50,682 (proposed Sept. 26, 1997) (to be codified at 17 C.F.R. pt. 240). The action line reads Proposed rule and the release is printed among the proposed rules of the volume. The policy sentence is at 50,689 and the spheres of authority sentence is at 50,683. The note to the policy sentence is the release's note 74. It attributes the 1957 answer to Chairman Armstrong personally, as the 1982 release does, and gives the page as 118. It cites Release No. 34-12999, *supra* note 153, alongside. The Commission adopted part of this package in 1998 and left the rest, and Section X.D sets out both.

The ground the bulletins inherited was not the one the Commission had tried to write. Section VI.D sets out the 1976 rulemaking. The Commission proposed to narrow the exclusion to routine, day-to-day matters, found no reasonable means of distinguishing routine business from important business, and kept the old words on the footing that they would be interpreted more flexibly. In the same release it announced that proposals with major implications would in the future be considered beyond the realm of ordinary business, and that future interpretive letters of the staff would reflect that view. That is the origin of the significant policy exception. It has never appeared in the rule text. It entered as an instruction about what staff correspondence should say.²⁶⁴

The doctrine's first casualty was the Commission's own drafting, a page later in the same release. Dividend proposals had been excludable as ordinary business, because management decides both whether a dividend is paid and in what amount. The Commission now took the view that dividends are not ordinary business matters in the strictest sense, because they are extremely important to most security holders and involve significant economic and policy considerations. They would no longer be excludable on that ground at all. So it added a thirteenth ground reaching specific amounts of cash or stock dividends, to prevent security holders from being burdened with conflicting proposals asking that differing amounts be paid.²⁶⁵ The doctrine narrowed the exclusion and the list grew to compensate. It is the clearest measure of what the announcement did, because the Commission applied it to itself before any staff letter applied it to anyone else.

The Commission used the same license again in 1983. It reopened the entire rule and took 397 comment letters from 383 commentators.²⁶⁶ It proposed no change to the ordinary business text. It proposed instead a significant change in the staff's interpretation. The staff had been refusing to apply the ground to proposals requesting reports or special committees. Its premise was that issuers do not prepare such reports as part of ordinary business. Because that interpretation raised form over substance and rendered the provision largely a nullity, the Commission adopted the change. The staff would consider whether the subject matter of the report or committee involved ordinary business, and exclude where it did.²⁶⁷

The same release did the same thing to the mootness ground. No text changed. The Commission announced that proposals substantially implemented could be omitted. It acknowledged that the new position added subjectivity but concluded that the previous formalistic application defeated the provision's purpose.²⁶⁸ Substantial implementation has been an interpretive announcement ever since.

²⁶⁴ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997–98. See *supra* Section VI.D.

²⁶⁵ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,999. The Commission's reasoning is in the proposing release at 41 Fed. Reg. 29,985, where it records that under the rule as it then stood almost all dividend proposals were excludable either as contrary to state law or as relating to ordinary business operations.

²⁶⁶ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,218, and notes 1 through 4. Of the 383 commentators, 115 generally supported Proposal I and 145 asked that there be no change to the existing rule. The amendments applied to proposals filed preliminarily on or after January 1, 1984, and the new timeliness requirements of paragraphs (a)(3) and (d) on or after July 1, 1984. Commissioner Longstreth dissented from the adoption at 38,223. He wrote that the amendments in the aggregate tilt significantly and unnecessarily against shareholders seeking access. He added that the active use of the proxy machinery by shareholders is not of itself an abuse, and that 145 commenters would have kept the rule as it stood.

²⁶⁷ *Id.* at 38,220–21.

²⁶⁸ *Id.* at 38,221.

The pattern held a third time in 1998. The Commission had proposed replacing the ordinary business language, thinking the legal term of art might confuse participants. It dropped the revision. The meaning of the phrase, it noted, had been developed by the courts over the years through costly litigation. It had essentially become a term of art in the proxy area.²⁶⁹ At each of the three points where the Commission reopened this ground, the operative phrase survived unchanged.

By 1998 the Commission had settled the two considerations that still govern. The first is the proposal's subject matter. The second is the degree to which a proposal micromanages the company, by probing too deeply into complex matters on which shareholders as a group could not make an informed judgment. The release traces the standard to 1976 in its own words. The standard, it says, was originally articulated in the Commission's 1976 release, and provided an exception for proposals raising significant social policy issues.²⁷⁰ Every subsequent movement of this ground happens inside that frame, and every bulletin that moves it cites the 1998 release, four of them going back to the 1976 release itself.

What moved, and when, is a matter of record. In 2002 the Division changed its treatment of equity compensation proposals, giving as its reason that public debate on the subject had become significant in recent months.²⁷¹ In 2005 it created the evaluation of risk framework, and in 2009 it abandoned it. In 2015 it accepted the Third Circuit's result and rejected its test.²⁷² In 2017 it relocated the significance judgment to the board. In 2018 and 2019 it extended micromanagement. In 2021 it rescinded all three of those bulletins, and in 2025 it reinstated part of what 2021 had rescinded.

D. The Economic Relevance Ground

This ground has the sharper record, because the Commission reversed itself on it before the Division ever did. Its quantitative dimension began in staff practice. In 1976 the American Jewish Congress submitted resolutions to more than 150 companies seeking reports on compliance with the Arab boycott of Israel. Responding to the resulting no-action requests, the staff consulted the Commission and used an economic significance test for the first time. The staff agreed to exclusion where a company's business with the Arab states and Israel came to less than one percent of sales, assets and earnings.²⁷³

That same year the Commission was asked to write the test into the rule and refused. It did not believe the ground should be hinged solely on the economic relativity of a proposal. A matter can be significant to a company's business without being significant from an economic viewpoint. It gave cumulative voting, ratification of auditors and political contributions as examples. Economic data might indicate a valid basis for omission in some circumstances. Significance nonetheless depends on the

²⁶⁹ Release No. 34-40018, *supra* note 206, 63 Fed. Reg. at 29,107.

²⁷⁰ *Id.* at 29,108.

²⁷¹ Staff Legal Bulletin No. 14A (CF), Shareholder Proposals (July 12, 2002), <https://www.sec.gov/interps/legal/cfslb14a.htm>.

²⁷² Staff Legal Bulletin No. 14H (CF), Shareholder Proposals (Oct. 22, 2015), at C, <https://www.sec.gov/interps/legal/cfslb14h.htm>. The decision is *Trinity*, 792 F.3d 323. The majority held the proposal excludable on a two-step inquiry, asking first whether the subject matter relates to ordinary business and then whether a significant policy issue transcends it, at 341 and 345–51. The Division agreed with the outcome and declined to adopt that inquiry, taking the position of the concurrence at 353, that significance and transcendence are interrelated rather than independent.

²⁷³ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,428.

company's individual situation, and there is no specific quantitative standard applicable in all instances.²⁷⁴

Six years later the Commission changed its mind. The 1982 proposing release recorded what the staff had been doing. Where a proposal bore no economic relationship to the business, the staff permitted exclusion. Where it reflected social or ethical issues raised by the business and the company conducted any such business, no matter how small, the staff did not. That interpretation, the Commission said, may unduly limit the exclusion, and it proposed incorporating economic factors.²⁷⁵ The 1983 release adopted it. The entire adopting discussion is two sentences. The Commission is adopting the paragraph as proposed. The paragraph relates to proposals concerning the functioning of the economic business of an issuer and not to such matters as shareholders' rights.²⁷⁶ A quantitative test the Commission had refused seven years earlier entered the rule with no stated reasoning at all.

Two years after that, in *Lovenheim v. Iroquois Brands*, a district court enjoined a company from excluding a proposal. The product line at issue accounted for less than five hundredths of one percent of assets. The court rested on the ethical and social significance of the proposal and on the fact that it implicated significant levels of sales.²⁷⁷ The Division read that decision in a way that narrowed the new exclusion nearly out of existence. That is the practice it described and abandoned in 2017, restored in 2021 by returning to the same decision, and abandoned again in 2025.

The Commission has not touched the text since. In 1997 it proposed a purely economic standard, deleting the otherwise significantly related clause and substituting a \$10 million threshold. Few commenters supported it, and the Commission made no substantive change.²⁷⁸ It also proposed and abandoned a mechanism letting three percent of a company's shareownership override both this ground and ordinary business, and dropped the ancillary amendments designed to implement it.²⁷⁹ The consequence matters for what follows. The economic relevance standard has stood unaltered in substance since 1983.

E. The Same Authority, Opposite Results

Staff Legal Bulletin No. 14I did two things at once. On ordinary business it relocated a judgment. Whether a proposal addressing ordinary business nonetheless focuses on a sufficiently significant policy issue raises difficult judgment calls. Those calls were in the first instance matters the board was generally better placed to determine. Going forward it would expect a no-action request to include a

²⁷⁴ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997.

²⁷⁵ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,428. The text proposed there is not the text adopted. The 1983 release substituted total assets for gross assets and net earnings for gross earnings, while stating that it was adopting the paragraph as proposed. Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,220 and 38,223. The adopted text is the text in force. 17 C.F.R. § 240.14a-8(i)(5) (2025), <https://www.law.cornell.edu/cfr/text/17/240.14a-8>.

²⁷⁶ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,220.

²⁷⁷ *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985), as described in Staff Legal Bulletin No. 14I, *supra* note 247, at C.2, and in Staff Legal Bulletin No. 14M (CF), Shareholder Proposals (Feb. 12, 2025), at B.2, <https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf>. Both record the underlying figures: sales of \$79,000 and a net loss of \$3,121 on a product line representing less than 0.05 percent of assets, against total assets of \$78 million, annual revenues of \$141 million and net earnings of \$6 million.

²⁷⁸ Release No. 34-40018, *supra* note 206, 63 Fed. Reg. at 29,113.

²⁷⁹ *Id.*

discussion reflecting the board's analysis of the policy issue and its significance.²⁸⁰ The staff would still decide. It would decide on a record the company's board had assembled.

On economic relevance it made the concession already described, and then decoupled the two grounds. Its analysis of significance under the economic ground had been informed by its analysis of ordinary business. The availability of the one had therefore been largely determinative of the other. It would no longer look to ordinary business when evaluating arguments under the economic ground.²⁸¹

Two seasons of extension followed. Staff Legal Bulletin No. 14J set out six substantive factors a board discussion might address. It also extended micromanagement to executive compensation proposals, which the Division had historically not excluded as micromanagement, saying it saw no basis for treating them differently from other types.²⁸² Staff Legal Bulletin No. 14K reported that the Division had in a number of instances been unable to agree with exclusion where no board analysis was provided. It stated that a proposal prescribing specific timeframes or methods for implementing complex policies may run afoul of micromanagement, whatever its precatory nature.²⁸³

What that produced can be read from two letters issued on the same day. On March 4, 2019 the Division concurred in excluding a proposal on greenhouse gas targets. The proposal sought annual reporting on short-, medium- and long-term targets aligned with the Paris agreement. The stated ground was that it prescribed the method and effectively required time-bound targets. The same day it declined to concur in excluding a second proposal. That one sought a report describing if and how a company planned to reduce its total contribution to climate change and align with the same agreement. The stated ground was that it deferred to management's discretion.²⁸⁴ Two companies, one subject, one day, opposite outcomes. The difference lay in the drafting.

Staff Legal Bulletin No. 14L rescinded all three in its first paragraph. It added that to the extent any other prior bulletin could be read as contrary, No. 14L controlled.²⁸⁵ Its reasons are stated. The rescinded bulletins had placed undue emphasis on the significance of a policy issue to a particular company. That came at the expense of whether the proposal focused on a significant social policy. That emphasis had drawn the staff into factual considerations that did not advance the policy objectives behind the exclusion, and had not yielded consistent, predictable results. It then stated what it would do instead. The staff would realign its approach with the standard the Commission articulated in 1976 and reaffirmed in 1998. It would ask whether a proposal raises issues with a broad societal impact. Section VI.D sets out the 1976 release. The Division realigned onto a standard the Commission had announced in the same document in which it concluded it could not write the line as a rule. On micromanagement, the rescinded guidance had expanded the concept beyond the Commission's policy directives.²⁸⁶ On

²⁸⁰ Staff Legal Bulletin No. 14I, *supra* note 247, at B.2.

²⁸¹ *Id.* at C.3.

²⁸² Staff Legal Bulletin No. 14J (CF), Shareholder Proposals (Oct. 23, 2018), at B.2 and C.3.c, <https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals>.

²⁸³ Staff Legal Bulletin No. 14K, *supra* note 231, at B.3 and B.4.

²⁸⁴ Devon Energy Corp., SEC No-Action Letter (Mar. 4, 2019); Anadarko Petroleum Corp., SEC No-Action Letter (Mar. 4, 2019). Both are described, with the Division's reasons for the different outcomes, in Staff Legal Bulletin No. 14K, *supra* note 231, at B.4 and notes 12 and 13. That section is reproduced verbatim in Staff Legal Bulletin No. 14M, *supra* note 277, Annex A.

²⁸⁵ Staff Legal Bulletin No. 14L (CF), Shareholder Proposals (Nov. 3, 2021), at A, <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14l-cf>.

²⁸⁶ *Id.* at B.2 and B.3.

economic relevance it returned to its longstanding approach prior to No. 14I, which it described as consistent with *Lovenheim*.²⁸⁷

Staff Legal Bulletin No. 14M rescinded No. 14L. It reinstated verbatim, in an annex, the micromanagement and executive compensation sections of No. 14J and the micromanagement section of No. 14K. It restored case-by-case consideration of a particular company's facts and circumstances as a key factor, which is what its predecessor had abandoned. It also decoupled the two grounds again, in nearly the words No. 14I had used.²⁸⁸ It dropped the board analysis as well, and its reason is not its predecessor's reason. No. 14L dropped the practice as a distraction from the proper application of the exclusion. No. 14M dropped it because in most instances the information the staff needed was not in the analysis, and board analyses had not generally had a dispositive effect.²⁸⁹ The two documents reverse each other on everything else and converge here, for incompatible reasons.

What moved is what significance is judged against, the particular company or the social policy itself. Nos. 14I and 14M rest on the Commission's 1982, 1983 and 1998 releases. No. 14L rests on the 1976 and 1998 releases. None of the three cites an amendment to either ground, because there was none. None cites a decision that changed the law.²⁹⁰ Seven years separate No. 14I from No. 14M, and the text of neither ground changed across them. A body of law can be read two ways, and reasonable readers differ. What is unusual is not disagreement but reversal. The same office, construing the same releases, reached one result in 2017 and extended it in 2018 and 2019. It reached the opposite result in 2021 and the first result again in 2025. Each time it explained itself in the language of interpretation. Each time the explanation was addressed to documents that had not changed. Four turns in the series issued within the first year of a new chairmanship. The two non-doctrinal reversals did not fall in a first year.²⁹¹

The Third Circuit reached the same judgment in 2015, about the pattern rather than about any one bulletin. It said the Commission's approach amounted to knowing a significant policy issue when it saw one. It cited a scholar's assessment that the Commission's shifting approach to social and political proposals is the most dramatic and prominent example of inconstancy under Rule 14a-8.²⁹²

²⁸⁷ *Id.* at C.

²⁸⁸ Staff Legal Bulletin No. 14M, *supra* note 277, at A, B.3 and C.3, and Annex A. The decoupling sentence at B.3 differs from the corresponding sentence in Staff Legal Bulletin No. 14I, *supra* note 247, at C.3, only in substituting at times for historically and for clarity for going forward.

²⁸⁹ *Id.* at D. Compare Staff Legal Bulletin No. 14L, *supra* note 285, at B.2, which drops the practice as a distraction from the proper application of the exclusion and records that the delta component sometimes confounded the substantial implementation standard.

²⁹⁰ Staff Legal Bulletin No. 14I, *supra* note 247, nn.5–9; Staff Legal Bulletin No. 14L, *supra* note 285, nn.1–12; Staff Legal Bulletin No. 14M, *supra* note 277, nn.2–17. No. 14L cites the 1998 release, Release No. 34-39093 and the 1976 release, and cites neither the 1982 nor the 1983 release. Nos. 14L and 14M each cite Release No. 34-89964, which amended the eligibility and resubmission provisions and neither of the two grounds. One decision is cited among the three, *Lovenheim*, decided in 1985. That no amendment to the economic relevance ground intervened is established by the 1998 release, *supra* note 278.

²⁹¹ The dates are Staff Legal Bulletin No. 14E (Oct. 27, 2009), nine months into the chairmanship of Mary Schapiro; No. 14I (Nov. 1, 2017), six months into that of Jay Clayton; No. 14L (Nov. 3, 2021), six and a half months into that of Gary Gensler; and No. 14M (Feb. 12, 2025), three weeks after a change of administration and under an acting chairman. The two reversals in the series that were not doctrinal are No. 14B (Sept. 15, 2004) and No. 14F (Oct. 18, 2011). No claim is made here as to why the pattern obtains.

²⁹² *Trinity*, 792 F.3d at 346 (quoting *Palmiter*, *supra* note 136, at 910).

Staff Legal Bulletin No. 14M contains the sharpest statement of what the instrument had become. Asked how it would treat requests already pending, the Division answered that the staff will consider the guidance in place at the time it issues a response. The standard governing a company's request is therefore not the standard in force when the proposal arrived, nor when the request was filed. It is whichever guidance exists on the day the staff happens to reply. It was then asked about companies that had passed the eighty-day deadline the rule imposes. It answered that publication of the bulletin would be treated as good cause for a later submission, where the new request related to the bulletin's arguments.²⁹³ A staff document reopened a deadline set by rule text, on the ground of its own publication.

Neither answer is objectionable as administration. Both are humane responses to a change the Division had made in the middle of a season. What they establish is the character of the obligation. Consider a federal requirement to carry a shareholder's proposal whose content can change inside the season it governs. Consider that the change is itself grounds to reopen a closed deadline. That is not a requirement of the kind rulemaking produces.

F. What Authorized the License

The obvious objection to everything above is that the staff went past the line the Commission had drawn. The record does not support it.

The Commission wrote this license and used it first. It found in 1976 that the ordinary business line could not be drawn by rule, and then directed the staff to draw it in future interpretive letters.²⁹⁴ It reopened the rule in 1983 with 397 comment letters in hand and changed no text on ordinary business. It instructed the staff instead to look through reports and committees to their subject matter.²⁹⁵ It did the same to mootness, and substantial implementation has been an interpretive position ever since.²⁹⁶ When it did amend text, on economic relevance, it adopted a quantitative standard it had rejected seven years earlier and explained the adoption in two sentences.²⁹⁷

The license to move is explicit, and it is the Commission's. The 1976 Statement of Informal Procedures states that the staff's views on certain issues may change from time to time. The occasions it names are re-examination, new considerations, and changing conditions indicating that earlier views are no longer in keeping with the objectives of the rule. Staff Legal Bulletin No. 14M cites that passage, in its first footnote, to justify rescinding No. 14L.²⁹⁸ The 1998 release says that from time to time, in light of experience and reflecting changing societal views, the Division adjusts its view on social policy proposals

²⁹³ Staff Legal Bulletin No. 14M, *supra* note 277, at I, questions 1 and 3.

²⁹⁴ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997-98. *See supra* Section IX.C.

²⁹⁵ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,218, 38,220-21.

²⁹⁶ *Id.* at 38,221.

²⁹⁷ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,220. The Commission had rejected the same quantitative test in 1976. Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997.

²⁹⁸ Release No. 34-12599, *supra* note 88, 41 Fed. Reg. at 29,991. The sentence immediately preceding states that the staff's advice on contested proposals, being informal and nonjudicial, has no precedential value as to identical or similar proposals submitted to other issuers. Staff Legal Bulletin No. 14M, *supra* note 277, n.1, quotes the change-of-views sentence and cites the release for it.

involving ordinary business.²⁹⁹ The staff had used it nine years before the series began. In 1992 it abandoned the significant policy standard for employment proposals because that standard had become too hard to apply. Section VI.E sets that out.

So the oscillation is not staff drift beyond a boundary. It is the operation of a discretion the Commission conferred, in the instrument that created the process and again in the release that produced the current rule. The staff said so itself in 1980. The Commission had been doing two things at once. It was deciding what counted as a proper subject for shareholder action, and it was policing the process against abuse. One is a question of substance and the other of procedure. The Commission answered them together, and its responses “frequently have overlapped (even to the extent of being stated in the same sentence), thereby causing some of the confusion that remains today.”³⁰⁰

That sharpens the difficulty rather than dissolving it. If the Commission wrote the license, the question is what authorized the Commission to write it. The 1983 release answers by adopting the rule and the interpretation under six statutory provisions. They are Sections 14(a) and 23(a) of the Exchange Act, Sections 12(e) and 20(a) of the Public Utility Holding Company Act, and Sections 20(a) and 38(a) of the Investment Company Act. It gives no account of how any of them reaches an obligation to carry a shareholder’s proposal.³⁰¹ Section 14(a) says nothing about shareholder proposals. It says nothing about which subjects a company may refuse to print, and nothing about who decides. Section XII takes up whether the Act’s grant to the Commission is nonetheless broad enough to carry a federal obligation of this kind.³⁰²

The question was put inside the Commission, and it went unanswered. At the 2007 roundtable a Commissioner asked whether the significant social policy doctrine should be looked at, saying it had grown up and did not necessarily have any basis.³⁰³ Two practitioners on the panel agreed at once. One called it a wild card among the regulations, which left companies without predictability.³⁰⁴ The exchange ended there and the panel moved on.

What the bulletin era shows is what the question looks like when it is left open for more than eighty years. The working content of a federal obligation came to rest in a document that changes without a vote and without a record. It changes inside the season it governs.³⁰⁵ It claims no legal force, and says so on its face.³⁰⁶ The Commission had proposed to stop administering the rule long before the bulletins began,³⁰⁷ and eighteen months after the last of them the Division stopped answering at all. The Third Circuit noticed the absence in the same opinion in 2015. It found that the Commission’s last word

²⁹⁹ Release No. 34-40018, *supra* note 206, 63 Fed. Reg. at 29,108. The release names plant closings, the manufacture of tobacco products, executive compensation and golden parachutes as subjects on which the Division had already reversed itself. Staff Legal Bulletin No. 14E, *supra* note 245, quotes the passage at note 7.

³⁰⁰ 1980 Staff Report, *supra* note 37, at arabic 146, B-14. Its authority for the two categories is Schwartz & Weiss, *supra* note 174, at 655.

³⁰¹ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,221.

³⁰² See *infra* Section XII, where the case for the Commission’s authority is stated at its strongest and the contrary case set against it.

³⁰³ 2007 Roundtable, *supra* note 203, at 177, Commissioner Atkins.

³⁰⁴ 2007 Roundtable, *supra* note 203, at 177, Goodman and Klafter.

³⁰⁵ Staff Legal Bulletin No. 14M, *supra* note 277, at I, questions 1 and 3.

³⁰⁶ Staff Legal Bulletin No. 14, *supra* note 160, Supplementary Information; Staff Legal Bulletin No. 14K, *supra* note 231, Supplementary Information.

³⁰⁷ See *infra* Section X.

on the exclusion came in the 1990s, and that there was no hint of change from the Commission or from Congress. It closed by adopting a former Commissioner's view. He had said it is neither fair nor reasonable to expect the Commission and its staff to deduce the prevailing wind on public policy issues Congress has not decisively addressed.³⁰⁸

X. The Commission Proposed to Stop, and Then Did

A. The Question First Put, 1972

The Commission's withdrawal from the shareholder proposal process in 2026 was not its first consideration of the question. It had considered it, in one form or another, for fifty-four years. The first occasion sets the pattern, because of the reason the Commission gave for staying.

In September 1972 the Chairman described a course the Commission had considered and rejected. "[C]onsideration has been given to pass the whole matter of what proposals should be included in the proxy statements over to the courts." What is involved, he said, "is usually a question of state corporation law which the courts are particularly expected to resolve." The Commission declined, because to "abdicate the role which it has historically played in the proxy process would cause great confusion in the organization, scheduling and conduct of annual meeting."³⁰⁹ Nothing in that answer concerns the Commission's authority. It concerns what withdrawing would disrupt.

The same address described the instrument in the same terms. Where proponents submitting multiple proposals had not followed through, the staff had issued no-action letters. "Thus by taking this administrative action, the Commission conserved its own resources and made it easier for companies to protect themselves from unnecessary cost and trouble."³¹⁰

The next day the Commission moved in the other direction. The amendments were signed on September 22, 1972 and published on October 31. They advanced management's filing from twenty days to thirty, and the Commission gave three reasons. Two were administrative. The third concerned the proponents themselves. "Shareholders who submit proposals will also benefit from the revision, because they will have more time, if they so elect, to enforce their rights in court in the event managements decide to omit their proposals."³¹¹ The same release moved the proponent's own deadline from sixty days to seventy, and it did so for management. A corresponding change was needed,

³⁰⁸ *Trinity*, 792 F.3d at 351. The court makes the observation in closing and asks the Commission to consider revising its regulation of proxy contests and issuing fresh interpretive guidance. The passage it quotes is remarks of Commissioner Richard Y. Roberts, reported at *Commissioner Criticizes Subjectivity, Inconsistency in SEC Review of Proposals*, BNA CORP. COUNS. WKLY. 2-3 (Mar. 31, 1993).

³⁰⁹ *Casey*, *supra* note 137, at 6-7.

³¹⁰ *Casey*, *supra* note 137, at 6.

³¹¹ Release No. 34-9784, *supra* note 151, 37 Fed. Reg. at 23,179. The release is signed by Ronald F. Hunt, Secretary, September 22, 1972, and was filed October 30 at 8:46 a.m. as FR Doc. 72-18467 and published October 31. Twenty days "did not allow sufficient time for the Commission's staff to give due consideration to what action, if any, might be appropriate with respect to a management's refusal to include a proposal in its proxy materials." And managements "have occasionally had to disrupt the printing schedules for their proxy material in those instances in which the staff was unable to expedite its letter on the matter due to its workload." The seventy-day change to paragraph (a) is on the same page, made because the filing period under paragraph (d) was being advanced by ten days.

the Commission said, to give management “an amount of time comparable to the former rule for reviewing and evaluating a proposal.” In 1976 it extended that deadline again, and gave the court route as its reason. Section XI.A sets that out. A Commission that had just declined to hand inclusion to the courts was adjusting the rule to make the route to them more usable.

B. The Rule Examined and Left Alone, 1977 to 1980

Five years after the Chairman’s address the Commission opened the widest inquiry it has made into the rule. In August 1977 it announced corporate governance hearings. The staff report records that in that release the staff solicited comments on whether Rule 14a-8 “should be amended to facilitate further the presentation of shareholder views and concerns in corporate proxy materials.” The comment file is No. S7-693, and the hearing transcript runs past page 4,500.³¹² The record is not comparable to anything else in this history. William L. Cary appeared, a professor of law at Columbia who had been Chairman of the Commission from 1961 to 1964. A sitting United States Senator appeared. Lewis Gilbert appeared, thirty-eight years after the episode that produced the rule.³¹³

The output was a staff report of ninety-three pages on Rule 14a-8 and annual meetings. It was printed for the Senate Banking Committee in 1980. It reviewed the rule’s history, the Division’s own practice, each ground for exclusion, and the comments received. It recommended three instruments and a set of limited amendments. Those recommendations became the Commission’s proposals two years later.³¹⁴

The commentators told the Commission the rule was working. Most commentators “felt that the shareholder proposal rule, as amended in 1976, was operating well,” and the staff recommended only limited amendments. The staff added that the commentators “had had only one proxy season of experience under the revised rule.” The Advisory Committee on Corporate Disclosure had said much the same in November 1977. The endorsement came from the side that pays for the rule. The Business Roundtable’s statement is the one the staff called typical. “In principle [the rule] is a viable and valuable part of corporate governance, through which management and shareholders express their views on issues to be voted on at the shareholders’ meeting.” Union Carbide, General Electric, the Secretary of AT&T and the American Society of Corporate Secretaries said the same.³¹⁵

³¹² 1980 Staff Report, *supra* note 37, at 133; *id.* at 174 n.120 (citing Exchange Act Release No. 34-13901 (Aug. 29, 1977)). *Id.* at 180 n.134.

³¹³ 1980 Staff Report, *supra* note 37, at 136 n.10 (Cary, Transcript at 86); *id.* at 217 n.235 (Senator Metzenbaum, Transcript at 63); *id.* at 165 n.98 (Lewis Gilbert, Transcript at 2258). The report identifies both men at 723 n.94, giving William L. Cary, Professor of Law, Columbia University School of Law, and Lewis D. Gilbert, Shareholder Representative. Neither that note nor the one at 136 records any Commission service for Cary, and the same note gives A.A. Sommer, Jr. as a former member of the SEC. Gilbert is described at 216 as a professional shareholder. Its note 197 at 207 cites a J. Gilbert at Transcript 2222, who is a different man. Cary was Chairman of the Commission from March 27, 1961 to August 20, 1964. SEC Historical Summary of Chairmen and Commissioners, <https://www.sec.gov/about/sec-commissioners/sec-historical-summary-chairmen-commissioners>.

³¹⁴ 1980 Staff Report, *supra* note 37, at 222–25. The recommendations are an interpretive release on the ordinary business ground, a concept release on the economic relevance and ordinary business grounds addressed to seven enumerated questions arising from *Bellotti*, 435 U.S. 765, and an interpretive release on the elections ground. On the 1982 proposals *see infra* Section X.C.

³¹⁵ 1980 Staff Report, *supra* note 37, at 133 and 222. The Business Roundtable statement is at *id.* at 133 (citing Statement of Business Roundtable, at 13 (File No. S7-693)). The Advisory Committee’s conclusion is at *id.* at 163 (citing Report of the Advisory

The complaints came from the other direction, which inverts the modern alignment. One group of commentators said the staff “has construed Rule 14a-8 too narrowly.” A number of others said the present system “is heavily biased in management’s favor.” One commenter argued in two directions at once. The Committee on Corporations of the State Bar of California told the Commission that requiring inclusion of matters not proper under state law “would go beyond the authority granted to the Commission under Section 14(a) of the Exchange Act to protect fair corporate suffrage.” The same committee said the staff was administering the rule too restrictively within that authority.³¹⁶

What the consensus was about can be measured. The corporate secretaries surveyed their membership for the 1979 season. Of 439 resolutions voted, 347 concerned traditional corporate matters. Directors and directors’ meetings accounted for 109, compensation for 65, and management policies for another 65. Ninety-two dealt with “corporate social responsibility.” The report puts resolutions on matters of “public policy” at twenty percent of those subject to shareholder vote.³¹⁷

Three things follow, and the first is the one that matters. A consensus that a rule is useful is not authority to make it. The report does not ask whether Section 14(a) authorized the obligation. It assumes the rule and examines how it is working. The 1977 record is therefore close to unanimous about a question nobody in it put.³¹⁸

The second is that the same proceeding recorded the Commission’s own doubt about its reach. In 1977 the Division asked the Commission for authority to take no position on the Arab boycott proposals. The Commission divided two to two on whether the proposals were excludable. Unable to decide, it instructed the staff to take no position, on the ground that the policy issues raised had implications beyond the ambit of the federal securities laws. That is the Commission placing a class of proposals outside its statute while continuing to carry them.³¹⁹

The third is that the rule endorsed in 1980 is not the rule operating now. Four fifths of what was voted in 1979 was ordinary corporate governance. By the 2020s the Chair was reporting environmental and social proposals at about half of those voted. The two counts use different definitions and different populations, and no trend line should be drawn between them. What they show is that consent given to one instrument does not carry to a different one.³²⁰

Committee on Corporate Disclosure to the Securities and Exchange Commission, H. Comm. on Interstate & Foreign Com., 95th Cong., 1st Sess. II-23, 417 (1977)). The other endorsements are at *id.* at 157 and 161. The statement that the staff is not recommending extensive changes is at *id.* at 164.

³¹⁶ 1980 Staff Report, *supra* note 37, at 160 and 174 n.121, both citing the committee’s comment letter in File No. S7-693. The contrary evidence on impact is at *id.* at 159, where Sister Regina Murphy is recorded as testifying that management will not adopt a proposal absent a majority vote however large the minority.

³¹⁷ 1980 Staff Report, *supra* note 37, at 139 (citing ASCS, Report on Shareholder Proposals (1980)). The season runs from July 1, 1978 to June 30, 1979. The remaining traditional matters are the annual meeting at 37, proxy materials at 26, security issuance and shareholders’ rights at 39, and auditors and accounting procedures at 6.

³¹⁸ The chapter runs from folio B-1 to folio B-93. Its treatment of Section 14(a) is at 1980 Staff Report, *supra* note 37, at 140–42, and it states the section’s legislative history and judicial construction rather than asking whether the Commission may require inclusion.

³¹⁹ 1980 Staff Report, *supra* note 37, at 188 n.152 (citing a Commission Minute dated February 1, 1977 re: Pfizer, Inc.).

³²⁰ Atkins, *supra* note 122, n.2 (giving environmental and social proposals as forty-nine percent of proposals voted in 2025, sixty percent in 2024, fifty-four percent in 2023 and fifty-two percent in 2022, on the Russell 3000 as reported by Proxy Analytics LLC). The 1979 figures count resolutions voted in the membership of the American Society of Corporate Secretaries and use a different subject definition. No trend is asserted between them.

C. The Year the Rule Itself Was Put Out for Comment, 1982 and 1983

Ten years later the Commission reopened Rule 14a-8, and it began by asking whether there should be one at all. It asked the public for views on “the fundamental question of whether security holder access to the issuer’s proxy statement should be provided under the Securities Exchange Act of 1934 or left to regulation under state law.” It added that if the right were to continue, the re-examination would also ask what its nature should be.³²¹ It also described what it had provided security holders since 1942. That was a right “to have their proposals presented to the issuer’s security holders at large and to have proxies with respect to such proposals solicited at little or no expense to the security holder.”³²² That formulation is the one the Chair proposed to re-evaluate in October 2025. Section XI.C takes that up. It was forty years old when the Commission wrote it.

The Commission also knew what the question would expose. It directed those who would argue for no federal right of access to address one question under Rule 14a-9. What must an issuer disclose when it has been told a proposal will be presented and is soliciting discretionary authority it intends to use against it?³²³ That is the theory on which the obligation was first enforced in 1938, set out at Section V.A.

Three proposals followed. Proposal I would keep the framework and revise the rule, its interpretations and the staff procedures under it. The revisions were substantial. A proponent would need one percent or \$1,000 in market value held for a year, could submit one proposal rather than two, and would face a deadline of one hundred twenty days. Paragraph (c)(5) would carry a five percent economic test, and paragraph (c)(12) would move from substantially the same proposal to substantially the same subject matter. Inside that package the Commission also asked about eliminating the staff’s administrative role and discontinuing no-action letters. It recorded the consequence. An issuer “would proceed wholly at its own risk if it chose to delete a proposal.” Where a proposal “was inappropriately excluded, the issuer could be sued by either the proponent or the Commission.” The narrower version reached the state law and illegality grounds. It had been suggested, the release said, that because the staff “may have no particular expertise with respect to the statutory provisions cited by counsel,” it is “the court, and not the staff, that are the appropriate forum.” It also reached two grounds whose application “depends almost entirely upon a factual determination that in most cases requires an investigation of the surrounding facts and circumstances,” which the release says the staff is not in a position to undertake. Those too, it said, had been suggested as “areas better left to the issuer and the proponent, and where necessary to the courts, to resolve.”³²⁴ Separately the Commission asked

³²¹ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,420, 47,421. The question is put in the executive summary and again in Section I of the release.

³²² *Id.* at 47,421.

³²³ *Id.* The Commission’s authority for the practice that preceded the rule is at its note 4, which says the Commission administratively required disclosure of proposals it had reason to believe would be presented. That note cites the 1943 Hearings at 169–70 and the January 1940 release. See Section V.A and *supra* notes 60 & 72.

³²⁴ *Id.* at 47,430. The release names two different sets of grounds on that page. The discussion gives paragraphs (c)(1) and (c)(2), as to which the staff requires an opinion of counsel, together with paragraphs (a)(4) and (c)(4), which require an investigation of the underlying facts. The request for comment two paragraphs later gives paragraphs (a)(2), (c)(1), (c)(2) and (c)(4). The release does not reconcile them.

whether the proponent should pay a fee to the Commission for processing the proposal, collected by the issuer and paid over.³²⁵

Proposal III went further. All proposals “that are proper under state law and that do not involve the election of directors would be included in an issuer’s proxy statement, subject to a numerical maximum.”³²⁶ The rule “would be self-executing.” Eleven of the thirteen existing bases for omission would go, and the limited disputes over the remaining two “generally would not be resolved by the Commission staff,” but by the courts. The Commission would still intervene “in those rare instances where necessary to redress the most egregious of conduct.” It had been suggested only recently, in an address the release names in a footnote.³²⁷ The approach would “remove the Commission staff from its role as referee in routine interpretive matters,” and the staff “would no longer ‘adjudicate’ disputes concerning the includability of contested proposals.”³²⁸ The two grounds it would have kept were the proper subject ground and the elections ground. Section VIII.D records that those are the only two in the list that are not screens on the content of a proposal.

Proposal II was not a question but a drafted rule. New Rule 14a-8A would have let an issuer and its security holders adopt their own plan. A plan required approval by a majority of the outstanding voting securities and reapproval at least once every five years. The holders themselves could initiate or amend it. It could permit omission on any of twelve enumerated grounds and could set its own deadlines. The resubmission thresholds would have gone, replaced by a five year bar on any proposal on substantially the same subject matter as one the holders had declined to approve.³²⁹ The Commission did not propose private ordering without a floor. A plan could not preclude a proponent holding one percent or \$5,000 in market value, and had to allow at least five hundred words for each proposal and its supporting statement.³³⁰ Section XI.C treats corporation-level frameworks as a possibility now open. The Commission drafted one in 1982.

Two figures give the proposals their measure, and both are the Commission’s own. The staff spent approximately one staff year, or 1,208 hours, processing the materials submitted under Rule 14a-8 during the 1982 season.³³¹ And the disposition chart for the two seasons the Commission counted gives the ground for every no-action position taken. Ordinary business is the largest substantive ground,

³²⁵ *Id.* at 47,426. The fee would be given to the issuer when the proposal was submitted and paid by the issuer to the Commission, and returned to the proponent where the proposal never came before the Commission. Note 25 on the same page records that the change would require amending Rule 14a-6(i). A separate fee, payable by the proponent to the issuer, is among the terms a plan could carry under Proposal II. *Id.* at 47,422 n.10.

³²⁶ *Id.* at 47,422, 47,433–34. The maximum is worked out at 47,433, at five proposals plus one for each 100,000 record holders above 500,000, to a maximum of twelve. The preference for proponents who have had no proposal included in three years, and the selection by lot beyond that, run from 47,433–34.

³²⁷ *Id.* at 47,422 n.13 (citing Longstreth, *The S.E.C. and Shareholder Proposals: Simplification in Regulation*, Remarks to National Association of Manufacturers, Denver, Colorado (Dec. 11, 1981)). The release does not name him as a Commissioner. He was one, and he dissented from the 1983 adoption. *See supra* note 266.

³²⁸ *Id.* at 47,422. The marks around adjudicate are the Commission’s.

³²⁹ *Id.* at 47,422, 47,432–33.

³³⁰ *Id.* at 47,432–33. The rule then allowed two proposals of not more than three hundred words each with a supporting statement of up to two hundred. The Commission invited comment at 47,422 on whether such limitations were necessary at all, since security holders could reject a plan they judged too restrictive.

³³¹ *Id.* at 47,423 n.15. The note as printed gives the figure for materials submitted pursuant to Rule 14a-6, which is the filing rule, and reads as a slip for 14a-8.

at fifty-one and seventy-three. The proper subject ground accounts for none at all in either year, against 387 and 487 contested proposals.³³²

The Commission declined in August 1983, and its stated reason was the comment file. “Almost without exception, the commentators opposed the discontinuation of the staff’s involvement in the process, citing problems of costs, confusion, complexity and delay.” No change to the staff’s role in the administration of the rule, it concluded, “therefore will be effected.”³³³ Section IX.C records the size of that file, and Section IX.F records what the same release said about its own statutory authority.

One item inside Proposal I did not survive either, and it went the other way. Under the mootness ground the Commission asked whether a precatory resolution should be treated as moot where the board had considered it in good faith and rejected it. It put the question under other issues and invited comment on introducing such an interpretation. It adopted the other change to that ground, from proposals fully effected to proposals “substantially implemented by the issuer.” It did not adopt this one. Because of “the administrative difficulties in administering the ‘good faith’ test,” it said, it “will not undertake the proposed interpretation at this time.” Liebler recorded the refusal as a shortfall, because her complaint was that the Commission had not gone far enough.³³⁴

What killed it was not authority, and not any view about what shareholders may put to a vote. The Commission would not take a position its staff could not administer. That is the ground now approached from the other side at Section XI.C, where exclusion would rest on a Delaware law opinion or on a bylaw the company adopted for itself. Liebler proposed the bylaw route in the same article. The administrability objection does not reach either path, because both move the judgment off the staff.

D. Reopened Four Times, 1997 to 2025

The Commission reopened the rule in September 1997, and it canvassed withdrawal before it proposed anything. It could, it said, “withdraw entirely from the area, leaving it to each state to adopt its own shareholder proposal rule to govern what proposals are appropriate to be included in companies’ proxy materials.” The reason it gave is the one this paper has traced. “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.” It added that in its current form the rule “in fact defers to state law on the central question of whether a proposal is a proper matter for shareholder action.”³³⁵ It named the practical obstacle in a footnote, and answered it with a transition period. States “likely do not currently have appropriated [*sic*] procedures in place to accommodate such an approach.” The Commission “could retain rule 14a-8 for a period of time, such as 3 or 6 years, to permit states to

³³² *Id.* at 47,424. The chart sits wholly on that page. Its own note attributes the rise in exclusions for personal grievance, from nine to forty-two, to twenty proposals submitted by one proponent to Uniroyal, Inc. and to an identical proposal submitted to ten companies by the Gold Bondholders Protective Council, Inc.

³³³ Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,221.

³³⁴ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,429. The question is put under other issues, following the mootness discussion. Release No. 34-20091, *supra* note 191, 48 Fed. Reg. at 38,221. The Commission adopted the substantially implemented change in the same item. Liebler, *supra* note 162, at 435, records the refusal among the pieces of the first alternative the Commission left out.

³³⁵ Release No. 34-39093, *supra* note 263, 62 Fed. Reg. at 50,683. The canvass opens the request for comment on alternatives to the amendments proposed that day. The deference sentence cites Rule 14a-8(c)(1), which is the present (i)(1).

adopt necessary procedures.”³³⁶ It described its own position in the same passage. The current rule “in effect places the Commission and its staff in the role of informal arbiter between companies and shareholders submitting a growing variety of shareholder proposals.” It asked, “Should these judgments be made by institutions other than the Commission, or by the shareholders and companies themselves?” It then set the canvass aside, on the results of its own questionnaire, and proposed the package it had.³³⁷

One Commissioner would have gone further. Steven Wallman concurred in issuing the release, and wrote that it “would be worthwhile to reduce as much as possible the staff’s role as line-drawers.” The alternative he named is the one the Commission had canvassed, “to permit all resolutions to be included subject to whatever exclusions the states wished to impose as a matter of internal corporate affairs.” He suspected “that both companies and shareholders will find this option to be impracticable.” If they did not, he believed “the Commission should give it more thought.”³³⁸

The Commission closed that round in May 1998. “Our proposed changes evoked considerable public controversy, as have our earlier efforts to reform these rules.” More than two thousand comment letters came in.³³⁹ Among the changes it had floated was a reduction in its own role and its staff’s. A number of commenters “resisted the idea of significantly decreasing the role of the Commission and its staff as informal arbiters through the administration of the no-action letter process.” They were “equally unsupportive of fundamental alternatives to the existing rule and process.” On the narrower proposal, that the staff express no view on personal grievance requests, shareholder commenters were concerned that a shareholder “might be forced to incur the expense of litigation to prevent exclusion of the proposal.” The Commission decided not to implement it, and said it would continue to administer the rule “consistently with our current practice of making case-by-case determinations.”³⁴⁰ That is the answer of 1983 reached again, and from the same source.

The Commission reopened the rule again in 2007, and it asked a question it had asked once before. The question was whether a company or its shareholders “should have the ability to propose and adopt bylaws that would establish the procedures that the company will follow for including non-binding proposals.” It asked whether the substance of such a procedure “would not be defined or limited by Rule 14a-8, but rather by the applicable provisions of state law and the company’s charter and bylaws.” It named the far end of the range itself. The framework “could specify that non-binding proposals would not be eligible for inclusion in the company’s proxy materials.”³⁴¹ And it asked whether,

³³⁶ *Id.* at 50,683–84 n.26. The note is attached to the sentence on state corporate law and spheres of authority, which Section IX.C carries.

³³⁷ *Id.* at 50,684. The passage sits between the 1982 alternatives and the questionnaire results. On the questionnaire itself see *id.* at 50,683 n.14, which records that the Commission staff prepared it as part of a study Congress required.

³³⁸ Concurrence of Commissioner Steven M.H. Wallman, *id.* at 50,705–06. The line drawing point is at his note 7, on 50,706. His concurrence also opposed holding the reversal of *Cracker Barrel* to the fate of the wider package. Section VI.E sets out that interpretation.

³³⁹ Release No. 34-40018, *supra* note 206, 63 Fed. Reg. at 29,106.

³⁴⁰ *Id.* at 29,106 and 29,112–13. The count that follows is at 29,114, in the Final Regulatory Flexibility Analysis. Between September 30, 1996 and September 30, 1997 the Commission received submissions under the rule from 245 companies, of which six were small businesses. That is a count of companies rather than of proposals.

³⁴¹ Shareholder Proposals, Exchange Act Release No. 34-56160, Investment Company Act Release No. IC-27913, 72 Fed. Reg. 43,466, 43,478 (Aug. 3, 2007). The Commission acted July 27, 2007. The request appears under the heading Bylaw Amendments Concerning Non-Binding Shareholder Proposals.

if shareholders approved such a procedure, “interpretation and enforcement of that procedure would be the province of the appropriate state court.” Under that approach “the Commission and its staff would not resolve such questions.”³⁴² The idea was its own and it said so. Its footnote sets out Proposal II of 1982. It records that in 1983 the Commission “left the Exchange Act Rule 14a-8 framework intact, concluding that, at that time, a federal framework for including shareholder proposals in company proxy materials was in the best interests of shareholders and issuers.”³⁴³ The words at that time are the Commission’s own.

The same release proposed to widen the rule in a second respect. It would have let shareholders use Rule 14a-8 to carry bylaw amendments establishing procedures for nominating directors.³⁴⁴ The Commission had put a contrary amendment out for comment on the same day, in a separate release. It adopted that one on December 6 and acted on nothing else, extending the elections ground to a nomination and to a procedure for such nomination or election. It held the comments on the first release to that proceeding. They went “beyond the scope of the Proposing Release” and were “more appropriately addressed in connection with the Companion Release.”³⁴⁵ About 8,800 letters had come in, against the more than two thousand the 1998 proposals drew.³⁴⁶ Its stated reason for acting bears on what came later. To permit “this escalating state of confusion to continue for the 2008 proxy season and beyond,” it wrote, “would effectively require shareholders and companies to go to court to determine the meaning of the Commission’s proxy rules.” Inaction would leave both “in a position of ‘every litigant for himself.’” That “would benefit neither shareholders nor companies.”³⁴⁷ Section XI.A sets out what the 2026 season produced.

It asked again in 2019, and the question is one question with five parts. “Does the Rule 14a-8 process work well? Should the Commission staff continue to review proposals companies wish to exclude? Should the Commission instead review these proposals? Is there a different structure that might serve the interests of companies and shareholders better? Are states better suited to establish a framework governing the submission and consideration of shareholder proposals?”³⁴⁸ The first of those is the Commission asking the public whether its own rule works.

In 2020 it declined to change the structure. It acknowledged the concerns commenters had raised about consistency. It restated an earlier statement that “the staff’s views on certain issues may change from time-to-time, in light of re-examination, new considerations, or changing conditions which indicate that its earlier views are no longer in keeping with the objectives of Rule 14a-8.” It continued to believe “that changes in staff views may be necessary on occasion.” It declined to adopt any formal

³⁴² *Id.* at 43,478–79. The release also solicits comment on the practicality and feasibility of relying on state courts as the arbiter of disagreements between companies and shareholder proponents.

³⁴³ *Id.* at 43,478 n.71. The note sets out Proposal II of Release No. 34-19135 and gives the 1983 conclusion with the qualification at that time.

³⁴⁴ *Id.* at 43,469–70.

³⁴⁵ Release No. 34-56914, *supra* note 165, 72 Fed. Reg. at 70,452–53. The Commission acted December 6, 2007 and the amendment took effect January 10, 2008.

³⁴⁶ *Id.* at 70,452 n.47. Approximately 8,400 of the letters were form letters opposing both releases and approximately 400 were not form letters.

³⁴⁷ *Id.* at 70,452.

³⁴⁸ Release No. 34-87458, *infra* note 430, 84 Fed. Reg. at 66,465, at question 16 of the request for comment. The release proposed a tiered ownership requirement and a rise in the resubmission thresholds to five, fifteen and twenty-five percent. Its statutory authority is one sentence, under Sections 3(b), 14 and 23(a) of the Exchange Act, at 66,514.

proceeding, noting only that “the staff may seek the Commission’s views on certain matters related to Rule 14a-8, including certain changes in staff positions.”³⁴⁹ The license discussed at Section IX.F was restated in the release that declined to constrain it.

One thing the Commission did not answer in 2020 belongs on the record. A commenter argued that the rule lacks a clear statutory mandate. The Commission gave no reply to that argument anywhere in the release. Its only statutory passage is the recital that the amendments are adopted under Sections 3(b), 14 and 23(a) of the Exchange Act. At Section II.G.1 of the same release, it answered First Amendment objections at length.³⁵⁰

Its most recent attempt came in July 2022, when it proposed to amend the substantial implementation, duplication and resubmission grounds. The release states the rule’s purpose in state law terms. It is “intended to facilitate shareholders’ right under state 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.” Its statutory authority is a single sentence and carries no argument.³⁵¹ The Commission never adopted the amendments. It withdrew the proposal as of June 17, 2025, together with thirteen other notices of proposed rulemaking. It gave no reason for any of them, beyond saying that it no longer intends to issue final rules with respect to them. The shareholder proposal release was listed first among the fourteen and was the only Division of Corporation Finance rulemaking in the group.³⁵²

E. The Terminus, 2025 and 2026

The Division suspended substantive responses for the 2025-26 season on November 17, 2025, preserving one ground, and discontinued responding altogether on August 14, 2026. Both statements are at Section VII.A. Section XI.A sets out what replaced the process. Its stated reason changed between them. In November it gave the government shutdown, the volume of filings requiring prompt attention and the extensive body of guidance already available. In August the reason was “to focus Division resources on the review of Securities Act and Exchange Act filings, including those reviews that are statutorily required,” together with the same body of guidance.³⁵³ The August statement dropped the shutdown.

³⁴⁹ Release No. 34-89964, *supra* note 190, section II.G.3.

³⁵⁰ *Id.*, sections II.G.1 and II.G.3. The statutory recital is at section VIII.

³⁵¹ Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-95267, Investment Company Act Release No. IC-34647 (July 13, 2022), 87 Fed. Reg. 45,052 (July 27, 2022), <https://www.federalregister.gov/documents/2022/07/27/2022-15348/substantial-implementation-duplication-and-resubmission-of-shareholder-proposals-under-exchange-act>. The purpose statement is in the Introduction, supported by the 2019 proposing release and by ALAN PALMITER & FRANK PARTNOY, CORPORATIONS: A CONTEMPORARY APPROACH 482 (1st ed. 2010), for the proposition that the rule is a federal mechanism to facilitate state-created shareholder voting rights. The authority is Sections 3(b), 14 and 23(a) of the Exchange Act and Sections 20(a), 30 and 38 of the Investment Company Act.

³⁵² Withdrawal of Proposed Regulatory Actions, Securities Act Release No. 33-11377, Exchange Act Release No. 34-103247, Advisers Act Release No. IA-6885, Investment Company Act Release No. IC-35635 (June 12, 2025), 90 Fed. Reg. 25,531 (June 17, 2025), <https://www.federalregister.gov/documents/2025/06/17/2025-11110/withdrawal-of-proposed-regulatory-actions>. The Commission acted June 12, the notice was filed June 16 and published June 17, and the withdrawals take effect as of June 17. The fourteen are listed in the DATES block at 25,531.

³⁵³ Statement Regarding the Division of Corporation Finance’s Role, *supra* note 184; Updated Statement Regarding the Division of Corporation Finance’s Role, *supra* note 185. See Section VII.A.

Fifty-four years separate Casey's answer from that one. In 1972 the Commission declined to hand inclusion to the courts because withdrawing would "cause great confusion in the organization, scheduling and conduct of annual meeting."³⁵⁴ In 2026 the Division withdrew and gave the same kind of reason it had given for staying. A month later the Commission went further. On September 16, 2026 it proposed to rescind the rule itself. Section XII.F sets out that proposal.

XI. After the Answer Stopped, 2026

A. What Replaced the Process in 2026

The withdrawal of no-action review raised a practical governance question the historical record could not answer. What institutional mechanism would replace the no-action process for exclusion disputes? The 2026 season supplies a partial answer. Interpretive authority shifted to issuers in the first instance and to federal courts on challenge. Cooley counts six proponent suits over exclusions in the season, five on the ordinary business ground and one on a procedural defect. Three produced a written ruling on preliminary relief. The District of Massachusetts granted it, and the District of Columbia denied it twice, in the Chubb and UnitedHealth matters. In the Massachusetts case the company then included the proposal and the suit was dismissed by stipulation. Cooley reports that the other three settled, with the company agreeing to include or implement the proposal.³⁵⁵ Proponents also pursued routes outside the rule, including advance notice bylaws with independent solicitation and campaigns against nominating committee directors.³⁵⁶

Whether litigation can carry the volume and timing of proxy-season disputes is a different question. The season's own record suggests it distributes access by litigation capacity, and not by the ownership thresholds the rule sets. Litigation was in any event the route the framework itself contemplated. The D.C. Circuit held in 1992, in *Roosevelt*, that a private right of action is implied from Section 14(a) and Rule 14a-8 to compel inclusion. It held that shareholders may seek declaratory and injunctive relief when management refuses to distribute their proposals. The Second Circuit reached the

³⁵⁴ Casey, *supra* note 137, at 7. See Section X.A.

³⁵⁵ Cooley, *Proxy Season Recap: Shareholder Proposal Exclusions and Litigation*, Cooley Governance Beat (2026), <https://governancebeat.cooley.com/proxy-season-recap-shareholder-proposal-exclusions-litigation/>. The count of six, the split and the settlement figure are the survey's. The three rulings are *DiNapoli v. BJ's Wholesale Club Holdings, Inc.*, No. 26-11075-LTS, 2026 WL 1113463 (D. Mass. Apr. 22, 2026) (Sorokin, J.); *As You Sow v. Chubb Ltd.*, No. 1:26-cv-00734, 2026 WL 879666 (D.D.C. Mar. 31, 2026); and *Fonds des Missions v. UnitedHealth Grp. Inc.*, No. 26-970 (RC), 2026 WL 1018600 (D.D.C. Apr. 15, 2026) (Contreras, J.). *Heritage Found. v. Airbnb, Inc.*, 2026 WL 395797 (D. Del. Feb. 12, 2026), was decided on a docket opened in 2025 and the season surveys do not count it. As of June 2, 2026 the survey records three of the six settled, one voluntarily dismissed and two pending. It gives counts and does not name the cases.

³⁵⁶ SHAREHOLDER RIGHTS GROUP, SHAREHOLDER PROPOSALS AND CORPORATE GOVERNANCE IN A SEASON OF REGULATORY UNCERTAINTY 10–11, 21–27 and Appendix B (Apr. 2026), <https://www.shareholderrightsgroup.com/2026/04/shareholder-proposals-and-corporate.html>. The Group is a proponent-side organization and its report states its methodology at Appendix B: exclusion notices posted on the Commission's website and not withdrawn as of April 15, 2026, cross-referenced against published proxy statements. It counts 155 exclusion notices in 2026 against 293 filed by the same date in 2025, of which the staff concurred in 197, and reports proposals voted from 356 to 290 through May 28. Management-side commentary describes the same shift; see Elizabeth Ising, Ronald Mueller, Julia Lapitskaya & Michael Svedman, *Considerations for Shareholder Proposals in a Post-Rule 14a-8 World*, Harv. L. Sch. F. on Corp. Governance (June 15, 2026), <https://corpgov.law.harvard.edu/2026/06/15/considerations-for-shareholder-proposals-in-a-post-rule-14a-8-world/>. Two sources of opposing orientation agree on the direction and are not independent on the figures, which are the Group's.

same point by refusing to review the staff, telling proponents that the district court is where the question belongs. The 2026 courts divided on it. The District of Massachusetts held in April that a private right of action is properly implied from Section 14(a) to enforce the obligation to include a proposal, quoting *Roosevelt*. It rejected the argument that *Alexander v. Sandoval* had swept that right away. The District of Columbia had left the question open a week earlier, for further briefing.³⁵⁷

The Commission had said as much three times, beginning in 1971. It proposed that December to give the security holder more time to pursue any remedies then available. It said at adoption in October 1972 that shareholders would have more time to enforce their rights in court where management omitted their proposals. In 1976 it advanced the proponent's deadline from seventy to ninety days. The added twenty days were partly to prepare for and institute a suit in a United States District Court. What changed in 2026 was not the availability of the route but the disappearance of the alternative to it. The one institutional response that survived the 2025 withdrawal, the exception for Rule 14a-8(i)(1), is discussed below, and it did not survive 2026.³⁵⁸

The prediction is fifty years old and it came from the rule's defenders. Schwartz and Weiss wrote in 1976 that the rule would wither away if its success were made to turn on private enforcement, unlike other Commission rules. Their three grounds are the ones the season tests. A shareholder whose proposal is omitted usually has a minimal financial stake in inclusion. Vindication creates no fund from which losses may be recovered or lawyers paid. And absent an economic incentive it is unrealistic to expect that the substantial expenditures a suit requires will be privately undertaken.³⁵⁹

The agency made the same prediction four years later, and it made it in defense of its own process. Explaining why it preferred no-action review to litigation, the staff gave four reasons. Review resolves matters before the meeting, so a proposal is not mooted while a suit is pending. Litigated results would take a great deal of time. Litigation over an exclusion might in many cases weigh in management's favor, because of management's access to greater resources. And the courts would carry an increased burden. The third reason is the one the 2026 season tests, and the Commission's own staff supplied it.³⁶⁰

³⁵⁷ *DiNapoli*, 2026 WL 1113463, at *4–*5 (quoting *Roosevelt*, 958 F.2d at 417, and rejecting the argument that *Alexander v. Sandoval*, 532 U.S. 275 (2001), reversed that approach). The court collects *KBR Inc. v. Chevedden*, 776 F. Supp. 2d 415, 423–26 (S.D. Tex. 2011), *Heritage Found.*, 2026 WL 395797, at *4–*6, *Apache Corp. v. N.Y.C. Emps.' Ret. Sys.*, 621 F. Supp. 2d 444, 453 (S.D. Tex. 2008), and *Tosdal v. Nw. Corp.*, 440 F. Supp. 3d 1186, 1200–01 (D. Mont. 2020). It also notes that the company relied on *Trinity*, which presumed the right exists. *Fonds des Missions*, 2026 WL 1018600, at *12, lists the private right of action among the questions the parties only briefly touched and leaves it for further briefing.

³⁵⁸ *Roosevelt*, 958 F.2d at 417, 425, 429 (implying a private right of action from Section 14(a) and Rule 14a-8 to compel inclusion, and holding that shareholders may seek declaratory and injunctive relief when management refuses to distribute their proposals); *ACTWU*, 15 F.3d at 257 (a proponent believing a proposal improperly omitted should seek a judicial determination in the district court); *N.Y.C. Emps.' Ret. Sys.*, 45 F.3d at 14 (plaintiffs may sue the company under Rule 14a-8 to enjoin the board to include their proposal); Release No. 34-9432, *supra* note 151, 36 Fed. Reg. at 25,432 (proposing to allow the security holder more time to pursue any remedies he may have available); Release No. 34-9784, *supra* note 151, 37 Fed. Reg. at 23,179 (shareholders will have more time to enforce their rights in court where management decides to omit their proposals); Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,995 (advancing the proponent's deadline in part to allow time to prepare for and institute such a suit).

³⁵⁹ Schwartz & Weiss, *supra* note 174, at 650.

³⁶⁰ 1980 Staff Report, *supra* note 37, at 155. The staff gave four reasons for preferring no-action review to litigation. The third is that "it must be recognized that litigation over the propriety of management's exclusion of a proposal in many cases might weigh in management's favor due to its access to greater resources."

Litigation is not the whole of what remains. Some states impose a disclosure duty of their own, and it does not depend on Rule 14a-8. Michigan requires written notice of the time, place and purposes of any shareholders' meeting. Notice of the purposes, the statute provides, includes notice of shareholder proposals a shareholder intends to submit for a vote. That duty carries a limit on the face of the subsection, and the limit is the federal boundary. It applies unless the corporation has securities registered under Section 12 of the Exchange Act. Michigan imposes the floor only where the federal regime does not reach. The floor therefore does not reach the companies Rule 14a-8 governs.³⁶¹ The Sixth Circuit enforced that requirement in 2015, in *Hartman*. A company had told its shareholders only that someone intended to propose a resolution urging the board to amend the bylaws. It never said which bylaw or what subject. That was not notice.³⁶² The court answered the company's objection in terms the present question makes useful. The fact that Michigan does not replicate the Commission's maximal proxy-access regime does not obviate the statute's own requirements, which set a minimum disclosure floor. The court rested on Michigan law alone and left the wider questions for another day. It says nothing about whether the resolution was proper, and the resolution was precatory. The company before it was outside Section 12 and reported under Section 15(d), so the subsection applied on its own terms. For a registrant there is no such floor. What the Division stopped doing in 2026 has no state substitute of this shape, at least in Michigan.³⁶³

The same case shows what that floor is worth. The company disclosed the minimum and announced that it would treat unmarked proxies as votes against. The proposal drew 150,000 shares against more than 1.7 million.³⁶⁴ A duty to give notice is not a duty to carry.

B. The Carve-Out and the Delaware Question

The Division's November 17, 2025 statement withdrew substantive responses to no-action requests for the season while preserving one exception, requests to exclude under Rule 14a-8(i)(1). Section VII.A sets out the withdrawal and the reasons the Division gave for it.³⁶⁵ Its reason for the

³⁶¹ Mich. Comp. Laws § 450.1404, Business Corporation Act, Act 284 of 1972. Subsection (1) carries the notice of time, place and purposes. Subsection (2) carries the shareholder proposal duty and opens with the exception, which applies unless the corporation has securities registered under Section 12 of the Exchange Act. The same subsection lets the bylaws establish reasonable procedures for submission in advance of the meeting. The section was last amended in 2001, Act 57, so subsection (2) stood in this form when the 2013 notice was given. The opinion sets out the operative clause and not the opening words, which did not bear on the company before it. *Gwyn R. Hartman Revocable Living Trust U/A/D 11/16/93 v. S. Mich. Bancorp, Inc.*, 780 F.3d 724, 726 (6th Cir. 2015).

³⁶² *Hartman*, 780 F.3d at 725–26. The proxy statement said only that a shareholder intended to present a proposal urging the board to adopt an amendment to the company's bylaws. The company was outside Section 12. Its annual report on Form 10-K for 2012, filed March 28, 2013, gives None for securities registered under Section 12(b) and None under Section 12(g). It reports under Section 13 or 15(d) at Commission File No. 000-49772. *S. Mich. Bancorp, Inc.*, Annual Report (Form 10-K) (Mar. 28, 2013), <https://www.sec.gov/Archives/edgar/data/703699/000119312513130714/d444453d10k.htm>.

³⁶³ *Id.* at 727. The court surveys other states on the same page. California requires disclosure of the general nature of the business to be transacted at a special meeting, and of the matters the board intends to present at a general meeting, at Cal. Corp. Code § 601(a). Delaware requires advance notice of the substance of only a few types of proposed action. For a certificate amendment the notice must set out the amendment in full or a brief summary of the changes, at Del. Code Ann. tit. 8, § 242(b)(1). Its courts have supplied a broader duty of disclosure, at *Stroud v. Grace*, 606 A.2d 75, 85–88 (Del. 1992). The court expressly left open whether Michigan law incorporates the Delaware duty.

³⁶⁴ *Id.* at 725–26. The board's proxy statement announced that the directors would use their discretionary authority to vote the proposal down, by treating all submitted proxies as no-votes absent instructions to the contrary.

³⁶⁵ 17 C.F.R. § 240.14a-8(i)(1) (2025), <https://www.law.cornell.edu/cfr/text/17/240.14a-8>. For the retraction of substantive no-action review see Statement Regarding the Division of Corporation Finance's Role, *supra* note 184, which gives the reason for

exception was the opposite of the reason it gave for withdrawing. Guidance was extensive everywhere else and insufficient here. In light of recent developments on the application of state law and Rule 14a-8(i)(1) to precatory proposals, the Division said, there was not a sufficient body of guidance for companies and proponents to rely on. It would continue to review and express its views on (i)(1) requests until it determined that there was. For the phrase recent developments it cited the Chair's keynote address of five weeks earlier.³⁶⁶ The carve-out was therefore purposive, and the Division said so on the face of the document. Fisch, Haan, Lipton and Miazad read it as reflecting the Commission's newfound interpretation that precatory proposals are improper under Delaware law. That reading is supported by the statement's own footnote. It does not rest on inference from timing. What followed is the part neither account anticipated. The Division received no request to exclude a proposal under Rule 14a-8(i)(1) during the whole of the 2025-26 season. On August 14, 2026 it discontinued responding to (i)(1) requests along with everything else. The ground on which it had preserved review, and preserved it because guidance was insufficient, was the one ground nobody invoked.

Chair Atkins set out how a Delaware company could exclude a precatory proposal under paragraph (i)(1). He did so in his keynote address at the Weinberg Center on October 9, 2025. He put it conditionally. The Delaware question belongs to those who practice Delaware law, he said, and the agency should defer to them on it. On that footing one could argue that a precatory proposal to a Delaware company is excludable. Where a company makes that argument and supplies an opinion of counsel, the argument should prevail, at least for that company.³⁶⁷ The underlying question is whether Delaware corporate law affirmatively recognizes precatory shareholder proposals as a shareholder right. The alternative is that the long practice of including them reflects custom and consent rather than legal entitlement. Both sides rest on the same authorities and read them oppositely.

Leo Strine put the question in print seventeen years before the address, while a Vice Chancellor of the Delaware Court of Chancery. He had put it at the Commission in 2007. State corporation laws do not contemplate non-binding stockholder votes on anything, he wrote, and the Commission has permitted precatory proposals on virtually everything for that reason. Stockholders held by federal mandate an option to require a referendum where state law gave them no right to demand one. He qualified the state-law half in his footnote. The term proper business, he wrote, "would seem to stop far short of giving a stockholder a right to demand a vote on a non-binding resolution when such resolutions are never mentioned in the statute or most corporate charters or bylaws." What would clearly be proper, on his account, is the timely proposal of a bylaw on a subject Section 109 identifies. That footnote also reproduces the note to (i)(1), and says the Commission used the absence of state law on non-binding stockholder plebiscites to justify creating the device.³⁶⁸

Pinder's argument runs through Delaware voting rights. Stock ownership confers three fundamental rights, to vote, to sell and to sue, and subsidiary rights flow from those. The voting right

the (i)(1) exception and cites the Chair's keynote address at its note 2, and Updated Statement Regarding the Division of Corporation Finance's Role, *supra* note 185, whose note 2 records that no request to exclude under Rule 14a-8(i)(1) was received during the 2025-26 proxy season.

³⁶⁶ Atkins, *supra* note 122.

³⁶⁷ Atkins, *supra* note 122.

³⁶⁸ Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1088–89 (2008). The quoted passage, the Section 109 point and the reproduction of the note to Rule 14a-8(i)(1) are at 1089, in his note 33, which opens at 1088.

reaches the election of directors, matters committed to stockholders by law or by the governing documents, and matters the board chooses to submit. A precatory proposal is on none of them. No such voting right exists, so no subsidiary right to force that vote flows from one. He locates the federal distinction where this paper locates it. It rests on the Commission applying a state law that is generally nonexistent, and on one 1954 New York decision that stated the point without citation.³⁶⁹

Fisch, Haan, Lipton and Miazad answer on incidental powers. Stockholders hold the statutory power to elect and remove directors, and Section 121 reserves the powers incidental to those. No statute authorizes stockholders to nominate directors either, and Delaware courts have held that they may. The advisory resolution stands on the same footing. Their second answer is judicial practice. No court has treated a resolution differently for being advisory, on their account. They run the point through *Conservative Caucus*, *Auer v. Dressel*, *Medical Committee* for Human Rights and *Hartman*. The four are not of equal weight. They add a point that cuts against the Chair's framework from the other side. The rule's ownership, holding period and resubmission limits have no Delaware source, so the federal rule already departs from state law by restricting shareholder rights rather than enlarging them.³⁷⁰

The framework Pinder uses is Delaware's own, and it comes with a criterion he does not apply. He takes the three fundamental rights, and the subsidiary rights that flow from them, from *Williams*, citing it at page 2 of his own article. He quotes the sentence in which the Court of Chancery names them.³⁷¹ The subsidiary rights named there are three. The right to communicate with other stockholders, the right to nominate directors, and the right to communicate with and even oppose management and the board. None of the three appears in the Delaware General Corporation Law. The

³⁶⁹ Pinder, *supra* note 158. The Chair's October 9, 2025 address cited the then-unpublished draft, posted to SSRN on August 28, 2025. The three fundamental rights and the voting rights framework are at 2 and are developed at 6–14. The account of the federal distinction is at 5, resting on LOSS, SELIGMAN & PAREDES, *supra* note 161, at 513–14.

³⁷⁰ Fisch et al., *supra* note 157. The incidental powers argument rests on Del. Code Ann. tit. 8, sections 121, 141(a), 141(k), 211 and 212, and on *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985). Two of those authorities are worth pinning down. Section 212 governs voting power and proxies, being one vote per share unless the certificate provides otherwise, how a proxy may be granted, and when a proxy is irrevocable. It does not speak to what may be put to a vote. *Moran* at 1355 is Part III.C of that opinion, on whether a rights plan's twenty percent trigger fundamentally restricts a proxy contest, and the court held the effect minimal. Part III.C concerns the right to conduct a proxy contest, and the opinion does not reach the right to nominate. That is consistent with the *see, e.g.* signal Fisch and her co-authors use for it. *Moran*'s own passage on Section 141(a) is at 1353. Having found authority for the plan in Section 157, the court there notes the inherent powers of the board over the corporation's business and affairs. That is board authority and not stockholder authority, and inherent is the court's word rather than incidental. So neither passage supplies the incidental powers proposition. Pinder cites *Harrah's Entertainment* for the same proposition, and that is the decision that holds it. *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 311 (Del. Ch. 2002) (quoting *Durkin v. Nat'l Bank of Olyphant*, 772 F.2d 55, 59 (3d Cir. 1985)). The Delaware Supreme Court took the same passage as its own ground in *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 237 and n.22 (Del. 2008), and cites *Harrah's* again at 233 n.10. The point about the rule's ownership, holding period and resubmission limits is theirs. The judicial practice argument is theirs as well, and so is the set of four cases. What each decides is uneven. *Auer* sustained a precatory resolution, and Section VI.D sets out what the Commission built on it. *Conservative Caucus* reached the point in a stocklist action under Section 220, where whether the proposal could be put at the meeting was never before the court. *Medical Committee* turned on the Commission's obligation to state its reasons, and *Hartman* on notice under Michigan law. Neither of those two opinions reaches the validity of the precatory form, so the argument from them is an argument from silence. That is why Section XI.A takes *Hartman* on the disclosure floor instead.

³⁷¹ In re *The Williams Cos. Stockholder Litig.*, No. 2020-0707, 2021 WL 754593, at *20 (Del. Ch. Feb. 26, 2021). The opinion carries no reporter pagination, so the pinpoint is to the star pagination of the electronic report. The passage sits in the court's standing analysis under *Tooley*, on whether a rights plan claim is direct or derivative, and not in a holding about proposal rights. Pinder, *supra* note 158, quotes the sentence at his notes 1 and 32.

enumeration in his own source is therefore not a closed list of what stock ownership carries. His next authority supplies the test. Subsidiary rights exist so that the exercise of the fundamental right is not illusory or meaningless. He cites *Harrah's Entertainment* for it, where the right to elect directors would be meaningless without a subsidiary right to nominate a competing slate.³⁷² That is a functional criterion and not an enumerative one. The argument in his text turns on the absence of the precatory proposal from a list. The authorities in his notes turn on whether the fundamental right would otherwise be illusory. He records the difficulty himself, noting that recent decisions of Vice Chancellor Laster speak of rights appurtenant to the shares rather than dividing them into fundamental and subsidiary categories.³⁷³ None of this establishes a precatory proposal right. It establishes that the absence of one from an enumeration does not settle the question, and this paper's own position does not rest on that enumeration.

One Delaware decision met the argument directly. In *Conservative Caucus*, Chevron resisted a stocklist demand on the ground that the resolution at issue was not a proper subject. Its reason was that Section 141(a) vests the management of the corporation in the board. It added that the resolution conceded its own limited effect by asking that the stockholders request board action. The Court of Chancery rejected the inference. That the resolution only requests board action does not make it improper and does not change its purpose, which was to influence the board. The limit is on the face of the opinion. It is a stocklist action under Section 220. The court had already held that a proper purpose was stated and that all others were irrelevant. Whether the proposal could be put at the meeting was never before it. The proponent was a conservative advocacy organization holding thirty shares, and it framed its position on the company's foreign operations as economic risk to the company. Chevron answered that its stockholders should not face pressure from groups whose only interest is opposition or criticism on issues with little or no impact on the corporation's profitability.³⁷⁴

The question was put at the Commission itself in 2007, and it was answered there. On May 7 of that year the Commission held a public roundtable on the federal proxy rules and state corporation law. Martin Dunn of the Division of Corporation Finance put the point to the first panel. Whenever the staff received a precatory proposal, he said, nobody ever argued that state law gave no authority to raise it. He found that interesting, and he asked why the argument never came.³⁷⁵ Vice Chancellor Strine answered that the Commission had made it up and that Delaware was fine with it. No one cared in Delaware, he said, because it was precatory.³⁷⁶ R. Franklin Balotti of Richards, Layton and Finger reached the same place by a different route. Precatory resolutions were authorized by Section 211, which lets a stockholder bring before a meeting anything proper for a stockholder to act on. It was proper for

³⁷² Pinder, *supra* note 158, at his note 33 (citing *Harrah's Entertainment*, 802 A.2d at 311).

³⁷³ Pinder, *supra* note 158, at his note 34.

³⁷⁴ *Conservative Caucus Rsch., Analysis & Educ. Found., Inc. v. Chevron Corp.*, 525 A.2d 569, 572–73 (Del. Ch. 1987). Chevron's argument under Section 141(a), and its point that the resolution requested rather than directed, are at 572. The court's answer runs from 572–73. The proper purpose holding, and the statement that all other purposes are irrelevant, are at 572. The plaintiff's thirty shares and its framing of the Angola position as economic risk to the company are at 570. Chevron's answer about pressure from groups whose only interest is opposition or criticism is at 573. Marginally related is the court's own phrase, in its concession a paragraph later, and not Chevron's.

³⁷⁵ 2007 Roundtable, *supra* note 203, at 32.

³⁷⁶ 2007 Roundtable, *supra* note 203, at 32–33.

stockholders to ask directors to act, as against telling them to act.³⁷⁷ Stephen Bainbridge of UCLA agreed with both. He argued later in the same panel that the Commission's powers under Section 14(a) reach disclosure and process alone. He nonetheless took precatory proposals to be not invalid under Delaware law, and he attributed the model to the Commission rather than to the states.³⁷⁸

One of those routes runs through a section that does not say what it is asked to say. Section 211 fixes the place and timing of stockholder meetings. It requires an annual meeting for the election of directors and provides for special meetings. It requires written ballots in director elections unless the certificate of incorporation provides otherwise. Precatory, advisory and non-binding resolutions appear nowhere in it. Its only opening is the closing sentence of subsection (b), that any other proper business may be transacted at the annual meeting.³⁷⁹ Balotti's proposition therefore rests on what proper business means in Delaware rather than on express statutory text. It is the same phrase Strine's hedge turns on, read the other way, and the two men sat on the same panel.

The Chair set both sides out in his own notes. One of them quotes Strine at the roundtable and then gives Balotti's answer to him. It records Balotti's reading of Section 211 and describes him as one of the leading experts on Delaware corporate law. The adjoining note adds a second scholar to Strine's side. Manesh finds nothing in Delaware's statute or case law establishing the right to make or vote on a proposal as settled public policy. He reaches it by a route of his own. His subject is private ordering, and his claim is that a corporation may restrict proposal rights by charter or bylaw. His notes answer Balotti on Section 211. He cites a Chancery decision holding that the statute is silent on how a stockholder may make proposals at all. That is the reading of Section 211 this paper reached on its own. He does not say the case law is empty. He says the judicial references to a proposal right are scant and fleeting, and he collects them. The Chair therefore advanced the framework with the contrary authority named on the face of his own remarks.³⁸⁰

³⁷⁷ 2007 Roundtable, *supra* note 203, at 34–35. At the same pages Balotti asked whether the second leg of the certification amendment was still before the legislature, and Strine answered that it was. It had been approved four days earlier, on May 3, 2007. Balotti also noted that the court need not accept every question certified to it. *See infra* note 393.

³⁷⁸ 2007 Roundtable, *supra* note 203, at 37–38. Bainbridge made the concession while proposing a materiality test, which he recommended because it would let the Commission avoid deciding whether Section 109 or Section 141(a) governs. His argument on the limits of Section 14(a) is at 57 and 63.

³⁷⁹ Del. Code Ann. tit. 8, § 211. The opening is the last sentence of § 211(b). Subsection (a) governs place and remote participation, (b) the annual meeting and the election of directors, (c) the consequences of failing to hold one, (d) special meetings, and (e) written ballots in director elections. Pinder reaches the same conclusion about the section. Pinder, *supra* note 158, at 6.

³⁸⁰ Atkins, *supra* note 122, nn.12–13. Note 13 quotes Strine at 2007 Roundtable, *supra* note 203, at 18, and gives Balotti at 34. Note 12 cites Strine, *supra* note 368, at 1088–89, and Mohsen Manesh, *The Corporate Contract and the Private Ordering of Shareholder Proposals*, 50 J. CORP. L. 1, 29 (2024). The description of Balotti is the Chair's. Three of Manesh's notes carry the argument. Note 200 gives Del. Code Ann. tit. 8, § 211(b) for the proposition that the statute provides only that any other proper business may be transacted at the annual meeting. It pairs that with *Strategic Inv. Opportunities LLC v. Lee Enters.*, No. 2021-1089, 2022 WL 453607, at *8 (Del. Ch. Feb. 14, 2022), which says the statute is silent as to how a stockholder may make proposals. It also cites *Colon v. Bumble, Inc.*, 305 A.3d 352, 359 (Del. Ch. 2023) for the default rights the statute does give. Note 202 takes the three fundamental rights from *Strougo v. Hollander*, 111 A.3d 590, 595 n.21 (Del. Ch. 2015), and the subsidiary rights from *Williams*, and adds that the right to make a proposal is on neither list. Note 203 collects the decisions that recognize the right. They are *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. at 881, *Goggin v. Vermillion, Inc.*, No. 6465, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011), and *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 344 (Del. Ch. 2008). His answer is that the references are scant and fleeting, and not that they do not exist. His reading of *Transamerica* is at his Part IV.B.2, and it is the reading Liebel and the Chair take.

Chairman Cox then put the converse from the dais. What would follow if state law were explicit that such proposals are allowed? Bainbridge answered that the Commission would have a problem in that case. He added that no state law was so explicit, and that Delaware would not rush to adopt one.³⁸¹ The absence of express authorization was matched by the absence of express prohibition, and both were said on the record. Strine went further, twice. Proposals had been excluded on the ground that state law made them clearly improper where no Delaware court had decided the question. The Commission should make clear that an uncertain state-law question is not a ground for exclusion. He closed the panel on the same point. He did not think the Commission needed to reach the Delaware Supreme Court every time, and an uncertain question should go on the ballot and be answered afterward.³⁸² Chair Atkins's framework takes a different course on both points. It excludes on a company's own opinion of counsel where no Delaware court has spoken, and it offers certification as the route to an answer. Chair Atkins sat as a Commissioner at that roundtable and questioned its second panel.³⁸³

The afternoon panel divided on a question the morning panel had not put. Whether the precatory proposal is a creature of Rule 14a-8 or of state law. Stanley Keller said there was no question that the rule had created it, and that as a matter of state law it did not exist outside the rule. He said it again in his closing remarks. Amy Goodman agreed, saying it was the non-binding proposal of Rule 14a-8 that created the mechanism.³⁸⁴ Paul Neuhauser answered them. The rule created the binding proposal too, because a bylaw proposal does not reach the ballot without it either. It did not create the precatory proposal, on his account. It created a mechanism for any kind of proposal.³⁸⁵ What state law supplies, he said, is *Auer v. Dressel*. He called it the classic case and maybe the only case, and took it to be the common law rule.³⁸⁶ Section VI.D sets out what the Commission built on that one decision. Goodman closed with a caution that runs against the framework Chair Atkins has since set out. Whatever the Commission did about precatory proposals, it should not simply push them into binding bylaws. It was still not clear under state law what is an appropriate subject for a shareholder bylaw.³⁸⁷

Chairman Cox put the paper's own question to that panel from the dais. Whether the federal proxy rules should facilitate proposals on subjects where shareholders cannot direct management or the board under state law. He put it as a normative question and not a descriptive one, about the rules the Commission ought to have rather than the rules it has. John White put the historical half of it a few minutes later. Was that what Congress had in mind back in 1934?³⁸⁸ Goodman answered the normative question with a history of the ordinary business exclusion. Its genesis, she said, was not to permit non-

³⁸¹ 2007 Roundtable, *supra* note 203, at 38–39.

³⁸² 2007 Roundtable, *supra* note 203, at 34 and 79.

³⁸³ 2007 Roundtable, *supra* note 203, at 103–04.

³⁸⁴ 2007 Roundtable, *supra* note 203, at 142 and 181 for Keller, and at 179–80 for Goodman. The panel is introduced at 130. Stanley Keller was at Edwards Angell Palmer and Dodge and Amy Goodman at Gibson Dunn and Crutcher, and the moderator put his question to them as advisers to corporate clients. Paul Neuhauser was a professor emeritus at the University of Iowa College of Law and appeared for shareholder proponents.

³⁸⁵ *Id.* at 143 and 184.

³⁸⁶ *Id.* at 146. Neuhauser also gives the facts of the case, that the resolution endorsed the administration of a former president, was submitted by that president, and that he held fifty-two percent of the vote.

³⁸⁷ *Id.* at 181. The transcript prints the caution as a warning against moving precatory proposals into non-binding proposals, which the rest of her sentence contradicts, since it closes on everything that today is a non-binding proposal becoming a binding bylaw.

³⁸⁸ 2007 Roundtable, *supra* note 203, at 144–45 for Chairman Cox and at 148–49 for John White.

binding proposals on things shareholders could not deal with under state law. The significant social policy carve-out had taken the exclusion away from that.³⁸⁹ Neuhauser said that overstated it a little. A proposal could always have been knocked out on the ground that state law did not allow it, and that was so long before the exception arrived.³⁹⁰ He then put the exclusion itself outside the rule. It technically is not in the rule, on his account, but it is in all the releases. The courts have said the releases are part of the rule. The economic relevance ground is in the rule, and he said that being in the rule does not help much.³⁹¹ No one on the panel answered him, and the moderator turned to closing remarks.

C. The Mechanism and the Private Ordering Path

The procedural mechanism Chair Atkins outlined operates in two stages. The primary path is staff deference to a Delaware law opinion. A Delaware-incorporated company excludes a precatory proposal under (i)(1) as not a proper subject under Delaware law. It supports the no-action request with a Delaware law opinion. The Commission's staff defers to that opinion in granting relief. The Chair stated that he has high confidence that the staff will honor this position.³⁹² The secondary path, available where the Commission chooses not to decide on its own, is certified question procedure. The Commission may certify a question of Delaware corporate law directly to the Delaware Supreme Court for authoritative resolution. This procedure exists under the Delaware constitution and has been used once before, in *CA, Inc. v. AFSCME Employees Pension Plan*. The Commission certified two questions in June 2008. The Court ruled the following month on the validity of a shareholder bylaw amendment proposal.³⁹³

The opinion-of-counsel mechanism is not new. It has been in the rule since the January 1954 amendment. That amendment required a company invoking state law against a proposal to support the claim with an opinion of counsel. Section VI.C sets it out. The mechanism has already done work in the other direction. At the Commission's roundtable in 2007 Keller described what it had produced. The ability to exclude binding proposals as inconsistent with state law, and the ease of obtaining opinions to that effect, had moved the playing field toward the non-binding proposal. He gave a second reason alongside it. A non-binding proposal drew a higher favorable vote, because less was at stake and the company opposed it less hard. On that account the same instrument has worked in both directions.³⁹⁴

³⁸⁹ *Id.* at 145.

³⁹⁰ *Id.* Neuhauser put the exception at least thirty-five years back, and maybe more.

³⁹¹ *Id.* at 178. The phrasing is his and is recorded in his terms.

³⁹² Atkins, *supra* note 122.

³⁹³ Del. Const. art. IV, § 11(h). The provision was renumbered from § 11(8) by 84 Del. Laws, c. 281 and 85 Del. Laws, c. 5. The Securities and Exchange Commission was added to the tribunals authorized to certify by 76 Del. Laws, c. 37, § 1, effective May 3, 2007. On the first use, *see CA, Inc.*, 953 A.2d at 229 & n.1, 231. The Commission certified two questions on June 27, 2008, and the Court accepted them for review on July 1. It answered on July 17. Footnote 1 records that this was the first certification the Commission had submitted to the Court. The amendment has two legs, and the section's credit line pairs 76 Del. Laws, c. 37 with 75 Del. Laws, c. 384. The first leg is 75 Del. Laws, c. 384, formerly Senate Bill No. 333, approved June 30, 2006. It struck paragraph (8) whole and substituted the text the 2007 act then passed again. The Commission clause was therefore written in 2006 and took effect on the second passage. The 2007 act did not produce the present list. Its operative text names other Delaware courts, the Supreme Court of the United States, a Court of Appeals of the United States, and a United States District Court. It adds the Securities and Exchange Commission and the highest appellate court of any other state.

³⁹⁴ 2007 Roundtable, *supra* note 203, at 142–43, Keller.

What is new is not the instrument but the expectation attached to it. The Chair has said that a company invoking that mechanism against a precatory proposal should prevail.³⁹⁵

Nor is the precatory question new to the rule. The Commission reached it in 1976 and came out the other way. Mandatory dividend proposals would remain excludable under what is now (i)(1), the Commission said, to the extent they would “intrude on the board’s exclusive discretionary authority under the applicable state law to make decisions on dividends.” But where such proposals were “advisory in nature, and therefore non-binding on the board even if adopted,” the Commission was “unable to agree that proponents should be denied the opportunity to present them.”³⁹⁶ The note to (i)(1) followed the same logic. It provides that some proposals are not proper under state law if they would bind the company. It provides that in the Commission’s experience most proposals cast as recommendations or requests that the board take specified action are proper under state law. And it provides that the Commission will assume a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise. The presumption runs toward inclusion and the burden sits with the company.³⁹⁷

The Chair’s account of that note is that it codifies a staff presumption that the rule’s own text makes rebuttable. On his reading the 1983 amendment was meant to establish that mandatory or precatory form is solely a matter of state law. It was also meant to dispel any impression that the Commission’s application of the paragraph turns on form.³⁹⁸ The Commission had said the same when it proposed the language. Its 1997 proposal said it would revise the note to reflect the Division’s current practice. The note therefore records what the staff was already doing.³⁹⁹

Two features of the mechanism bear on the weight the framework puts on it. One has moved since 1954 and the other has not. The 1976 release states that management carries the burden of demonstrating its view. It says so under that provision or any other provision of the rule. The same passage states that paragraph (d) requires an opinion of counsel whenever a company asserts omission for reasons based on matters of law. The current rule requires an opinion only where the reasons are based on matters of state or foreign law. That narrowing appears in the 1997 proposal, in the answer to its Question 12, and the release does not mark it as a change. The burden did not narrow with it. It stands on its own in the current rule, in the answer to Question 7, and it does not depend on the note to (i)(1).⁴⁰⁰

³⁹⁵ Release No. 34-4979, *supra* note 78, 19 Fed. Reg. at 246–47; Atkins, *supra* note 122.

³⁹⁶ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,999.

³⁹⁷ Note to 17 C.F.R. § 240.14a-8(i)(1) (2025). The note stands in the terms Strine reproduced in 2008. Strine, *supra* note 368, at 1089.

³⁹⁸ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,999 (mandatory dividend proposals excludable under subparagraph (c)(1) to the extent they would intrude on the board’s exclusive discretionary authority, advisory proposals not). On the note to (i)(1), Atkins, *supra* note 122 (citing Release No. 34-20091, *supra* note 191, and Release No. 34-39093, *supra* note 263, 62 Fed. Reg. at 50,685).

³⁹⁹ Release No. 34-39093, *supra* note 263, 62 Fed. Reg. at 50,685. The sentence sits in the discussion of the Question and Answer format, among revisions the Commission described as reflecting current Division or Commission interpretations. *Id.* at 50,684. The note as adopted differs from the proposed text in one phrase. The proposal would have read if written so that they would be binding on the company, and the note now reads if they would be binding on the company. 17 C.F.R. § 240.14a-8(i)(1) (2025), note to paragraph (i)(1).

⁴⁰⁰ Release No. 34-12999, *supra* note 153, 41 Fed. Reg. at 52,997. Both sentences sit in the discussion of what is now (i)(2), and both are stated as reaching the whole rule. The Commission repeats the burden on the same page, in its discussion of what is

The staff's own guidance carries a caution the framework does not. A company and its counsel submitting such an opinion should consider whether the law underlying it is unsettled or unresolved. Strine quoted that sentence in 2008 and supplied his own emphasis. The Delaware question here is unsettled on the account of both sides. The bulletin says more that bears on the path. The staff considers whether counsel is licensed in the jurisdiction whose law is at issue. It considers how far the opinion assumes things about the proposal that the proposal's own language does not call for. A proponent may answer with an opinion of its own, and is not required to.⁴⁰¹

The Delaware question can be answered two ways, and each leads somewhere different. Suppose a Delaware law opinion supports the conclusion that precatory proposals are not a state-law right. The federal framework for precatory proposals would then have no state-law foundation in Delaware. The same follows if the Delaware Supreme Court reaches that conclusion on a certified question. The same question would then be answered jurisdiction by jurisdiction under each state's corporate law. Other state courts and other state corporate law authorities could reach different answers. Suppose the Court instead determines that Delaware law recognizes precatory proposals as a shareholder right. The framework's underlying state-law foundation would then be confirmed, at least for Delaware-incorporated corporations. The (i)(1) ground would be foreclosed in Delaware. State law would then constrain the Commission's reading rather than displace it.

The same treatment extends to a corporation's own governing documents. The Chair has said that restrictions in a certificate of incorporation or bylaws should likewise be respected as a basis for (i)(1) exclusion. That extends the framework to private ordering. Pinder's article reaches the same conclusion, observing that "a corporation may adopt bylaws to provide for, and regulate, the submission of such proposals."⁴⁰²

Private ordering along this path would produce corporation-level variation in shareholder proposal frameworks, including among corporations incorporated in the same state. That variation would replace the uniformity Rule 14a-8 has provided across the federal market. Under most state corporate law frameworks, including Delaware's, shareholders have an established right to amend the corporation's bylaws subject to procedural requirements and any limitations in the certificate of incorporation.⁴⁰³ Bylaw amendment proposals are not precatory. They are substantive proposals that

now (i)(5). The rule text adopted with that release carried the requirement at paragraph (d)(4), where the reasons were based on matters of law. *Id.* at 53,001. The proposed narrowing is at Release No. 34-39093, *supra* note 263, 62 Fed. Reg. at 50,705, in the answer to Question 12. For the present requirement *see* 17 C.F.R. § 240.14a-8(j)(2)(iii) (2025), and for the burden *see id.* § 240.14a-8(g).

⁴⁰¹ Staff Legal Bulletin No. 14B, *supra* note 238, section E. The bulletin states that Rule 14a-8(j)(2)(iii) requires an opinion of counsel where the asserted reasons for exclusion are based on matters of state or foreign law. It says the company and its counsel should consider whether the law underlying the opinion is unsettled or unresolved. It says the opinion should cite relevant legislative authority or judicial precedents wherever possible. The same section gives two further criteria the staff applies to such an opinion. It considers whether counsel is licensed in the jurisdiction whose law is at issue. It considers the extent to which the opinion assumes things about the operation of the proposal that the proposal's language does not call for. It records that a shareholder contesting the company's opinion may submit one of its own and is not required to. The bulletin ties the requirement to paragraphs (i)(1), (i)(2) and (i)(6), and states at its section B that Rule 14a-8(g) puts the burden on the company. Strine, *supra* note 368, at his note 34, quotes the unsettled or unresolved sentence and supplies the emphasis.

⁴⁰² Pinder, *supra* note 158, at 1 (abstract).

⁴⁰³ Del. Code Ann. tit. 8, § 109(a). After a corporation has received payment for any of its stock, the power to adopt, amend or repeal bylaws is in the stockholders entitled to vote. A certificate of incorporation may confer that power on the directors, and

modify the corporation's governing rules. Even if precatory proposals are foreclosed in a given jurisdiction, bylaw amendment proposals to create or modify a corporation-specific shareholder proposal framework would remain available as a state-law shareholder right. Corporations could therefore be pressured through bylaw amendment campaigns to adopt their own shareholder proposal frameworks. Eligibility thresholds, exclusion grounds and resubmission standards would be set by corporate bylaw rather than by federal rule. The Chair's framework treats all three paths as bases for (i)(1) exclusion: state-law judicial determination, state statutory restriction and corporate governing document restriction. He has said that a Texas corporation opting into Senate Bill 1057's restrictions should be respected. That bill illustrates the state statutory variant, and a corporate bylaw amendment the corporate-level one.⁴⁰⁴

Delaware has answered the same question once, on the neighboring subject. Section 112 of its corporation law lets the bylaws require a company soliciting proxies for a director election to include a stockholder's nominees alongside the board's. The section leaves the conditions to the bylaws. The first two it names are an ownership or duration threshold and a disclosure requirement on the nominating stockholder. Those are the conditions Pinder would put on a precatory proposal bylaw. The circumstances of the enactment matter as much as the text. One act added Section 112 and, at its next section, Section 113 on proxy expense reimbursement. The Delaware Supreme Court had held a reimbursement bylaw invalid as drafted months before. It closed by telling stockholders who wanted that bylaw to amend the certificate or seek recourse from the General Assembly. The act does not say whether the court's invitation prompted it. What Section 112 itself accomplished remains disputed. Some read it as conferring a new right and others as confirming authority stockholders already had. The same uncertainty attends a precatory proposal bylaw.⁴⁰⁵

The private ordering path is not new either. Liebler proposed it in 1984, in the article that argued for rescinding the rule. Issuers should adopt bylaw amendments placing reasonable restrictions on the ability of shareholders to bring matters before the meeting. A proposal fee and a five or ten percent minimum holding were her examples, and the bylaws could also require proponents to pay the printing, mailing and distribution costs. Issuers already had the power to adopt such provisions under existing state law and needed no authority from the Commission. Her reading of *Transamerica* is the reading the Chair took forty-one years later. The congressional intent passage is broad dictum. The

doing so neither divests the stockholders of it nor limits it. Section 109(b) confines bylaw content to provisions not inconsistent with law or with the certificate of incorporation.

⁴⁰⁴ Atkins, *supra* note 122. Tex. S.B. 1057, 89th Leg., Reg. Sess. (2025) (enacted), <https://capitol.texas.gov/tlodocs/89R/billtext/html/SB01057F.htm> (codified at Tex. Bus. Orgs. Code § 21.373, effective September 1, 2025). Such a corporation may elect to be governed by the section through an amendment to its governing documents, with notice in its proxy statement preceding adoption. A shareholder or group must then hold voting shares equal to at least \$1 million in market value or three percent of the corporation's voting shares, determined as of the date of submission; must hold those shares continuously for at least six months before the meeting and throughout its duration; and must solicit the holders of shares representing at least sixty-seven percent of the voting power entitled to vote on the proposal. The corporation must in turn describe the submission process in its proxy statement, including how shareholders may contact one another to meet the ownership thresholds. Director nominations and procedural resolutions ancillary to the conduct of the meeting are excepted.

⁴⁰⁵ Del. Code Ann. tit. 8, § 112 (77 Del. Laws, c. 14, § 1); *id.* § 113 (77 Del. Laws, c. 14, § 2). The conditions named first are at § 112(1) and (2). *CA, Inc.*, 953 A.2d at 240, gives the two alternatives, in an opinion decided July 17, 2008 and modified August 15, 2008. Pinder dates the act to 2009 and treats the disagreement over Section 112 as the parallel to the precatory question. Pinder, *supra* note 158, at 30. He collects the disagreement at his note 140, quoting D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 *FORDHAM L. REV.* 125, 158 (2011).

holding is that the rule requires inclusion of proposals that are proper subjects under state law, without regard to a bylaw notice provision. It does not preclude corporations from adopting bylaw provisions valid under state law that restrict the right to bring matters before the meeting.⁴⁰⁶

The path was put again at the Commission itself in 2007, and there the inducement was removal from Rule 14a-8. Keller proposed taking the non-binding proposal out of the annual meeting frame. An electronic system of communication and polling would carry it instead. Shareholders meeting an eligibility level could submit, and other shareholders could record a view within a defined period. The company would disclose the result, and the board would say what it had done in response and why.⁴⁰⁷ He would do it on an opt-in basis, at least at the outset. A company that opted in would have its non-binding proposals taken outside the 14a-8 regime, and he called that the carrot offered.⁴⁰⁸ Chairman Cox reframed it from the dais. The panel should judge it on its own merits and not as an alternative, so that lost access to precatory proposals need not count as its cost.⁴⁰⁹ Neuhauser answered that moving proposals off the proxy statement would mean they were literally lost. Participation would be slight, and slighter still with no control over what was said. Control brings free speech problems and SEC authority problems, and a company running the system would not be trusted.⁴¹⁰

Joseph Grundfest put the same question a different way. The state is not necessarily the right level for experiment, he said, and the corporate level may be the more vibrant one. Two companies chartered in Delaware can differ enough that the best access rule for one is wrong for the other. A national standard also requires content regulation by the staff and compels speech on matters close to political. He asked whether the time was ripe for some devolution of authority, not to the states but to the individual corporations. He put the premise plainly later in the panel. If shareholders can be trusted to act intelligently in their own interest, they can be trusted to frame the access rule for their own company. His closing asked for greater experimentation and greater individualization, and for the shareholders and the corporation to decide the rules of access themselves.⁴¹¹

The Chair set this inside a wider argument, and that argument is not about allocating authority. It is about the number of public companies. He opened on about 4,700 exchange-listed companies in 2025 against about 7,800 in 1997, and named three pillars for reversing the decline. They are simplifying disclosure, de-politicizing shareholder meetings, and reforming securities litigation. The shareholder proposal material sits under the second. On this view, the substantive questions Rule 14a-8 has been used to settle should be resolved at the state level under state corporate law authority. The Commission would retain a narrow procedural role. Private ordering through corporate bylaws would fill whatever gap the state-law default leaves. He has further said that the Commission should re-evaluate the rule's fundamental premise. His words for that premise are that shareholders should be able to force companies to solicit for their proposals. The qualifiers are that the proposal is a proper subject for

⁴⁰⁶ Liebler, *supra* note 162, at 459, 464–65 (the bylaw path and the costs), and at 460–62 (the reading of *Transamerica*).

⁴⁰⁷ 2007 Roundtable, *supra* note 203, at 152–54.

⁴⁰⁸ *Id.* at 160–61.

⁴⁰⁹ *Id.* at 167.

⁴¹⁰ *Id.* at 184.

⁴¹¹ 2007 Roundtable, *supra* note 203, at 226–27. The premise is at 233 and the closing at 237–38. Grundfest appeared from Stanford Law School and the panel is introduced at 187.

shareholder action under state law, and that it costs the shareholder little or nothing. The vision therefore extends past the precatory question, to the basic design of the federal framework.⁴¹²

The formulation is not his. It is the Commission's own, and it was already forty years old in 1982. The proposing release of that year describes what the rule had provided since 1942 in the same terms. Security holders had a right to have their proposals presented to security holders at large. And they had a right to have proxies solicited with respect to them at little or no expense to the security holder. What the Chair proposes to re-evaluate is the premise in the words the Commission chose for it.⁴¹³

The premise is older than 1982, and Chair Atkins traces it further back himself. His note runs to the 1943 hearings, to the pages where Congressmen Boren, Hall and Reece pressed their objections to the rule. Section V.D sets out those exchanges and what the Commission answered. The reconsideration is therefore proposed on objections the record already holds, together with the answers made to them at the time.⁴¹⁴ The sentence he takes from Purcell is in this paper too, at the same page of the same hearing. He gives it as the rule assuring nothing beyond what state law already grants. Chairman Cox gave the same sentence in 2007, opening a roundtable convened to inform a rulemaking. He gave it as the warrant for a federal role in vindicating state law rights, among them the right to make a proposal and to have it voted on. He cited nothing for it. In the same passage he stated what Congress had authorized, that the system was meant to replicate as nearly as possible the shareholder's opportunity at a meeting.⁴¹⁵

Four questions will decide whether this vision is realized. The first is whether the legal-opinion path produces (i)(1) exclusions that survive challenge. The second is whether the certified question procedure is invoked, and how the Delaware Supreme Court and other state supreme courts respond if it is. The third is whether bylaw amendment campaigns emerge as a significant private ordering mechanism. The fourth is whether other states follow the Texas Senate Bill 1057 pattern of statutory restriction. The Commission's proposal of September 16, 2026 would change the order of those questions. If the rule is rescinded, the first two lose their occasion, because no federal ground for exclusion would remain to test. The last two would then carry the question. The release expects states and companies to set their own standards, and Section XII.F sets that out.

⁴¹² Atkins, *supra* note 122, in the text at its note 1 for the company counts and the three pillars, at its notes 33–35 for private ordering and state standards, and at its notes 38 and 39 for the premise. Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,421. The Commission there states the right it has provided since 1942, being to have proposals presented to security holders at large and proxies solicited on them at little or no expense to the security holder. The proposals must be proper for security holder action.

⁴¹³ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,421.

⁴¹⁴ Atkins, *supra* note 122, n.39 (collecting three exchanges at 1943 Hearings, *supra* note 2, at 163–65 for Boren, 170–71 for Hall, and 175 for Reece). Boren's objection runs from 163–65. It opens on the propaganda hypothetical and closes on the Fuller count. Purcell answers at 163 that a stump speech for a political party is outside the spirit of the rule. Reece's exchange is at 175. Purcell says there that the Commission's direction has been principally concerned with disclosure. He adds that it has gone beyond only in incidentals such as the ballot form. Both exchanges are at Section V.D. Hall's at 170–71 is not the holdings list given there. Hall asks why the burden of publicizing a proposal shifts to management. Purcell answers that the proposals involve rights of stockholders under state law.

⁴¹⁵ Atkins, *supra* note 122, n.35 (giving the Purcell sentence at 1943 Hearings, *supra* note 2, at 172). Section V.B cites the same page for that sentence. Chairman Cox's use is at 2007 Roundtable, *supra* note 203, at 8, and his statement of what Congress authorized is at 7–8.

XII. The Case For and Against, and What Neither Argues

A. The Case for the Rule

The fullest modern statement of the case for Rule 14a-8 is Cox and Thomas's, published in 2021. Their claim is that the rule should be understood as a corporate public square.⁴¹⁶ They begin from a problem about information rather than about voting. Boards depend on management for most of what they know. Director tenure has lengthened as boards have grown more independent, and the risk is a board that stewards the practices that produced the firm's past successes rather than monitoring them. On that account a proposal is worth more than the vote it draws. It carries information the board would not otherwise receive, and it carries that information to directors at companies the proposal never targeted.⁴¹⁷ The argument has a particular application to institutional investors. Large institutions are, in a phrase Cox and Thomas take from Gilson and Gordon, "rationally reticent" to initiate a public campaign against a portfolio company. They vote nonetheless, and voting on proposals lets an institution learn what other institutions think.⁴¹⁸

A second claim, about accountability, is much older. Freeman made it in 1957. It is of no consequence whether a stockholder ever prevails, and the value of the rule is that management is required to make a defense of its position.⁴¹⁹

The earliest form of the argument is about the franchise, and it is older than the modern literature suggests. In 1952, ten years after the rule was codified, Emerson and Latcham surveyed every proposal carried in a management proxy statement over four years. "There is no significant evidence of any abuse of the proposal rule," they concluded. "Unless one does not favor stockholder democracy, it is difficult to conceive any real objection to the present proposal rule or its administration." The failure of proposals to carry or win larger votes was "no criterion by which to judge the proposal rule," because the subject matter was competing ideas and popularity afforded no useful measure of their worth. What was involved, they wrote, was "basically the right of a minority to express itself and have an exchange of ideas."⁴²⁰ Emerson was a serving Commission attorney, writing under a disclaimer that the views were his own.⁴²¹

The strongest version of the argument was put in 1976 by Schwartz and Weiss. The need for some disclosure was clear, they wrote, "but the SEC could have accomplished this limited objective with a relatively simple disclosure requirement." The more detailed requirements of the rule, they went on, "one must assume, reflect an effort on the part of the Commission to act in what it deems 'the public

⁴¹⁶ James D. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating a Corporate Public Square*, 2021 COLUM. BUS. L. REV. 1147, 1153–54.

⁴¹⁷ Cox & Thomas, *supra* note 416, at 1151–52, 1154–56.

⁴¹⁸ *Id.* at 1156–59. The exemptions permitting an institution to announce its vote and urge others to do likewise are at 17 C.F.R. § 240.14a-2(b) (2025).

⁴¹⁹ Freeman, *supra* note 68, at 555.

⁴²⁰ Emerson & Latcham, *supra* note 127, at 835. The survey is described at 812. *See also* Ryan, *supra* note 36; Bayne, *supra* note 77.

⁴²¹ Emerson & Latcham, *supra* note 127, at 807 nn.*, †. The starred note identifies Emerson as Interpretative Attorney for the Cleveland Regional Office of the Securities and Exchange Commission and Lecturer in Law in Securities at Western Reserve University Law School. The dagger note, Latcham's, records that the opinions expressed are the writers' and not necessarily those of the Commission.

interest.” Cox and Thomas endorse the reasoning forty-five years later. Neither they nor anyone else has removed the assumption from it.⁴²²

The reason an assumption was necessary appears in the same article. The Commission “has not articulated a basic rationale in support of its approach to rule 14a-8,” Schwartz and Weiss observed, “but it seems aware of this fact.” Thirty-four years after the rule was adopted, its two leading academic defenders could describe its purposes only by inference. George Dent opened his 1985 case for abolition on the same fact and cited them for it.⁴²³

Neither the older argument nor the newer one claims that the federal rule creates what shareholders may propose. The proposition originates with Freeman. Writing in 1957, he said the rule in its fundamental aspects is “not an invention of the SEC” and is “merely a recognition of rights granted by state law.” The proxy rules, on his account, have “added nothing essential to the right of the shareholder” to raise a question at a meeting and have it voted on. Schwartz and Weiss restate it in 1976 and cite him for it. The rule is not the basis of the shareholder’s right to offer a resolution. That right arises under state law. What the rule supplies is the mechanism by which other shareholders learn of the proposal and vote on it. Cox and Thomas confine their case to matters already proper for shareholder action under applicable state law, and anchor the rule in a provision directed at the shareholder franchise. From Freeman to Cox and Thomas the defense has located the substance in state law and the federal contribution in mechanism.⁴²⁴

The state law the defense points to does not supply the right of access. No state has a statute giving a shareholder access to the issuer’s proxy materials, and the few courts to reach the question have recognized no such right. *Carter v. Portland General Electric Co.* refused one in 1961, holding that a court could not adopt the Commission’s proxy rules for a company outside them. *Dyer v. SEC* had said two years earlier that the rule affords stockholders a privilege they do not otherwise ordinarily have. The substance the defense locates in state law is what may be voted on, and not the right to put it before the meeting.⁴²⁵

The case closes on a concession two generations of its proponents have made. During its study, Schwartz and Weiss wrote in 1976, the Commission “may develop legislative proposals to fill in those voids in the 1934 Act that presently exist.” On the same page they had observed that the program “seems to be asking a great deal of a relatively modest provision of the federal securities laws.” To the extent the legislative history is unclear about supporting their view, Cox and Thomas wrote in 2021, “it should be expanded by Congress to remove such doubts.” If necessary, they wrote in their conclusion,

⁴²² Schwartz & Weiss, *supra* note 174, at 638. Cox & Thomas, *supra* note 416, at 1183–84.

⁴²³ Schwartz & Weiss, *supra* note 174, at 639 n.16. Dent, *Regulatory Failure*, *supra* note 1, at 6.

⁴²⁴ Freeman, *supra* note 68, at 549–50. The first two phrases are at 549 and the third at 550. Schwartz & Weiss, *supra* note 174, at 636 n.9, cite him for it. Cox & Thomas, *supra* note 416, at 1165, 1169 n.83.

⁴²⁵ *Carter v. Portland Gen. Elec. Co.*, 227 Or. 401, 403–07, 362 P.2d 766 (1961). The court records at 403 that the defendant “is not subject to these particular regulations” and that “[i]f it were, a different case may have been presented.” It concludes at 405 that it “cannot judicially adopt these rules,” and rests that at 406–07 on the absence of any administrative body to determine in the first instance whether a proposal is proper. *Dyer v. SEC*, 266 F.2d 33, 41 (8th Cir.), *cert. denied*, 361 U.S. 835 (1959) (Rule X-14A-8 “affords a privilege, which does not otherwise ordinarily exist in favor of stockholders,” so that the Commission may impose reasonable conditions on its enjoyment). This *Dyer* is not the 1961 decision at 289 F.2d 242 on which the elections ground rests. Liebler, *supra* note 162, at 457 n.166, collects both for the proposition that state law supplies no right of access. She names Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1520–24 (1970), as arguing the other way.

“we would ask Congress to authorize the Rule’s use to facilitate the creation of a corporate public square.”⁴²⁶

B. The Case Against It

The most sustained case against the rule is George Dent’s, published in 1985. It was answered at length three years later, and Dent replied in 1989 on narrower ground than he had taken.⁴²⁷ He begins where the rule’s defenders begin, with the original justification. The rule was first explained on the ground that management could not honestly tell shareholders it knew of no other business while withholding a proposal it knew would be presented. That theory cannot support the rule as built. The Commission has not applied it consistently, requiring inclusion where management made no such statement and sought no discretionary authority. And applied consistently it would compel inclusion of every proposal, whereas the rule has carried exceptions from the beginning and no one argues that disclosure principles demand all of them.⁴²⁸

His second argument is about materiality, and it is a legal argument rather than a complaint about cost. Disclosure obligations under the securities laws reach material facts. A fact is material if a reasonable shareholder would consider it important in deciding how to vote. Since no shareholder proposal opposed by management had ever come close to a majority, Dent reasoned, nothing about such a proposal could be material. Disclosure principles therefore could not compel its inclusion.⁴²⁹ That was accurate when he wrote it. It did not stay accurate. The Commission counted 533 proposals drawing majority support between 2011 and 2018, 479 of them on first submission. The strongest legal argument against the rule in 1985 rested on a fact about 1985, and the rule outlasted the fact.⁴³⁰

Dent narrowed the claim himself. In 1989 he wrote that the rule “has become firmly established over the last fifty years” and that “it is unlikely that a court would invalidate it now.” He asked for repeal as to traditional proposals rather than abolition outright.⁴³¹ He would accept the rule for institutional proposals on a narrow disclosure theory,⁴³² replace the eligibility screens with a bond, and extend the rule to elections.⁴³³

Susan Liebler’s argument, published in 1984, has the same shape and the same difficulty. Writing shortly after serving as Special Counsel to the Chairman of the Commission, she took from a sitting Commissioner the statement that in the entire history of the rule only two proposals not supported by management had ever been approved. On that basis she concluded that proposals

⁴²⁶ Schwartz & Weiss, *supra* note 174, at 686. Cox & Thomas, *supra* note 416, at 1158, 1198.

⁴²⁷ Ryan, *supra* note 36, at 122–23, 145–46; George W. Dent, Jr., *Proxy Regulation in Search of a Purpose: A Reply to Professor Ryan*, 23 GA. L. REV. 815 (1989). The exchange is set out at Section XII.C.

⁴²⁸ Dent, *Regulatory Failure*, *supra* note 1, at 6. For the original justification and its date, see *supra* Section V.A.

⁴²⁹ *Id.* at 7–8 (applying *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

⁴³⁰ Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-87458 (Nov. 5, 2019), 84 Fed. Reg. 66,458, 66,493 & n.207 (Dec. 4, 2019). The Commission reports voted proposals as one population and does not separate those management opposed. These figures therefore meet Dent’s premise by degree rather than in its own terms.

⁴³¹ Dent, *Reply*, *supra* note 427, at 821.

⁴³² *Id.* at 821–23.

⁴³³ *Id.* at 823–24.

appeared to be of little relevance or interest to the shareholders who bore their cost, and that the rule created a free-rider problem rather than solving one. The premise has failed in the same way.⁴³⁴

What survives the failure of the premise is the cost, and the cost is contested. The Commission put that cost on the company in 1943 and defended it as a very small item that company funds could rightfully bear. Section V.B sets out the exchange. Dent collected the figures issuers reported in response to the Commission's 1982 request and estimated the annual total to issuers at \$12 million to \$20 million. When the Commission returned to the question in 2020, the commenters divided. Business Roundtable members reported \$50,000 to \$100,000 or more per proposal, Exxon Mobil at least \$100,000, and one company reported \$133,000 for a proposal that went to a vote. CalPERS put the marginal cost at under \$20,000 and said the work product is on the Commission's own website. John Coates and Barbara Roper noted that the Commission's paperwork burden analysis used a figure of about \$19,000, drawn from a survey of sixty-seven Business Roundtable companies. They allowed that this lower estimate may not comprehensively reflect all costs. It is at least in tension, they wrote, with the Commission's assertion that \$50,000 is a lower bound. The Commission accepted the point. In the final rule it moved the lower bound of its direct cost estimates from \$50,000 to \$20,000, using its own print and mail estimate of \$18,982 rounded up.⁴³⁵ Section XII.F gives the Commission's 2026 figures.

Whatever the right figure, it is not large against the enterprises that bear it, and Dent conceded as much. Rule 14a-8's interference with state law, he wrote, "is limited to a small area of the law and involves no major principle or sums of money."⁴³⁶ Proposals "may divert the attention of busy managers to insignificant matters," he also wrote, and they impose a cost on shareholders through "the cluttering of proxy statements with proposals of little interest to them."⁴³⁷ Neither criticism can be tested. Neither can the claim, made from the other direction, that proposals improve board performance. The cost argument has never been the strongest one available to critics.

A different criticism comes from a defender of shareholder rights rather than from an opponent. Jill Fisch argues that the difficulty is not that shareholders speak but that the Commission decides what they may speak about. One solution, she writes, would be for the Commission "to get out of the business of refereeing shareholder voting," returning questions about the approximate scope of shareholder voting power to state courts.⁴³⁸ That criticism and Dent's arrive at the same destination from opposite premises. He would abolish the rule because it does no good. She would withdraw the Commission from administering it because the Commission is the wrong institution to decide what it covers. Neither route runs through the statute.⁴³⁹

⁴³⁴ Liebler, *supra* note 162, at 425–26 & n.9 (taking the figure from an address by Commissioner Bevis Longstreth of December 11, 1981). Her service as Special Counsel to the Chairman during the 1981–82 academic year is recorded at 425 n.*.

⁴³⁵ Dent, *Regulatory Failure*, *supra* note 1, at 14–15. Release No. 34-89964, *supra* note 190, 85 Fed. Reg. at 70,245 & n.63 (collecting comment letters from Business Roundtable, CalPERS, the Center for Capital Markets Competitiveness, John Coates and Barbara Roper, Exxon Mobil Corporation, General Motors Company, and the Society for Corporate Governance, all of January and February 2020). The adjustment is at 85 Fed. Reg. at 70,274, where the Commission records that in response to those comments it adjusted the lower end, used the \$18,982 print and mail estimate rounded up to twenty thousand as the lower bound, and continued to use a hundred fifty thousand as the upper bound. The upper figure came from a commenter at the Proxy Process Roundtable and commenters objected that it rested on no hard data. *Id.* at 70,273.

⁴³⁶ Dent, *Regulatory Failure*, *supra* note 1, at 28.

⁴³⁷ *Id.* at 15–16.

⁴³⁸ Fisch, *Transamerica*, *supra* note 66, at 78.

⁴³⁹ The convergence is taken up at Section XII.C.

C. What None of Them Answers

Of the works examined here, the arguments set out above are the strongest on either side, and they have one feature in common. With one exception, none of them argues from the statute. Cox and Thomas advance the widest reading of Section 14(a) among them and ask Congress to supply the authority if the legislative history will not. Schwartz and Weiss describe the Commission as acting in what it deems the public interest, mark that description as an assumption, and close by suggesting the Commission may develop legislative proposals to fill the voids in the 1934 Act. Emerson and Latcham defend the rule on the ground that a minority is entitled to express itself, which is a claim about what shareholders should have rather than about what Congress conferred. Fisch defends shareholder access and would have the Commission withdraw from deciding its scope, returning the question to the state courts.

Dent would abolish the rule, and he is the exception that has to be named. His argument is about authority, and Section XII.D sets it out. On his account the rule serves neither disclosure nor fair corporate suffrage. That argument was published in 1985. It was answered.⁴⁴⁰

Patrick Ryan answered Dent and Liebler on authority in 1988. A “radical attack on the legitimacy of rule 14a-8 as beyond the power conferred by Congress on the SEC,” he concluded, “is fatally flawed.”⁴⁴¹ Dent replied in the same journal the following year.⁴⁴² What Ryan concedes is as useful as what he asserts. The statutory text, he wrote, “says nothing specific, however, about the shareholder voting problems Congress might have been attempting to address by enacting this provision.” Nor does it “give on its face any hint of what the appropriate shareholder role might be in corporate governance.” The intrinsic aids run out at once.⁴⁴³ His extrinsic case rests chiefly on the Fletcher Report, which he concedes could not have influenced any member because it issued after enactment. He answers his own concession by tying the report to the drafters, the Landis Group and the staffs of Rayburn and Fletcher, rather than to the members who voted.⁴⁴⁴

Liebeler put the question in the same period and then explained why it would not be litigated.⁴⁴⁵

So the question was not met with silence. Louis Loss put it in 1961, in the passage Section XII.D sets out. Liebler put it in 1984 and Dent in 1985. Ryan answered in 1988 and Dent replied in 1989. Fisch took it up in 1993. She found the rule’s limits on ownership, holding period, resubmission and subject matter to have no foundation in state or common law, leaving the Commission’s authority to impose them unclear. Her objection runs against the exclusions and not against the rule, because she holds the Commission both authorized and obliged to make rules enhancing shareholder voting.⁴⁴⁶ Nothing

⁴⁴⁰ Dent, *Regulatory Failure*, *supra* note 1, at 22–23, 26 (applying *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976), and *NAACP v. FPC*, 425 U.S. 662, 669–71 (1976)).

⁴⁴¹ Ryan, *supra* note 36, at 122–23, 136, 145–46.

⁴⁴² Dent, *Reply*, *supra* note 427, at 815.

⁴⁴³ Ryan, *supra* note 36, at 124–25.

⁴⁴⁴ *Id.* at 131–32. The Fletcher Report is S. Rep. No. 73-1455, which note 26 records as ordered printed June 6 and printed calendar day June 16, 1934.

⁴⁴⁵ Liebler, *supra* note 162, at 425 n.*, for the date of her service. Her account of why the question would not be litigated is at 459 and is set out at Section XII.E.

⁴⁴⁶ Fisch, *From Legitimacy to Logic*, *supra* note 1, at 1149, 1151, 1199. The absence of a state or common law foundation for the rule’s limits is at 1149. The Commission building a federal common law of proper subject, quoting Loss, is at 1151. The judgment that the rules remain an unauthorized and misbegotten regulatory endeavor is at 1199. The limit is at 1134 and 1197.

examined here takes the question up after that until September 2026, when the Commission did so itself. Section XII.F sets out that release. Liebelers second point belongs in a different category and should not be folded into the others. It is a claim about issuers and courts. On her account an issuer is unlikely to find a direct test cost effective.⁴⁴⁷

The modern works divide. Most turn on the value of shareholder voice, the cost of proposals, the competence of the Commission and the proper allocation of corporate power. Those are questions about what the rule should be. Dent and Ryan turn on what Congress enacted, and their exchange did not settle it. The question the next two subsections take up is whether Congress ever put the rule there.

D. The Case for the Authority, and the Answer to It

The case for the Commission's authority is not weak, and it should be put at its strongest before it is answered.

Its best statement in a federal court is *Roosevelt v. E.I. du Pont de Nemours & Co.* The D.C. Circuit there derived the shareholder proposal right from Section 14(a) and called it informational in character. It went further than the disclosure frame in one respect. Congress did not train Section 14(a) narrowly on the information a shareholder needs to exercise approval rights under state law. Beyond that limited frame, on the court's account, the section shelters use of the proxy solicitation process "as a means by which stockholders may become informed about management policies and may communicate with each other." The court read the fair corporate suffrage passage and the Senate report's reference to major questions of policy as supporting that wider reading.⁴⁴⁸

Its best statement in the literature rests on the same ground. Fisch writes that the *Transamerica* decision staked out the role of federal law in determining the scope of shareholder voting rights, and established the authority of the Commission both in dictating mechanisms to protect those rights and in imposing its view of fair corporate suffrage upon issuers. Louis Loss put the textual version of it a generation earlier. The Commission's power under Section 14(a), he wrote, "is not necessarily limited to ensuring full disclosure." The statutory language "is considerably more general than it is under the specific disclosure philosophy of the 1933 Act."⁴⁴⁹

Its strongest statement is not in a case or in the literature. It is in a statute. In 2010 Congress required that proxy materials include "a separate resolution subject to shareholder vote to approve the compensation of executives." It provided that the vote "shall not be binding on the issuer or the board of directors of an issuer." It went further in the same subsection. The vote may not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to

⁴⁴⁷ Liebeler, *supra* note 162, at 459. For the writers this paragraph collects, see Dent, *Regulatory Failure*, *supra* note 1; Liebeler, *supra* note 162; Ryan, *supra* note 36; Dent, *Reply*, *supra* note 427; and 2 Loss, *supra* note 161.

⁴⁴⁸ *Roosevelt*, 958 F.2d at 421–22, 425. The characterization of the right as informational in character is the court's own, at 421, and it is the ground on which the right is derived. The court does not say that Section 14(a) reaches the substance of what shareholders may vote on. Its holding, at 425, is that shareholders may seek declaratory and injunctive relief when management refuses to distribute their proposals. Its own note 10 records the consensus understanding that the typical Rule 14a-8 proposal is advisory or precatory in nature. It cites Ryan, *supra* note 36, at 101.

⁴⁴⁹ Fisch, *Transamerica*, *supra* note 66, at 53. 2 Loss, *supra* note 161, at 868.

executive compensation.”⁴⁵⁰ Congress legislated with the shareholder proposal process in view, described it in terms that track the rule, and took care that its new vote would not narrow it. A defender of the rule can say that Congress knew what Rule 14a-8 did, wrote around it, and supplied by acquiescence what the original grant may not have.

Three things limit what that will carry. First, the provision is a rule of construction, and what it construes is the say-on-pay vote rather than Rule 14a-8. It directs that the new vote shall not be read to restrict a practice, which presupposes the practice and does not confer it. Second, the same Congress showed in the same act what an authorization looks like. It gave the Commission express authority to require that an issuer’s proxy solicitation include a nominee submitted by a shareholder, and authority to require a procedure for it.⁴⁵¹ That is a grant, and it is permissive rather than mandatory. The rule made under it could therefore be vacated without disturbing the grant. For shareholder proposals Congress wrote no such provision, in 2010 or at any time.⁴⁵² Third, what the say-on-pay provision does establish is that Congress in 2010 knew of the practice and left it alone, which is a proposition about acquiescence. The question this paper asks is about the original authority, so the two do not meet. A court weighing the rule today would nonetheless have to reckon with the 2010 provision.

One further objection has not been faced here, and it comes from the decision that removed judicial deference rather than from any defender of the rule. In overruling *Chevron*, the Supreme Court was careful to say that the best reading of a statute may well be that it delegates discretionary authority to an agency. It gave three forms. Express delegation of the meaning of a term. Power to fill up the details. And regulation subject to a term that leaves the agency flexibility, for which the Court’s own examples were the words appropriate and reasonable. Section 14(a) authorizes such rules as the Commission may prescribe as “necessary or appropriate in the public interest or for the protection of investors.” That is the Court’s third form, in the Court’s own words. The third form carries its own limit, and it comes from the same case. *Michigan v. EPA* held that although appropriate leaves an agency flexibility, an agency may not entirely fail to consider an important aspect of the problem.⁴⁵³

The objection has an institutional half as well. Congress amended Section 14 through twelve public laws between 1964 and 2022 with Rule 14a-8 in continuous operation, and never disturbed it. Only two of those acts touched subsection (a). The 1964 amendment replaced the limit to exchange-listed securities with registration under Section 12. The 2010 amendment added proxy access for shareholder nominees. Neither addressed shareholder proposals. If the rule rested on nothing, the argument runs, some Congress in eighty years would have said so.⁴⁵⁴ Congress also engaged the rule

⁴⁵⁰ 15 U.S.C. § 78n-1(a)(1), (c), (c)(4). Section 14A was added by Pub. L. No. 111-203, title IX, § 951, July 21, 2010, 124 Stat. 1899, and amended by Pub. L. No. 112-106, title I, § 102(a)(1), Apr. 5, 2012, 126 Stat. 308. The statute does not use the word advisory. Subsection (c) is captioned Rule of construction.

⁴⁵¹ 15 U.S.C. § 78n(a)(2), added by Pub. L. No. 111-203, title IX, § 971(a), July 21, 2010. The source credit to section 78n lists four amendments made by that act, and § 971(a) is the only one that touched subsection (a). The twelve public laws amending section 14 between 1964 and 2022 are set out below in this subsection.

⁴⁵² *Business Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (holding the Commission arbitrary and capricious in promulgating Rule 14a-11 and vacating the rule). For shareholder proposals, the twelve public laws amending section 14 are set out below in this subsection.

⁴⁵³ *Loper Bright*, 603 U.S. at 394–95 (citing *Michigan v. EPA*, 576 U.S. 743, 752 (2015)). 15 U.S.C. § 78n(a)(1). On the limit, *Michigan*, 576 U.S. at 752.

⁴⁵⁴ 15 U.S.C. § 78n, source credit. The twelve are Pub. L. No. 88-467, § 5, 78 Stat. 569 (1964); Pub. L. No. 90-439, § 3, 82 Stat. 455 (1968); Pub. L. No. 91-567, §§ 3–5, 84 Stat. 1497 (1970); Pub. L. No. 98-38, § 2(b), 97 Stat. 205 (1983); Pub. L. No. 99-222, §

directly and declined to act. In 1970 Senator Muskie introduced S. 4003, the Corporate Participation Act, for himself and Senator Eagleton. It would have amended Section 14(a) itself, adding that inclusion of a security holder's proposal "shall not be prohibited on the ground that such proposal may involve economic, political, racial, religious or similar issues, unless the matter or action proposed is not within the control of the issuer." It was referred to the Committee on Banking and Currency and was not enacted. A Congress that reached the rule's operation and passed nothing is a stronger form of this objection than a Congress that never looked.⁴⁵⁵ The Commission answered the objection itself in September 2026. Section XII.F sets out the answer.

The case against the authority is equally established, and it comes from the same court that decided *Roosevelt*.

In *Business Roundtable v. SEC* the D.C. Circuit vacated Rule 19c-4, which had restricted disparate voting rights plans. The Commission had defended the rule as furthering the purposes of Section 14(a). The court read both committee reports and found them concerned with disclosure and with the procedures of solicitation. It held that the fair corporate suffrage passage would not carry the weight the Commission placed on it, and that "'public interest' is never an unbounded term." It located the boundary in "control over management's power to set the voting agenda," and said Rule 14a-4(b)(2) "may lie in a murky area between substance and procedure."⁴⁵⁶

Dent applied the same doctrine directly to Rule 14a-8 five years earlier. The terms of Section 14(a) and of the general rulemaking provision are broad, he wrote, but such language does not confer unfettered discretion, because an agency may pursue only ends that effectuate the policies of the enabling statute. His authorities were the defenders' own. Loss supplies the other half of the treatise the defenders rely on. Where state law is clear that a matter is for the directors alone, he wrote, "that would seem to be decisive." If Congress had intended to give the Commission power to reallocate functions between the two corporate organs, "so revolutionary a federal intervention would presumably have been more clearly expressed."⁴⁵⁷

There is a test for when a rulemaking grant of this period confers the force of law, and the paper has not applied it until now. Merrill and Watts derive it from the statutes rather than from the courts. A grant is legislative where Congress attached sanctions to violations of the rules made under it. They apply that standard to the Exchange Act at the general grant in Section 23(a).⁴⁵⁸ Section 21(e) lets the Commission ask a district court to order compliance with the rules. Section 32 makes a willful violation a crime where the Act itself makes the violation unlawful. Section 14(a) does exactly that for the proxy

2, 99 Stat. 1737 (1985); Pub. L. No. 101-550, tit. III, § 302, 104 Stat. 2721 (1990); Pub. L. No. 103-202, tit. III, § 302(a), 107 Stat. 2359 (1993); Pub. L. No. 105-353, tit. III, § 301(b)(7), 112 Stat. 3236 (1998); Pub. L. No. 107-123, § 6, 115 Stat. 2396 (2002); Pub. L. No. 111-203, tit. IX, §§ 953(a), 955, 971(a), 991(b)(3), 124 Stat. 1903, 1904, 1915, 1953 (2010); Pub. L. No. 112-106, tit. I, § 102(a)(2), 126 Stat. 309 (2012); and Pub. L. No. 117-263, div. E, tit. LVIII, § 5821(g), 136 Stat. 3426 (2022).

⁴⁵⁵ S. 4003, 91st Cong. (1970), 116 CONG. REC. 20,928–29 (June 23, 1970). The bill text is at 20,929. See also 1980 Staff Report, *supra* note 37, at 150 n.47.

⁴⁵⁶ *Business Roundtable*, 905 F.2d at 407–08, 410–11 (citing *NAACP v. FPC*, 425 U.S. 662, 669 (1976)).

⁴⁵⁷ Dent, *Regulatory Failure*, *supra* note 1, at 22–23. 2 Loss, *supra* note 161, at 902–03.

⁴⁵⁸ Merrill & Watts, *supra* note 59, at 510 & n.215.

rules.⁴⁵⁹ They name Section 14 themselves, on a different argument. Where a statute carries both a general rulemaking grant and overlapping narrower ones, they write, the general grant is best read as housekeeping and the narrower grants as legislative, because otherwise the statute is redundant. They give the Exchange Act as their example and list the proxy grant among its narrower ones. They mark that argument as not necessarily decisive, and it sits against their own treatment of Section 23(a).⁴⁶⁰ So Rule 14a-8 meets the test on its face.

That is the beginning of the question and not the end of it. The test assumes a rule that operates by sanction, and it asks what a violation looks like. For Rule 14a-8 the answer is that a company violates the rule by excluding a proposal it was required to carry. The Commission sued once on that footing, against Transamerica in 1946, and never sued again. The remedy had been described to Congress three years earlier. Purcell set out a graduated escalation ending in an action for an injunction, and Bane said in the same hearing that the Commission had never had such a case. What carried the obligation instead was the no-action letter, which the Commission's own 1976 statement describes as requiring no response or action by the Commission or its staff. A rule that qualifies as legislative by the sanctions attached to it has been administered for eighty years without them.⁴⁶¹

The same standard turns up in the deference cases, and there it was the Court that failed to state it. Writing in 2006, Cass Sunstein set out step zero, which is the prior question whether the *Chevron* framework applies at all. The line the Court had drawn ran through the force of law. Decisions carrying it got the framework, and less formal action was left to a case-by-case inquiry. Sunstein's objection was that the Court never said what the phrase meant. He gave two readings. On the first a decision has the force of law because it receives deference, which is a circle and not a test. On the second a decision has the force of law when it binds private parties, so that a violator faces immediate sanctions. He took the second as the most plausible reading of *Mead*, and his authority was Merrill and Watts.⁴⁶²

So the standard applied above is not merely a historical one. It is what the phrase meant to the Congress that wrote the Act, and it is what the Court was reaching for when it decided *Mead* in 2001. *Chevron* was overruled in 2024, and the paper cites Sunstein for what the phrase has meant rather than for the deference that once followed from it. From the Act to *Mead*, the test asks the same thing. Rule 14a-8 answers it the same way, which is that the sanction exists in the statute and has never once been used.⁴⁶³

⁴⁵⁹ Securities Exchange Act § 21(e), 15 U.S.C. § 78u(e); § 32(a), 15 U.S.C. § 78ff(a); § 14(a), 15 U.S.C. § 78n(a). Section 32(a) reaches a willful violation of any rule whose violation is made unlawful or whose observance is required under the Act, and section 14(a) makes solicitation in contravention of the Commission's rules unlawful.

⁴⁶⁰ Merrill & Watts, *supra* note 59, at 510 & n.215. Their structural argument, that a general grant overlapping narrower ones is best read as housekeeping, is at their notes 73–76, and their note 74 lists the Exchange Act's narrower grants as 15 U.S.C. sections 78m and 78n.

⁴⁶¹ On the single action to compel inclusion and the absence of any successor, see *supra* Section VI.B. 1943 Hearings, *supra* note 2, at 117–18. The exchange is discussed in Section V.C. Release No. 34-12599, *supra* note 88.

⁴⁶² Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191, 193, 222 (2006), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12203&context=journal_articles. He borrows the term at 191 n.19 from Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001). His authority for the sanctions reading is Merrill & Watts, *supra* note 59, at 472.

⁴⁶³ Sunstein, *supra* note 462, at 222. For *Loper Bright*, see *supra* note 453. For the sanctions test as Merrill and Watts derive it, see *supra* note 458.

The answer to the ratification argument is in the statute, and it is the same form of argument the rule's critics have used against wider claims for it.

Congress has addressed shareholder access to a company's proxy solicitation. It did so in 2010, expressly, in Section 14(a) itself. The subsection now provides that the rules prescribed under it may include a requirement that a solicitation by or on behalf of an issuer include a nominee submitted by a shareholder, and a requirement that the issuer follow a certain procedure in relation to such a solicitation.⁴⁶⁴ Congress said nothing about proposals. The one bill that would have reached proposals confirms the same thing. S. 4003 would have added its sentence to Section 14(a), and that sentence assumed the obligation rather than conferring it. It said inclusion shall not be prohibited on certain grounds, which presupposes a duty to include. Muskie described the source of that duty himself. Under Section 14(a), he said, "the SEC has given stockholders the right to include shareholder proposals of certain kinds in management proxy materials."⁴⁶⁵

That is not an argument from silence alone, and it is not this paper's invention. Bainbridge reasoned in 1992 that the Exchange Act's silence on substantive voting rights carried weight because the New Deal Congresses reached those questions expressly when they chose, in the Public Utility Holding Company Act and the Investment Company Act. Dent made the identical move in 1986 against a claim that Section 14(a) reached dual class stock. He observed that Congress had expressly forbidden dual class stock to certain companies in those same two statutes. If Congress did consider dual class stock an abuse, he wrote, "the proxy rules were a strange weapon with which to attack it, and Congress certainly hid its intentions very well." Here the express provision and the silence are not in sibling statutes. They are in the same subsection of the same section.⁴⁶⁶

The Supreme Court has carried one sentence through three decisions in four years. "Corporations are creatures of state law," it said in *Cort v. Ash* in 1975, "and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Santa Fe* quoted it in 1977 and *Burks* in 1979. *Santa Fe* gave the reason. "Absent a clear indication of congressional intent," the Court wrote, it was "reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden." None of the three concerned the proxy rules. They state the default against which the silence in this subsection has to be read, and the exception *Cort* names is an express one.⁴⁶⁷

⁴⁶⁴ 15 U.S.C. § 78n(a)(2), added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, 124 Stat. 1376 (2010).

⁴⁶⁵ S. 4003, 116 CONG. REC. at 20,929 (Sen. Muskie).

⁴⁶⁶ Stephen M. Bainbridge, *Redirecting State Takeover Laws at Proxy Contests*, 1992 WIS. L. REV. 1071, 1114–15. George W. Dent, Jr., *Dual Class Capitalization: A Reply to Professor Seligman*, 54 GEO. WASH. L. REV. 725, 734 (1986).

⁴⁶⁷ *Cort v. Ash*, 422 U.S. 66, 84 (1975). *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977), quoting *Cort*. *Burks v. Lasker*, 441 U.S. 471, 478 (1979), quoting the same sentence by an *ibid.* *Burks* adds at 478 that legislation in this field is generally enacted against the background of existing state law, and that Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute. Dent, *Dual Class Capitalization*, *supra* note 466, at 734–35, and Bainbridge, *supra* note 466, at 1114 n.204, collect *Santa Fe* and *Burks*.

E. What the Courts Have Not Decided

What the courts have done with the question is less than it appears.

Transamerica is where the authority is supposed to have been settled, and it was not. The Third Circuit decided that case on the ground that Gilbert’s proposals were proper subjects for stockholder action under the General Corporation Law of Delaware. Having so held, the court opened its next paragraph by assuming *arguendo* that this was not so. Inside that hypothetical sits the sentence entertaining no doubt that the rule represented a proper exercise of the authority conferred by Congress. It answers whether a corporate bylaw may defeat the rule, not whether Congress authorized it. *Transamerica* had argued that the proposals were not proper subjects. It never argued the rule was invalid, and the court closed by noting that its other arguments need not be discussed.⁴⁶⁸

Roosevelt did not reach the question either, because Du Pont did not raise it. *Business Roundtable* drew the boundary in 1990 and placed nothing on either side of it. When the same circuit vacated the proxy access rule in 2011 it did so on Administrative Procedure Act grounds, holding that the Commission had failed to assess the economic effects of its rule, and it referred in passing to Rule 14a-8 as “a rule not challenged here.”⁴⁶⁹

So two panels of one circuit read the same two committee reports twenty-one months apart and drew opposite inferences from them. A paper arguing that a federal obligation rests on a statutory silence usually has to assert the silence. Here it does not need to.

A third court read the same passage the other way twenty-five years after *Business Roundtable*. Concurring in *Trinity* in 2015, Judge Shwartz took Section 14(a) as having been enacted to ensure fair corporate suffrage, and rested Rule 14a-8 on that footing. She wrote that the majority’s test undermines “the principle of fair corporate suffrage animating Rule 14a-8.” She glossed that principle, quoting *Medical Committee*, as shareholders’ “ability to exercise their right—some would say their duty—to control the important decisions which affect them in their capacity as . . . owners of [a] corporation.” Her authorities are *Borak*, *Transamerica* and *Medical Committee*, each cited for the proposition that the Act runs to the benefit of stockholders rather than managers. The limit is the same as *Transamerica*’s. It is a characterization of purpose in a concurrence, offered to settle how the exclusion applies, and no party in the case argued that the rule was invalid.⁴⁷⁰

A fourth court reached Section 14(a) in 2025 and reached a limit rather than the obligation. In *Interfaith Center on Corporate Responsibility v. SEC* the district court granted the Commission summary judgment on every count of an Administrative Procedure Act challenge to the 2020 amendments. It held the representative limitation within the authority Congress conferred, quoting *Roosevelt* for the proposition that Congress entrusted the prescription of proxy rules to the Commission. It found one procedural error, that the Chief Economist’s memorandum and the preliminary staff analysis should

⁴⁶⁸ *Transamerica*, 163 F.2d at 517–18.

⁴⁶⁹ *Roosevelt*, 958 F.2d at 421. *Business Roundtable*, 905 F.2d at 411. *Business Roundtable*, 647 F.3d at 1148–49, 1153.

⁴⁷⁰ *Trinity*, 792 F.3d at 353–54 (Shwartz, J., concurring) (citing *Borak*, 377 U.S. at 432, *Transamerica*, 163 F.2d at 517, and *Medical Committee*, 432 F.2d at 676 and 681–82).

have been disclosed earlier, and held it harmless. The court upheld a restriction on who may use the rule. Whether Congress authorized the obligation to carry a proposal at all was not before it.⁴⁷¹

Liebeler answered in 1984 why the question has never been litigated. “Even though strong legal arguments can be made that the Commission has exceeded its authority in promulgating the shareholder proposal rule, it is unlikely that any issuer would find it cost effective to test this issue directly,” she wrote. “The direct costs of shareholder proposals are almost certainly less than the litigation costs and costs associated with incurring the wrath of the Commission staff which would certainly be visited upon such a deviant issuer.” She also set out how the test might be brought anyway. Her suggestion was that a group of issuers adopt bylaw amendments restricting what shareholders may bring before a meeting, on the recommendation of a trade association. She named the American Society of Corporate Secretaries and the Business Roundtable. What was needed, she wrote, was “an institute or a public interest law firm, funded by issuers, which could challenge this ill-conceived SEC regulation.”⁴⁷² No such challenge was brought. Forty-two years later the Commission raised the question itself.

F. The Rescission Proposal, 2026

On September 16, 2026 the Commission proposed to rescind Rule 14a-8 in its entirety.⁴⁷³ It gave two grounds. The first is authority. “We are proposing to rescind Rule 14a-8 because the rule exceeds the Commission’s statutory authority.”⁴⁷⁴ The second is policy, and the release states it as independent of the first. Even if the rule or parts of it were within the Commission’s authority, it says, policy reasons would support rescinding all of it.⁴⁷⁵ The proposal would leave the role of shareholder proposals to state law and company governing documents.⁴⁷⁶ It would also amend Rule 14a-4(c) to widen the discretionary voting authority a company may use on proposals it does not carry.⁴⁷⁷ It is a proposal, and comments are due sixty days after publication in the Federal Register.⁴⁷⁸

The release reads Section 14(a) as reaching the manner of solicitation and the disclosure a solicitation must carry.⁴⁷⁹ On that reading “nothing in section 14(a) authorizes the Commission to regulate the scope of the voting or other rights shareholders may have under State law, such as the right

⁴⁷¹ *Interfaith Ctr. on Corp. Resp. v. SEC*, No. 21-1620 (RBW) (D.D.C. June 5, 2025) (slip op.). No Federal Supplement page has been assigned and the slip opinion is cited for that reason. The *Roosevelt* quotation is *Roosevelt*, 958 F.2d at 421. The court also quotes *Palmiter*, *supra* note 136, at 886, for the description of what the rule requires. The preliminary staff analysis it holds should have been disclosed earlier found that similar increased ownership requirements would reduce shareholder proposals by up to seventy-eight percent.

⁴⁷² Liebeler, *supra* note 162, at 459. The suggestion and the trade associations are at note 169 on that page. The restrictions she had in mind are at note 170. They are a proposal fee and a minimum ownership requirement of five or ten percent, which she took to be valid under state law.

⁴⁷³ Rescission of Rule 14a-8’s Federal Regulation of Shareholder Proposals and Amendments to Rule 14a-4, Exchange Act Release No. 34-106383, File No. S7-2026-32, at 1, 13 (Sept. 16, 2026) (proposed rule), <https://www.sec.gov/files/rules/proposed/2026/34-106383.pdf> [*hereinafter* Rescission Proposing Release].

⁴⁷⁴ *Id.* at 13.

⁴⁷⁵ *Id.* at 11–12, 36.

⁴⁷⁶ *Id.* at 1, 13.

⁴⁷⁷ *Id.* at 1, 12–13.

⁴⁷⁸ *Id.* at 1.

⁴⁷⁹ *Id.* at 14–15.

to propose a matter for a shareholder vote.”⁴⁸⁰ A rule that sets inclusion standards not found in state law, the release says, dictates the scope of those rights. That exceeds the Commission’s authority.⁴⁸¹ The release rests this on the statute’s text and structure and on the federalism clear-statement cases.⁴⁸² It relies on *Business Roundtable*⁴⁸³ and on *Santa Fe*.⁴⁸⁴ It treats the Public Utility Holding Company Act as showing how Congress wrote when it meant to reach voting power.⁴⁸⁵ It reads *Transamerica* as never squarely presenting the question of authority.⁴⁸⁶ Sections XII.D and XII.E reach those last three points on the same authorities. The release’s own statement of authority cites Sections 3(b), 14 and 23(a) of the Exchange Act. It names no subsection.⁴⁸⁷

The release’s theory is not this paper’s thesis, and the difference matters. This paper argues that Congress never authorized the obligation to carry a proposal. The release objects to the federal standards built on that obligation, because they displace state law.⁴⁸⁸ Its contrast is universal proxy. There the Commission requires a proxy card to name every duly nominated candidate, and the release says that rule “works in conjunction with State law.”⁴⁸⁹ State law, the release notes, gives shareholders the right to elect directors.⁴⁹⁰ On proposals, it says, state law is often unclear, and the Commission has supplied its own answers.⁴⁹¹ The release does not decide whether a rule deferring wholly to state law would be within the Commission’s authority. It assumes the point and rejects such a rule on policy. Its reason is that the Commission would be drawn back into state-law questions.⁴⁹²

The release also answers the defense Section XII.A traces from Freeman to Cox and Thomas. That defense locates the substance in state law and the federal contribution in mechanism. The release anticipates the argument that the rule only sets conditions on an opportunity federal law provides, and it cites *Dyer* for that argument.⁴⁹³ Its answer is that proxy voting has largely replaced attendance at the meeting. Deciding what reaches the proxy therefore alters the voting process.⁴⁹⁴ The D.C. Circuit made a related point in 2011. The Commission had attributed the costs of its proxy access rule to the state-law right to nominate directors. The court held that this reasoning “fails to view a cost at the margin” and “is illogical and, in an economic analysis, unacceptable.”⁴⁹⁵ The release names the same structure in its own economic analysis. A proponent can place a proposal on the company’s proxy at near-zero marginal cost to itself and at a cost to the company. The release calls that a form of cost externalization.⁴⁹⁶ The costs

⁴⁸⁰ *Id.* at 15.

⁴⁸¹ *Id.* at 16–17, 31–32.

⁴⁸² *Id.* at 14–19 & nn.48–49.

⁴⁸³ *Id.* at 15 n.34, 16 n.39, 17 & n.44, 18–20 & nn.48, 50–51, 54 (citing *Business Roundtable*, 905 F.2d at 410).

⁴⁸⁴ Rescission Proposing Release, *supra* note 473, at 18 & n.48 (citing *Santa Fe*, 430 U.S. at 479).

⁴⁸⁵ Rescission Proposing Release, *supra* note 473, at 16 & nn.36–37.

⁴⁸⁶ *Id.* at 34–35 & n.103.

⁴⁸⁷ Rescission Proposing Release, *supra* note 473, at 218. The same formula appears at 212. The citation covers the amendments to Rule 14a-4(c) as well as the rescission, so little turns on its generality.

⁴⁸⁸ *Id.* at 27–32.

⁴⁸⁹ *Id.* at 32–33 & nn.94–98. The quoted phrase is at 33.

⁴⁹⁰ *Id.* at 32 & nn.95–96.

⁴⁹¹ *Id.* at 29, 33–34, 40–42.

⁴⁹² *Id.* at 55–56.

⁴⁹³ *Id.* at 31 & n.92 (citing *Dyer*).

⁴⁹⁴ Rescission Proposing Release, *supra* note 473, at 31–32 & n.93.

⁴⁹⁵ *Business Roundtable*, 647 F.3d at 1151–52.

⁴⁹⁶ Rescission Proposing Release, *supra* note 473, at 141, 176.

of inclusion and distribution are borne by the company.⁴⁹⁷ A company may have little practical choice but to include a proposal and bear those costs, the release states, even though neither state law nor the federal proxy rules require inclusion.⁴⁹⁸ It estimates the aggregate annual saving from rescission at \$39.6 million.⁴⁹⁹ The costs vary by the type of proposal.⁵⁰⁰ The obligation to carry has consequences of its own.

The release takes up one piece of the early record. It rejects the theory on which the obligation was first enforced in 1938. The omission of a proposal, it says, “is generally not, without more, materially false or misleading.”⁵⁰¹ The release cites the 1943 hearings for Purcell’s account of the rule’s purpose and cost.⁵⁰² It does not take up Representative Wolverton’s request, joined by Director Bane, that Congress clarify the language.⁵⁰³ It does not address the 2010 grant of express authority over shareholder nominees.⁵⁰⁴ It cites the say-on-pay provision for the votes Congress required, and not for its clause on shareholder proposals.⁵⁰⁵ It does not cite *Roosevelt* or S. 4003.⁵⁰⁶ It answers the acquiescence argument this way. “[A]gencies may not add to their powers by adverse possession; longevity is not a substitute for legal authority.”⁵⁰⁷ Section XII.D sets out why a court weighing a final rule would still have to reckon with 2010.

Loper Bright applies to the Commission’s new reading as fully as to its old one. Courts must now “exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” and “may not defer to an agency interpretation of the law simply because a statute is ambiguous.” A statute has “a single, best meaning.”⁵⁰⁸ The release calls its own reading the plain and best one.⁵⁰⁹ On review the question would be the best reading of Section 14(a), with no deference to the Commission in either direction. The major questions doctrine has little work to do, because it limits claims of power and the release disclaims one.⁵¹⁰ An older doctrine fits better. Justice Frankfurter put the point in 1941. Just as “established practice may shed light on the extent of power conveyed by general statutory language,” so “the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.” Section 14(a) was enacted in 1934. The Commission asserted no power over the inclusion of shareholder

⁴⁹⁷ *Id.* at 188.

⁴⁹⁸ *Id.* at 151.

⁴⁹⁹ *Id.* at 178–79. The figure is \$29.7 million in internal burden hours and \$9.9 million in external costs. The release carries forward the 2020 range of \$20,000 to \$150,000 a proposal, which it puts at about \$25,000 to \$188,000 in current dollars. *Id.* at 125. Section XII.B sets out the earlier figures.

⁵⁰⁰ Timothy M. Doyle & Robert G. Eccles, *Rule 14a-8 in Practice: A Descriptive Account from Twenty Interviews* (Responsible Bus. Initiative, July 2026), <https://rbi-us.org/wp-content/uploads/2026/07/RBI-Rule-14a-8-In-Practice.pdf>. The release cites the account for that point. Rescission Proposing Release, *supra* note 473, at 126 n.356. That note gives a different host for the same paper.

⁵⁰¹ Rescission Proposing Release, *supra* note 473, at 56 n.175 (disagreeing with Statement of Chairman Purcell). For the 1938 enforcement, see *supra* Section V.A.

⁵⁰² *Id.* at 9 & nn.17–18 (purpose); *id.* at 36 & n.105 (cost).

⁵⁰³ See *supra* Section V.D.

⁵⁰⁴ See *supra* Section XII.D.

⁵⁰⁵ Rescission Proposing Release, *supra* note 473, at 14 n.28, 19 n.53. See *supra* Section XII.D.

⁵⁰⁶ See *supra* Sections XII.D and XII.E.

⁵⁰⁷ Rescission Proposing Release, *supra* note 473, at 35.

⁵⁰⁸ *Loper Bright*, 603 U.S. at 399–400, 411–13.

⁵⁰⁹ Rescission Proposing Release, *supra* note 473, at 27, 35.

⁵¹⁰ See *West Virginia v. EPA*, 597 U.S. 697, 721–24 (2022).

proposals for four years, and when it did so in 1938 it acted under the anti-fraud rule. It wrote the power into the rules in 1940 and explained it at neither point.⁵¹¹

The two grounds bear on what a final rule would settle. The release would rescind on policy even if the rule were within the Commission's authority.⁵¹² A court could sustain a final rule on that ground without reaching authority. A rescission sustained on policy alone would leave a later Commission free to adopt a rule again. Only a holding on authority would foreclose that. The release also asks for comment on reliance interests in the current rule.⁵¹³ It asks as well about alternatives short of full rescission that would fall within the Commission's authority.⁵¹⁴

If a rescission were adopted and sustained on authority, there would be no federal mechanism for shareholder proposals and no federal body with power to create one. Companies would set their own terms of access within state law. That is what Liebeler proposed in 1984⁵¹⁵ and what the Commission itself put out for comment in 1982.⁵¹⁶ The release expects the same. It expects states and companies to be more inclined to set their own standards,⁵¹⁷ and it notes that Texas already has.⁵¹⁸ Where state law or a company's documents require inclusion, it adds, the proxy rules would govern that proposal.⁵¹⁹ The release states the limit in its introduction. "[O]nly Congress can authorize the Commission to intervene in matters traditionally left to State law."⁵²⁰ Congress has addressed access once, expressly, and confined itself to nominees.⁵²¹

The question put to Congress at the 1943 hearings is now before the Commission. The Commission's own answer is that the authority can come only from Congress.

XIII. Conclusion

The federal obligation to carry shareholder proposals was built on a silence. Section 14(a) authorized the Commission to regulate the conditions of proxy solicitation and said nothing about who decides what shareholders vote on. Neither committee report addressed it. The Commission answered the question itself, first by enforcement under the anti-fraud rule and then by rulemaking. It took the substance of what shareholders could propose from the law of the state of incorporation rather than supplying any of its own.⁵²²

⁵¹¹ *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941), *quoted in West Virginia v. EPA*, 597 U.S. at 725. The sentence before it states the limit. Authority actually granted by Congress cannot evaporate through lack of administrative exercise. Non-assertion bears on whether the power was conferred, not on whether a conferred power survives disuse. For the 1938 enforcement, the 1940 provision and the absence of explanation, *see supra* Sections V.A and V.B.

⁵¹² Rescission Proposing Release, *supra* note 473, at 11–12, 35–36.

⁵¹³ *Id.* at 35–36; *id.* at 60 (Request for Comment No. 2).

⁵¹⁴ *Id.* at 36; *id.* at 60–61 (Request for Comment Nos. 1, 7).

⁵¹⁵ Liebeler, *supra* note 162, at 459, 465.

⁵¹⁶ Release No. 34-19135, *supra* note 139, 47 Fed. Reg. at 47,422.

⁵¹⁷ Rescission Proposing Release, *supra* note 473, at 54–56.

⁵¹⁸ *Id.* at 51 & nn.161–62.

⁵¹⁹ *Id.* at 55.

⁵²⁰ *Id.* at 11.

⁵²¹ *See supra* Section XII.D.

⁵²² *See supra* Sections III.B, IV.B, V.A and VI.A.

That gap was identified at the time. At the 1943 hearings the Commission's own witnesses conceded that the rules went beyond disclosure. They rested the difference on committee report language rather than on the statute. The members who objected read the same silence the other way. The two sides agreed on one point. Representative Wolverton put the difference of opinion between the Commission and Congress to the witnesses, and asked that the language be clarified so there could be no doubt. Baldwin Bane, the Director of the Division of Corporation Finance, agreed that clarification was undoubtedly warranted. Both asked Congress to settle it.⁵²³

Congress did not. The operative language of Section 14(a) is unchanged from 1934, though the subsection has been amended twice. The 1964 amendment replaced the limit to exchange-listed securities with registration under Section 12. The 2010 amendment provided expressly for the inclusion of shareholder nominees. That same Congress also wrote that a say-on-pay vote may not be read to limit shareholder proposals related to executive compensation. That is the best evidence that Congress knew of the practice and left it alone. But knowing of a practice is not authorizing it, and the nominee provision in the same subsection shows what an authorization looks like. Eighty-three years have passed since the request for clarification was made.⁵²⁴

Administration filled the space. With no statutory standard underneath the rule, its working meaning could be set and reset by each successive Commission. The instruments that carried it require no amendment to the rule text and no reasoned explanation of the kind a rulemaking must carry, and the staff legal bulletin requires no Commission vote and no notice and comment at all. In 1976 the Commission announced the significant social policy doctrine in the same release in which it concluded it could not write that line as a rule. What it could not write, it assigned to correspondence. The staff legal bulletin became the instrument through which that assignment has since been exercised, and reversed, and reversed again.⁵²⁵

The instability this produces is not an abstraction. Rule 14a-8 runs on an annual cadence, so a change in standard lands inside a live season. A proposal excluded under one administration's reading may be required under the next. When the answer was withdrawn altogether in 2025 and 2026, litigation replaced it. On the first season's record, that distributes access by the capacity to bring a suit rather than by the ownership thresholds the rule sets. Neither companies nor shareholders can plan against a standard the Commission has licensed itself to change without explanation.⁵²⁶

The Commission has said as much about itself. It considered handing inclusion to the courts in 1972 and declined. It examined the rule from 1977 to 1980, found commentators content with it, and asked no authority question anywhere in the resulting report. In 1982 it asked the public whether a federal right of access should exist at all, or be left to the states. In 1997 it canvassed withdrawing from the field altogether and leaving the subject to them. In 2019 it asked whether the states were better suited, and in 2020 it declined to change the structure. An agency that three times asked the public

⁵²³ See *supra* Section V.D.

⁵²⁴ See *supra* Section XII.D.

⁵²⁵ See *supra* Sections IX.C and IX.F.

⁵²⁶ See *supra* Section XI.A.

whether it should be administering the rule at all ceased to administer it in 2026. In September it proposed to rescind the rule as beyond its statutory authority.⁵²⁷

The Commission cannot settle it alone. No court has decided whether Congress authorized the obligation, and the decisions that come nearest divide on the same two committee reports. After *Loper Bright*, a court would owe the Commission's new reading no more deference than its old one. State law can determine what shareholders may propose. It cannot supply a federal authority that Congress did not grant. The Commission cannot confer authority on itself. If Rule 14a-8 were rescinded on statutory grounds and that rescission were upheld on those grounds, no later Commission could restore the framework, because the deficiency would be statutory. A rescission upheld on policy alone would not have that effect. Only Congress could restore the framework in either case.⁵²⁸

The choice before Congress is therefore not between a rule and no rule. It is between settling the question and continuing to leave it open. Congress could authorize a shareholder proposal mechanism expressly, and set its outer limits. It could decline to authorize one and leave the subject to state corporate law. Either is a settlement, and either would give companies and investors a foundation that does not move with an election. What has not worked is the arrangement Congress left in place by saying nothing in 1934 and nothing again after 1943.

The question was put to Congress by both sides at the first hearings ever held on this rule. It remains open, and it remains Congress's.

⁵²⁷ See *supra* Sections X and XII.F.

⁵²⁸ See *supra* Sections XI.B, XII.D, XII.E and XII.F.

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The Responsible Business Initiative is a 501(c)(3) organization working to find bipartisan common ground on policy questions where business and investment decisions have become politicized. Corporate and investment communities depend on certainty in legal precedent and regulatory frameworks, and politicization erodes it. RBI combines policy, political, and legal analysis to support durable solutions across the political spectrum.