September 12, 2022

Ms. Vanessa Countryman
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549
VIA ELECTRONIC MAIL: rule-comments@sec.gov

Re: **File Number S7-20-22**:
Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8

Submitted by: James R. Copland

Dear Ms. Countryman:

I appreciate the opportunity to comment on the Commission's proposed rulemaking, "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8" (File No. S7-20-22).

I am a senior fellow with the Manhattan Institute for Policy Research, a non-profit, non-partisan think tank that develops and disseminates ideas that foster economic choice and individual responsibility.[1] Since 2003, I have served as the Institute's director of legal policy.[2]

The shareholder-proposal process under the SEC's Rule 14a-8 has constituted a significant focus of my research, especially since 2011, when the Institute launched ProxyMonitor.org, a publicly available database cataloging shareholder proposals and shareholder advisory votes on executive compensation at America's largest companies.[3] I have testified on the shareholder-proposal process before committees and subcommittees of the United States Senate[4] and United States House of Representatives,[5] in addition to authoring a number of reports, articles, and other

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[1] *See* About MI, https://www.manhattan-institute.org/about. My comment letter reflects only my own views, not my employer's. Some commentary is excerpted from my own prior writings, listed in the appendix, without attribution.
[2] *See* James R. Copland, https://www.manhattan-institute.org/expert/james-r-copland.
[3] *See* About Proxy Monitor, https://www.proxymonitor.org/Forms/About.aspx.
[4] *See* Statement of James R. Copland, "Who's Monitoring the Monitors? The Rise of Intermediaries and the Threat to Capital Markets," Hearing before the Senate Committee on Banking, Housing, and Urban Affairs: The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries, Apr. 2, 2019, *available at* https://www.banking.senate.gov/imo/media/doc/Copland%20Testimony%204-2-191.pdf.
[5] *See* Statement of James R. Copland, "SEC Rule 14a-8: Ripe for Reform," Hearing before the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises: Hearing on Corporate Governance: Fostering a System that Promotes Capital Formation and Maximizes Shareholder Value, Sept. 21, 2016, *available at* https://media4.manhattan-institute.org/sites/default/files/T-JC-0916.pdf; *see also* Statement of James R. Copland, "Economic Growth and Efficient Capital Markets: An Agenda at Odds with Subcommittee's Bills Under Consideration," Hearing before the House Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets: Promoting Economic Growth: A Review of Proposals to Strengthen the Rights and Protections for Workers, May 15, 2019, *available at* https://media4.manhattan-

writings on the subject, which are included in an appendix and incorporated herein by reference.

I also, of course, commented on a substantially similar SEC rulemaking, concerning Rule 14a-8, just over 2.5 years ago.[6] That rulemaking did not, in my view, go far enough in reining in the SEC's shareholder-proposal process, as I noted at the time. But that new rule, as Commissioner Peirce observed, has scarcely gone into effect—and not even fully operated in a full proxy season.[7] Prior to the 2020 rulemaking, the SEC had not revised its submission thresholds since 1998; it had not adjusted its resubmission thresholds since 1954.[8] The definition governing resubmissions has remained in its current form since 1983; as Commissioner Pierce observed, the Commission considered amending this definition in its rulemaking just two years ago and declined to amend it.[9]

In reversing course so quickly in adjusting the shareholder-proposal process it considered just two years ago, the Commission is clearly *not* responding to new data based on its earlier rulemaking. Rather, the Commission is clearly engaged in an act of policymaking will, owing to a change of control of administration—and a change in partisan control of the Commission. Such shifts are anathema to the objective, neutral factfinding through which independent administrative agencies are supposed to act in their quasi-legislative role;[10] and it's hard to escape the conclusion that this new rulemaking is anything but "arbitrary and capricious" under the terms of the Administrative Procedure Act.[11]

As I noted in my comment 2.5 years ago:

> The entire legal foundation of the SEC's shareholder-proposal rule is suspect; the SEC's role as shareholder-proposal gatekeeper goes beyond the Commission's proper role, which should be to facilitate *disclosure* rules necessary to the functioning of national securities markets—not intervening in corporations' annual-meeting process in substantive matters reserved to state law.

This latest rulemaking compounds these problems. The new rules will also doubtless interact negatively with Legal Bulletin No. 14L, released in November 2021, under which the Commission staff has backed away from the agency's longstanding insistence that shareholder proposals related to social or policy issues evidence a "nexus between a policy issue and the company."[12] Already, under these new standards, we have seen a record number of shareholder

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institute.org/sites/default/files/Testimony_JCopland_051519.pdf.

[6] James R. Copland, Comment, File No. S7-23-19, Release No. 34-87458, "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8," Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6741164-207698.pdf.

[7] *See* Statement of Commissioner Hester M. Peirce, "Exclusion Preclusion: Statement on the Shareholder Proposals Proposal," July 13, 2022, *available at* https://www.sec.gov/news/statement/peirce-statement-shareholder-proposals-proposal-071322.

[8] *See* Statement of Commissioner Elad L. Roisman, "Statement on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8," Sept. 23, 2020, *available at* https://www.sec.gov/news/public-statement/roisman-14a8-2020-09-23.

[9] *See* Statement of Commissioner Peirce, *supra* note 7.

[10] *Cf.* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[11] 5 U.S.C. § 706(2)(A); *see* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[12] *See* Announcement, Division of Corporation Finance, Securities and Exchange Commission, Shareholder Proposals: Staff Legal Bulletin No. 14L (CF), Nov. 3, 2021, *available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

proposals introduced in 2022—more than in any previous proxy season in the Proxy Monitor database, dating back to 2006—notwithstanding that not all companies have yet held annual meetings. The increase in the number of proxy statements has been driven by a near-doubling in the number of shareholder proposals related to environmental and social-policy concerns—exactly those unhinged from materiality or even corporate relevance by the new staff guidance document.[13]

This comment letter seeks to augment the record before the Commission, consistent with my research in the field. In Part I, I comment broadly on the shareholder-proposal process as the SEC has created and long overseen it. In Part II, I briefly comment on recent empirical trends in shareholder proposal submissions since the SEC published its final rule adjusting Rule 14a-8 two years ago, and since the staff issued its novel substantive guidance effectively amending Rule 14a-8 last fall. In Part III, I briefly discuss how the SEC's expanded 14a-8 process, in forcing companies to publish speech on matters of controversial public concern, but immaterial to investors' financial interests, runs afoul of the First Amendment.

Part I: The Shareholder-Proposal Process in General[14]

U.S. capital markets continue to lead the world.[15] A significant reason for continuing U.S. market leadership is what Yale law professor Roberta Romano has called the "genius of American corporate law":[16] SEC rules and regulations promulgated under the authority of the federal securities laws dictate disclosure rules, while substantive matters related to the distribution of authority between shareholders and corporate boards are left to state law.[17] Federal primacy in the disclosure regime enables investors to price securities efficiently on an apples-to-apples basis with adequate, accurate information. State primacy in allocating the substantive rights of shareholders vis-à-vis boards prevents a one-size-fits-all lock-in of inefficient rules—and facilitates a "race to the top" given shareholders' ability to incorporate variations in state legal regimes into securities

[13] It is curious indeed that such a substantial policy change—incorporating via staff "interpretation" a novel "significant social policy exception" to rules promulgated through notice-and-comment rulemaking—would be done via the vehicle of staff "guidance." In my view, Legal Bulletin No. 14L is clearly an end-run around proper administrative rulemaking, designed to skirt notice and comment and proper judicial review. Inasmuch as there is an obvious interaction effect between this novel staff guidance and the SEC's new proposed rules, I would ask reviewing courts to incorporate by reference the Legal Bulletin into any assessment of any final rules promulgated in this notice-and-comment rulemaking.

[14] This part of the comment letter substantially tracks the parallel part in my 2020 comment on the 14a-8 process. Although I am incorporating that comment fully here by reference, I am reiterating it here for context, for the ease of review by any reviewing court and for the new Commissioners who have promulgated this new, competing rule. Whether this new section is sufficiently similar to the parallel section in the 2020 comment be excludable as "duplicative" under the SEC's newly adopted standards-of-ambiguity for shareholder-proposal exclusion may be a question open to interpretation.

[15] *See* Ron Surz, *U.S. Stock Market Is Biggest & Most Expensive In World, But U.S. Economy Is Not The Most Productive*, NASDAQ.COM, Apr. 2, 2018, https://www.nasdaq.com/articles/us-stock-market-biggest-most-expensive-world-us-economy-not-most-productive-2018-04-02.

[16] *See generally* Roberta Romano, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

[17] *See, e.g.*, CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) ("Corporations are creatures of state law, 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.").

pricing.[18]

Recent statutory changes have somewhat interfered with the distribution of authority between federal and state securities and corporation law—particularly the Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002[19] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[20]. But in general, that states rather than the federal government have the "authority to regulate domestic corporations, including the authority to define the voting rights of shareholders" remains what the Supreme Court has called the most "firmly established" principle of American corporation law.[21]

The shareholder-proposal process under SEC Rule 14a-8 is, in many respects, a longstanding exception to this rule—albeit one created under the auspices of Commission rulemaking rather than clear statutory mandate. The SEC first promulgated a "shareholder proposal rule"—the antecedent to the current Rule 14a-8—in 1942.[22] Then–SEC chairman Ganson Purcell explained the purpose of the rule to the House Interstate and Foreign Commerce Committee as follows:

> Once a shareholder could address a meeting[;] today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has of expressing his judgment comes at the time when he considers the execution of the proxy form, and we believe, whether we are right and whether we are wrong—and I think we are right—that that is the time he should have the full information before him and the ability to take action as he sees fit.
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> The proxy solicitation is now in fact the only means by which a stockholder can act and can perform the functions which are his as owner of the corporation. It, therefore, seems clear to us that only by making the proxy a real instrument for the exercise of those functions can we obtain what the Congress and this committee called for in the form of "fair corporate suffrage."[23]

The allusion to "fair corporate suffrage" is not to the statutory text of the Securities Exchange Act

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[18] *See generally* Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989). *See also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (finding the "race to the top" hypothesis more supported than the "race to the bottom" hypothesis in empirical testing).

[19] Pub. L. No. 107-204, 116 Stat. 745 (2002). For a substantive critique of the Sarbanes-Oxley law, in the context of traditional American securities and corporate law, see generally Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

[20] Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Dodd-Frank law interjects a federal role into the allocation of shareholder-board authority through, *inter alia*, requiring publicly traded companies to hold shareholder "advisory votes" on executive compensation annually, biennially, or triennially. *See id.* at § 951.

[21] CTS Corp. v. Dynamics Corp., 481 U.S. at 89.

[22] *See* Securities Exchange Act of 1934 Release No. 3347 (Dec. 18,1942), 7 Fed. Reg. 10,653 (1942).

[23] Hearings on H.R. 1498, H.R. 1821, and H.R. 2019, Before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess., pt. 2, at 174-75 (1943).

of 1934[24] but rather to legislative history included in the House Report.[25] The actual section of the Securities Exchange Act upon which Rule 14a-8 is promulgated, § 14(a), is principally designed to ensure corporate disclosures to shareholders to afford investment information and prevent deception, as the Supreme Court noted in its *Borak* decision in 1964: "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."[26]

Although the unvoted-on legislative history in the House Report for the 1934 Act does allude to "fair corporate suffrage," the statute hardly wrests the allocation of substantive shareholder rights from the states and transfers them to the federal government.[27] As the D.C. Circuit explained in its 1990 *Business Roundtable* decision: "While the House Report indeed speaks of fair corporate suffrage, it also plainly identifies Congress's target—the solicitation of proxies by well informed insiders 'without fairly informing the stockholders of the purposes for which the proxies are to be used.'"[28] In *Business Roundtable*, the court rebuffed the Commission's "immensely broad" and "unbounded" view of its powers based on the allusion to "fair corporate suffrage" in the House Report;[29] the Court explained in no uncertain terms: "That proxy regulation bears almost exclusively on disclosure stems as a matter of necessity from the nature of proxies. Proxy solicitations are, after all, only communications with potential absentee voters."[30]

The proposed rulemaking observes that Rule 14a-8 is intended to facilitate "shareholders' traditional ability under state law to present their own proposals for consideration at a company's annual or special meeting." It cites for that proposition then-chairman Purcell's statement in his 1943 testimony that the shareholder-proposal rule "endeavor[s] to assure to the stockholder . . . those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on."[31]

But neither the current rulemaking analysis nor then-chairman Purcell's statement wrestles at all with underlying substantive rights under state law. In fact, no provision of Delaware's General Corporation Law[32] grants any shareholder a right, even as a default rule, to speak in a

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[24] Pub. L. No. 73-291, Ch. 404, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 78a–78oo (2006 & Supp. II 2009)), at §§ 78m, 78n & 78u.
[25] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 14 (1934).
[26] J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).
[27] *See* Business Roundtable v. SEC, 905 F.2d 406, 412 (D.C. Cir. 1990) (rejecting the premise that the SEC could "establish a federal corporate law by using access to national capital markets as its enforcement mechanism").
[28] *Id.* at 410. The court emphasized that "The Senate Report contains no vague language about 'corporate suffrage,' but rather explains the purpose of the proxy protections as ensuring that stockholders have 'adequate knowledge' about the 'financial condition of the corporation ... [and] the major questions of policy, which are decided at stockholders' meetings.'" *Id.* (citing S.Rep. No. 792, 73d Cong., 2d Sess. 12 (1934) (characterizing purpose of proxy protections as ensuring stockholders' "adequate knowledge" about the "financial condition of the corporation")).
[29] *Id.* at 407, 412 (rejecting SEC Rule 19c-4 because "the rule directly controls the substantive allocation of powers among classes of shareholders . . . in excess of the Commission's authority under Sec. 19 of the Securities Exchange Act of 1934, as amended").
[30] *Id.* at 410.
[31] Hearings on H.R. 1498, H.R. 1821, and H.R. 2019, Before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17-19 (1943). *See also* Business Roundtable, 905 F.2d at 410 ("The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting.").
[32] *See* 8 Del. C. § 101 *et seq.* For a variety of reasons, most large publicly traded companies in the United States are incorporated in Delaware. This phenomenon has long been the subject of academic debate. *Compare* William L. Cary,

corporate annual meeting or to introduce a proposal for vote at the meeting—notwithstanding detailed rules governing annual meetings;[33] shareholder voting rights;[34] and shareholder rights to inspect shareholder lists and corporate books and records.[35] Apart from certain matters requiring a shareholder vote by law, or as otherwise specified in corporate bylaws or articles of incorporation, whether to take a shareholder vote on a matter is a matter of board discretion under Delaware law.[36]

In a very real sense, then, the SEC's shareholder-proposal rules abrogate state law and substitute a substantive federal overlay: if a corporate board could, under Delaware law, refuse to grant speaking rights to a shareholder at an annual meeting—or refuse to allow a shareholder to put a matter up for a shareholder vote—then the SEC's contrary insistence is an implicit preemption of state law.

And while *Congress* would surely have the power to override state corporate law and preempt the field, it has not done so. As I observed in my June comment letter, co-authored with Bernard Sharfman, considering the Commission's proposed climate-change rulemaking: "The U.S. Supreme Court has repeatedly stated that the SEC does not have the authority to interfere in the governance of corporations unless Congress has provided it with *express* authority to do so."[37] There is simply no statutory justification for the Commission to *require* any corporation, by virtue of trading securities on a national exchange, to submit various shareholder issues to a vote of all shareholders, absent the consent of the corporate board of directors or a contrary directive under state law.

Yet that is precisely what the SEC has long done. And in its role as "shareholder-proposal gatekeeper," the Commission has often modified its substantive approach in diametrically varying ways. Consider the SEC's handling of shareholder proposals that it in 1952 described as "primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes."[38] The SEC's longtime position was that it "was not the intent of [the shareholder-proposal rule] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature."[39] Thus, the SEC permitted companies to exclude shareholder proposals of such a nature from their proxy ballots.[40] In 1972,

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Federalism and Corporate Law: Reflections upon Delaware, 83 YALE L.J. 663, 663, 705 (1974) (lamenting a "race to the bottom" in U.S. corporate law) *with* Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (arguing that, *contra* Cary, the federal structure of corporate law creates a "race to the top"); Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989). *See also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (finding the "race to the top" hypothesis more supported than the "race to the bottom" hypothesis in empirical testing).

[33] *See id.* at §§ 211, 222, 228.

[34] *See id.* at §§ 212, 213, 216, 217, 218, 225, 231.

[35] *See id.* at §§ 219, 220.

[36] *See id.* at § 146.

[37] Bernard S. Sharfman & James R. Copland, Comment, File No. S7-10-22, Release Nos. 33-11042; 34-94478, ", The Enhancement and Standardization of Climate-Related Disclosures for Investors," June 16, 2022, *available at* https://www.sec.gov/comments/s7-10-22/s71022-20131661-302049.pdf. *See* Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations . . . particularly where established state policies of corporate regulation would be overridden.").

[38] Exchange Act Release No. 4775, 17 Fed. Reg. 11,431, 11,433 (1952).

[39] Securities Exchange Act Release No. 3638 (Jan. 3, 1945), 11 Fed. Reg. 10,995 (1946).

[40] *See* Exchange Act Release No. 4775, 17 Fed. Reg. 11,431, 11,433 (1952).

the SEC modified its substantive screen; its new rule merely permitted companies to exclude shareholder proposals "not significantly related to the business of the issuer or not within its control."[41] In 1976, the SEC issued an interpretive release recalibrating the new standard in a way that essentially *inverted* the pre-1972 rule: a company could exclude a shareholder proposal related to the "ordinary business" of the corporation only if the proposal "involve[d] business matters that are mundane in nature and do not involve any substantial policy or other considerations."[42]

Even were the SEC's shareholder-proposal rule to be a legal assertion of the Commission's statutory power, it is doubtful that its current iteration satisfies the Commission's statutory mandate to develop rules that "promote efficiency, competition, and capital formation."[43] To be sure, corporations are wise to communicate with shareholders—particularly those that list securities on actively traded exchanges. But it is instructive that no foreign regime has any equivalent to the SEC's Rule 14a-8; nor, to my knowledge, has any company not subject to the SEC rule voluntarily adopted anything remotely equivalent.

There's good reason for that. Large shareholders—including both ordinary institutional investors managing passive stock portfolios and actively managed hedge funds seeking to modify corporate behavior to drive returns—make almost no use of the shareholder-proposal process. Rather, the SEC's shareholder-proposal rule in its current form typically enables shareholders with a limited investment interest in the corporation—and/or an investment interest oriented around principles other than share value—to co-opt the corporate agenda for their own purposes.

As I have argued previously, allowing shareholders to exploit the shareholder-proposal process on behalf of far-flung social and environmental causes can be expected to hurt shareholder value.[44] As a general matter, equity ownership through outside common shareholders has substantially *higher* agency costs than alternative forms of ownership, such as employee ownership, customer ownership, or supplier ownership.[45] Yet ordinary common-stock ownership remains the *dominant* form of organization for large, profit-seeking enterprises in the United States. One reason why is that common-stock ownership minimizes collective decision-

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[41] *See* Exchange Act Release No. 9784, 37 Fed. Reg. 23,178, 23,180 (1972).

[42] *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, 52,997–98 (1976). To be sure, the SEC's reversal of position on shareholder proposals "of a general political, social or economic nature" did not occur in a vacuum. In 1970, a panel decision of the D.C. Circuit Court of Appeals had challenged the SEC staff's application of the rule in issuing a no-action letter to Dow Chemical; the staff's position was that the company could exclude a shareholder proposal from the Medical Committee on Human Rights asking that the company cease manufacturing napalm—as a matter of general political or social concern. *See* Med. Comm. for Human Rights v. Sec. & Exch. Comm'n, 432 F.2d 659, 663 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); *see also* 17 C.F.R. § 240.14a-8(c) (1970). The circuit court did not overturn the SEC's rule; rather, it remanded the case to the agency for reconsideration so that "the basis for (its) decision (may) appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." Med. Comm. for Human Rights, 432 F.2d at 682. And the decision has no precedential value, having been subsequently vacated as moot by the Supreme Court. 404 U.S. 403 (1972). But the D.C. Circuit's opinion—with its lofty invocation of the "philosophy of corporate democracy," 432 F.2d at 681—very likely influenced the SEC's retreat and indeed U-turn from its prior position.

[43] 15 U.S.C. § 78c(f).

[44] *See, e.g.*, Statement of James R. Copland, *supra* note 4; James R. Copland, *Getting the Politics out of Proxy Season*, WALL ST. J., Apr. 23, 2015, *available at* https://www.manhattan-institute.org/html/getting-politics-out-proxy-season-5461.html.

[45] *See generally* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 35–49 (1996).

making costs.[46] Thus, shareholder voting rights, like state common-law fiduciary duties, exist for the limited purpose of mitigating agency costs—not to facilitate miniature "corporate democracies."[47]

One need not be an expert in public-choice theory to comprehend that aggregating disparate voting interests along multiple factors can make collective action difficult.[48] Democratic and republican institutions have many virtues, but "efficiency" is not among them. Corporations are something else entirely. And for publicly traded companies, the ability to sell one's shares is by far the greatest form of "investor protection"—provided investors receive adequate, truthful information upon which to act, which is precisely why the SEC's traditional focus on disclosure has been generally so successful.[49]

The proposed changes to the SEC's 14a-8 process would compound many of these longstanding problems.

- In making it more difficult to exclude "duplicative" proposals, the SEC invites confusion, as parallel, substantially similar ballot items compete for investor approval. It is easily conceivable that shareholder votes might ultimately conflict—obfuscating rather than clarifying investor opinion for board fiduciaries.
- The same is true for making it easier to introduce proposals substantially similar to those already implemented. If investor sentiment today seems to conflict with an already implemented proposal from just a year before, is a board supposed to reverse course? Should profit-maximizing corporations cycle back and forth through policy ideas like legislatures—or independent agencies involved administrative rulemaking? Is implicitly insisting on such inconstancy really consistent with the SEC's statutory mandate to "promote efficiency, competition, and capital formation"[50]?
- As Commissioner Peirce suggested, the proposed new rule on resubmission thresholds essentially obviates the 2020 rulemaking on this issue—and make it more likely that companies cannot exclude identical shareholder proposals filed year after year, even if vast majorities of shareholders vote against them repeatedly. Aside from the fact that submission of shareholder proposals is not cost-free to the company—and implicitly other shareholders—the repeat

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[46] *See id.*

[47] *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601 (2006) (arguing that increasing the power of shareholders to hold managers accountable, including through increased disclosure, imposes significant costs in reduced managerial authority).

[48] *Cf.* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963) (articulating Arrow's Impossibility Theorem, which holds that, given certain fairness criteria, voters facing three or more ranked alternatives cannot convert their preferences into a consistent, community-wide ranked order of preferences).

[49] These concerns are theoretical, but the comport with at least some empirical evidence as well. The Manhattan Institute commissioned an econometric study of shareholder activism and firm value by Tracie Woidtke, an economics professor at the University of Tennessee. *See* The University of Tennessee Knoxville: Tracie Woidtke, http://finance.bus.utk.edu/Faculty/TWoidtke.asp. In her study, published in 2015, Professor Woidtke examined the valuation effects associated with public pension fund influence, measured through ownership, on Fortune 250 companies. Woidtke found that "public pension funds' ownership is associated with lower firm value" and, more particularly, that "social-issue shareholder-proposal activism appears to be negatively related to firm value." *See* Tracie Woidtke, *Public Pension Fund Activism and Firm Value*, at 16 (Manhattan Institute 2015), *available at* https://www.manhattan-institute.org/html/public-pension-fund-activism-and-firm-value-7871.html.

[50] 15 U.S.C. § 78c(f).

> submission of decisively rejected shareholder proposals enables certain shareholder activists to commandeer corporate resources for private benefit and manipulate the shareholder-proposal process to extract corporate rents.[51]

Part II: Shareholder Proposal Trends

Large publicly traded companies that have filed proxy statements so far this year have faced more shareholder proposals, per company, than in any other year historically, dating back to 2006.[52] Underlying this trend is a huge uptick in the number of shareholder proposals related to environmental or social concerns. To date, environmental and social-policy proposals in 2022 comprise 61% of all shareholder proposals on company proxy ballots, a higher percentage than in any other year dating back to 2006. With about 10% of company annual meeting results still outstanding in 2022, the 250 companies in the Proxy Monitor database have already faced 207 balloted shareholder proposals involving environmental or social concerns—up from 112 in 2021, 107 in 2020, 104 in 2019, and 97 in 2018.[53]

The near-doubling of environmental and social concerns from 2021 to 2022 is almost certainly attributable to the SEC's announced staff decision in November to jettison longstanding guidance that socially oriented shareholder proposals had to be material to a company's business to be placed on proxy ballots, in Legal Bulletin No. 14L.[54] Under this guidance, the staff has backed away from the agency's longstanding insistence that shareholder proposals related to social or policy issues evidence a "nexus between a policy issue and the company"; the agency staff's new approach focuses instead "on the social policy significance of the issue that is the subject of the shareholder proposal."

In light of the rapid escalation in the introduction of shareholder proposals on corporate proxy ballots—particularly driven by social and environmental proposals far afield from the sorts of disclosures material to deriving share value, the purpose of our federal securities laws—it is highly irresponsible for the SEC to create even more ambiguities in the 14a-8 process to flood companies with even more shareholder proposals.

Part III: First Amendment Concerns[55]

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[51] Consider the late corporate gadfly Evelyn Davis, who "publishe[d] a yearly investor newsletter, *Highlights and Lowlights*, which earn[ed] her an estimated $600,000 annual income. According to one media account, Davis [sold] the $495, 20-page newsletter in part by 'cajol[ing] the nation's business titans into subscribing … with a minimum order of two copies.' Company executives also regularly shower[ed] largesse on Davis to stay in her good graces. According to one report in the 1990s, executives of all three major American car companies offered to deliver any car she purchased to her. Lee Iacocca reportedly said that he would do so in person." James R. Copland et al., *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism*, at 9 (Manhattan Inst. for Pol'y Res., Fall 2012), *available at* http://www.proxymonitor.org/Forms/pmr_04.aspx.

[52] Data are compiled from the Manhattan Institute's Proxy Monitor database, publicly available at www.proxymonitor.org.

[53] The Proxy Monitor database tracks the largest 250 publicly traded companies, as identified by *Fortune* magazine.

[54] *See supra* note 12.

[55] This section of the comment letter substantially parallels the similar section in the comment letter submitted in the June 2022 comment letter, submitted in response the proposed climate-change rule, co-authored with Bernard Sharfman.

The First Amendment's protections apply to corporate speech,[56] even as the First Amendment's reach with regard to *commercial speech* is more "limited" than in other contexts.[57] A form of "intermediate scrutiny" applies to *restraints* on commercial speech.[58] A lesser standard yet applies to *compelled* government speech in the professional or corporate context.[59] Indeed, the SEC's very disclosure regime itself principally involves compelled government speech—based upon the Congressional judgment that such disclosures are in the public interest; protect investors; and promote efficiency, competition, and capital formation.[60]

Critically, however, the Supreme Court's precedents limiting the First Amendment's reach in the context of government-compelled commercial and professional disclosures hinge on the government disclosure rules involving "purely factual and uncontroversial information."[61] Applying this principle to securities regulation, the D.C. Circuit struck down as unconstitutional the SEC's "conflict minerals" rule[62]—notwithstanding Congress's express authorization to craft one.[63] The Court observed:

> [W]hether a product is "conflict free" or "not conflict free" – [is] hardly "factual and non-ideological". . . . Products and minerals do not fight conflicts. The label "[not] conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that "message'" through "silence." By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First

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[56] *Cf.* Citizens United v. FEC, 558 U.S. 310 (2010).
[57] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976).
[58] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of NY, 447 U.S. 557 (1980).
[59] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 652-53 (1985); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
[60] *Cf.* 15 U.S.C. § 77b(b); 15 U.S.C. § 78c(f).
[61] Zauderer, 471 U.S. at 642 (permitting regulation of commercial advertising requiring disclosure of "purely factual and uncontroversial information"); Becerra, 138 S. Ct. at 2372 (finding Free Speech violation when regulation required disclosure of "information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic").

The Circuit courts remain split on *Zauderer*'s reach. *Compare* National Ass'n of Manufacturers v. S.E.C., 800 F.3d 518, 528–29 (D.C. Cir. 2015); Dwyer v. Cappell, 762 F.3d 275, 283 (3d Cir. 2014); Handsome Brook Farm v. Humane Farm Animal Care, 700 Fed.App'x 251, 258 (4th Cir. 2017); Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd., 632 F.3d 212, 227 (5th Cir. 2011); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652–53 (7th Cir. 2006); Milavetz, Gallop & Milavetz, P.A. v. U.S., 541 F.3d 785, 795-96 (8th Cir. 2008); U.S. v. Wegner, 427 F.3d 840, 850 (10th Cir. 2005); Tillman v. Miller, 1996 WL 767477 (N.D. Ga.) at 2-3 *with* American Meat Institute v. U.S. Dep't of Agriculture, 760 F.3d 18, 27 (D.C. Cir. 2014); Pharmaceutical Care Management Association v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005); National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001); Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 530 (6th Cir. 2012); CTIA - The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117, (9th Cir. 2017); American Beverage Ass'n v. City and Cnty. of San Francisco, 871 F.3d 884, 892 (9th Cir. 2017).

Justice Thomas has called on the Court to reexamine *Zauderer*. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 255–56 (2010) (Thomas concurring). Of course, *Zauderer*'s "relaxed" approach to "government-mandated disclosures," *id.*, *limits* the First Amendment's reach. If *Zauderer* does not apply, the First Amendment's limitations on government-compelled disclosures are *higher*.
[62] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015); *see* Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).
[63] *See* 15 U.S.C. § 78(m).

Amendment.[64]

Beyond debate, many of the sorts of environmental and social-policy concerns the SEC currently compels corporations to publish on their proxy ballots are not "uncontroversial". And by definition, now, under Legal Bulletin No. 14L, corporations will be compelled to publish uncontroversial ideas with which they disagree regardless of whether such speech is material—or even germane—to the company's valuation, the sorts of financial disclosures the Securities Acts were designed to require.[65]

Conclusion

Although it is now longstanding, SEC Rule 14a-8 creates a *federal* process overseeing substantive rights of shareholders and the substantive conduct of annual meetings—effectively abrogating contrary state law without clear congressional direction. The Rule, as existing and especially as newly proposed, interfere with market efficiency and capital formation. And in its new iterations, the Rule compels speech in violation of the First Amendment.

Rather than moving in exactly the wrong direction, I would urge the Commission to take a significant step toward ameliorating this problem by making its requirement *default* rather than *mandatory*. My strong expectation would be that most publicly traded companies would opt for the stable expectations of sticking with the SEC default rule—at least for now. But there might be variation. And shareholders making actual buy and sell decisions could price the costs and benefits of alternative rules that more tightly constricted shareholders' ability to co-opt annual meetings through ballot proposals: shareholder voting is beset by collective-action problems that severely limit its efficacy as a decision rule; but share *markets* are highly efficient.

Rather than the current rule—exacerbated by the novel substantive staff guidance issued under Legal Bulletin No. 14L—the Commission should also clearly allow companies to *exclude* from proxy ballots shareholder proposals chiefly concerned with broad social and economic policy issues—as was the SEC's earlier rule, prior to 1976. I would not expect many companies to utilize this rule in sweeping fashion; institutional investors are themselves under significant pressures from their investors on environmental and social concerns;[66] and they would likely exert pressure on issuers who too cavalierly sought to exclude shareholder proposals from proxy ballots. Again, however, different issuers could employ different strategies. And investors in efficient markets could make buy and sell decisions pricing varying decision rules.

Please feel free to reach out to me, through the Manhattan Institute, about my testimony or any of the appended writings. Thank you for your time and consideration.

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[64] Nat'l Ass'n of Mfrs., 800 F.3d at 527.

[65] Others have articulated theories on First Amendment doctrine as applied to SEC disclosure regime. *See What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4118755. I incorporate that paper here by reference for the Commission's consideration, without endorsing in whole or part the professor's broader legal and policy claims.

[66] *See* Statement of James R. Copland, *supra* note 4.

Respectfully submitted,

James R. Copland
Senior Fellow and Director, Legal Policy, Manhattan Institute for Policy Research

Appendix: Additional Writings

Please incorporate by reference this sampling of additional testimony, reports, and other writings authored or co-authored by me or published under my direction by the Manhattan Institute.

Testimony

Statement of James R. Copland, "Economic Growth and Efficient Capital Markets: An Agenda at Odds with Subcommittee's Bills Under Consideration," Hearing before the House Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets: Promoting Economic Growth: A Review of Proposals to Strengthen the Rights and Protections for Workers, May 15, 2019, *available at* https://media4.manhattan-institute.org/sites/default/files/Testimony_JCopland_051519.pdf.

Statement of James R. Copland, "Who's Monitoring the Monitors? The Rise of Intermediaries and the Threat to Capital Markets," Hearing before the Senate Committee on Banking, Housing, and Urban Affairs: The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries, Apr. 2, 2019, *available at* https://www.banking.senate.gov/imo/media/doc/Copland%20Testimony%204-2-191.pdf.

Statement of James R. Copland, "SEC Rule 14a-8: Ripe for Reform," Hearing before the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises: Hearing on Corporate Governance: Fostering a System that Promotes Capital Formation and Maximizes Shareholder Value, Sept. 21, 2016, *available at* https://media4.manhattan-institute.org/sites/default/files/T-JC-0916.pdf

Comment Letters

James R. Copland, Comment, File No. S7-23-19, Release No. 34-87458, "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8," Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6741164-207698.pdf.

James. R. Copland, Comment, File No. S7-22-19, Release No. 34-87457, "Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice," Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-22-19/s72219-6742842-207818.pdf.

Bernard S. Sharfman & James R. Copland, Comment, File No. S7-10-22, Release Nos. 33-11042; 34-94478, ", The Enhancement and Standardization of Climate-Related Disclosures for Investors," June 16, 2022, *available at* https://www.sec.gov/comments/s7-10-22/s71022-20131661-302049.pdf.

Manhattan Institute Reports and Findings

James R. Copland & Margaret M. O'Keefe, *Proxy Monitor2017: Season Review* (Manhattan Institute 2017), https://www.proxymonitor.org/Forms/pmr_15.aspx.

James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2016: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2016), *available at* http://www.proxymonitor.org/pdf/pmr_13.pdf.

Tracie Woidtke, *Public Pension Fund Activism and Firm Value* (Manhattan Institute 2015),

https://media4.manhattan-institute.org/sites/default/files/lpr_20.pdf.

James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2015: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2015), *available at* https://www.proxymonitor.org/Forms/pmr_11.aspx.

James R. Copland, *Proxy Monitor 2015 Finding 3: Special Report: Public Pension Funds' Shareholder-Proposal Activism* (Manhattan Institute 2015), https://www.proxymonitor.org/Forms/2015Finding3.aspx.

James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2014: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2014), *available at* https://www.proxymonitor.org/Forms/pmr_09.aspx.

James R. Copland, *Proxy Monitor 2014 Finding 5: Frequent Filers: Shareholder Activism by Corporate Gadflies* (Manhattan Institute 2014), https://www.proxymonitor.org/Forms/2014Finding5.aspx.

James R. Copland, *Proxy Monitor 2014 Finding 4: Special Report: Shareholder Activism by Socially Responsible Investors* (Manhattan Institute 2014), https://www.proxymonitor.org/Forms/2014Finding4.aspx.

James R. Copland, *Proxy Monitor 2014 Finding 3: Special Report: Labor-Affiliated Shareholder Activism* (Manhattan Institute 2014), https://www.proxymonitor.org/Forms/2014Finding3.aspx.

James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2013: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2013), *available at* https://www.proxymonitor.org/Forms/pmr_06.aspx.

James R. Copland, *Proxy Monitor 2013 Finding 3: Special Report: Public Pension Fund Activism* (Manhattan Institute 2013), https://www.proxymonitor.org/Forms/2013Finding3.aspx.

James R. Copland with Yevgeniy Feyman & Margaret O'Keefe, *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2012), *available at* https://www.proxymonitor.org/Forms/pmr_04.aspx.

James R. Copland, *Proxy Monitor 2011: A Report on Corporate Governance and Shareholder Activism* (Manhattan Institute 2011), *available at* https://www.proxymonitor.org/Forms/pmr_02.aspx.

Article

James R. Copland, "Against an SEC-Mandated Rule on Political Spending Disclosure: A Reply to Bebchuk and Jackson," 3 *Harvard Business Law Review* 381 (2013), *available at* http://www.hblr.org/wp-content/uploads/2013/10/HLB209_crop.pdf.

Columns

James R. Copland, "Senator Warren's Bizarro Corporate Governance," *economics21.org*, Aug. 16, 2018, *available at* https://economics21.org/warren-backwards-corporate-governance.

James R. Copland, "Another Shareholder Proposal? McDonald's Deserves a Break Today," *Wall*

Street Journal, Jul. 7, 2017, *available at* https://www.wsj.com/articles/another-shareholder-proposal-mcdonalds-deserves-a-break-today-1499381801.

Howard Husock & James R. Copland, "'Sustainability Standards' Open a Pandora's Box Of Politically Correct Accounting, *Investor's Business Daily*, Mar. 24, 2017, *available at* https://www.investors.com/politics/commentary/sustainability-standards-open-a-pandoras-box-of-politically-correct-accounting/.

James R. Copland, "Getting the Politics out of Proxy Season," *Wall Street Journal*, Apr. 23, 2015, *available at* https://www.manhattan-institute.org/html/getting-politics-out-proxy-season-5461.html.

James R. Copland, "Politicized Proxy Advisers vs. Individual Investors," *Wall Street Journal*, Oct. 7, 2012, *available at* https://www.manhattan- institute.org/html/politicized-proxy-advisers-vs-individual-investors-3863.html.