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Purpose Proposals

Law Working Paper N° 638/2022
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I thank participants at the University of Chicago Business Law Review Symposium, the Tulane Corporate and Securities Roundtable and the BYU Winter Deals Conference as well as Rick Alexander, Cathy Hwang, Sanford Lewis, Peter Molk, Alessio Pacces and Harwell Wells for their many helpful comments and suggestions.

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Abstract

Repurposing the corporation is the hot issue in corporate governance. Commentators, investors and increasingly issuers, maintain that corporations should shift their focus from maximizing profits for shareholders to generating value for a more expansive group of stakeholders. Corporations are also being called upon to address societal concerns – from climate change and voting rights to racial justice and wealth inequality. The shareholder proposal rule, Rule 14a–8, offers one potential tool for repurposing the corporation. This Article describes the introduction of innovative proposals seeking to formalize corporate commitments to stakeholder governance. These "purpose proposals" reflect a new dynamic in the debate over stakeholder governance by enabling shareholders to communicate their views about corporate purpose to their fellow shareholders and management. At the same time, purpose proposals highlight the potential problems with a shareholder voting process dominated by a handful of institutional intermediaries whose interests, particularly with respect to corporate purpose, may not be aligned with those of their beneficiaries. This Article provides the first analysis of purpose proposals. It presents data on the introduction of these proposals and the extent to which they have commanded shareholder support. It interrogates the justifications for the proposals offered by their proponents. Finally, it considers the role of the shareholder proposal rule in offering a mechanism for shareholder debate over corporate purpose.

Keywords: Corporate governance, shareholder proposals, statements of purpose, stakeholder capitalism, public benefit corporations, PBCs, institutional investors, fiduciary duty, shareholder voting, SEC Rule 14a-8, ESG

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Purpose Proposals

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I. INTRODUCTION

Repurposing the corporation is the hot issue in corporate governance. For many years, corporate law scholars found common ground in the principle of shareholder primacy—that a corporation should operate in an effort to maximize shareholder value.[1] As members of the law and economics branch of the academy, Frank Easterbrook and Dan Fischel are commonly associated with the shareholder primacy norm.[2] In truth, however, the dominant theme of The Economic Structure of Law, the book that is the focus of this symposium issue, is the "corporation-as-contact."[3] Easterbrook and Fischel explicitly recognized the potential that shareholder primacy might lead to corporate behavior that was not socially optimal and that, "[w]hen situations of this sort occur, there are gains to be had in overriding the corporate contracts."[4]

Agreement on the shareholder primacy norm has evaporated. In November 2019, the Business Roundtable (the BRT) issued its "new" statement on the purpose of the corporation, replacing its focus on shareholder primacy with a statement signed

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[1] *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637 (2006) (explaining and critiquing the shareholder primacy norm).

[2] *See, e.g.*, William W. Bratton, *Team Production Revisited*, 74 VAND. L. REV. 1539, 1552 (2021) ("Shareholder primacy is a tie that binds together Jensen and Meckling's model, Easterbrook and Fischel's contractarianism, and the shareholder paradigm"). *See generally* FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). As Ed Rock explains in his contribution to this symposium, Easterbrook and Fischel in fact take the view that corporate participants need not contract for shareholder primacy and that the purpose of the corporation is merely a term of the corporate contract. Edward Rock, *Easterbrook and Fischel on Corporate Purpose*, 1 U. CHI. BUS. L. REV. __, __ (2022).

[3] EASTERBROOK & FISCHEL, *supra* note 2 at 7.

[4] Frank Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1439 (1989).

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by 181 CEOs who committed to a purpose of maximizing value for all stakeholders.[5] Scholars have already written dozens of articles and books arguing that the traditional corporate purpose of maximizing shareholder value is inappropriate and outdated, and proposing that corporations reframe their purpose in terms of stakeholder and/or societal interests.[6] Defenders of the repurposed corporation differ in their objectives and in the scope of their proposals, but their general mission enjoys broad-based support from investors and commentators.

Corporations appear to be taking these concerns to heart. In the last several years, a growing number of companies, even those that traditionally resisted pressure to make their operations more sustainable, have publicly announced their plans to improve. General Motors announced a goal of phasing out the manufacture of all gas-powered vehicles by 2035.[7] Exxon revealed a five-year climate change plan to comply with the Paris Agreement's reduction targets.[8] And HSBC reported that it will target net zero carbon emissions across its entire customer base by 2050.[9]

Whether these issuers will treat these statements as binding commitments remains to be seen. One article studied the process by which corporate CEOs signed the BRT statement and concluded that signing the statement did not reflect a meaningful commitment by issuers to a shift in business operations and instead appeared to be "mostly for show."[10] To be fair, a true commitment to stakeholder capitalism would involve substantial and perhaps costly changes to the way many issuers currently operate.[11] Moreover, the BRT is a membership organization of chief executive officers, not corporations, and it is not entirely clear why a CEO's individual

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[5] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), https://perma.cc/A2GD-AM25.

[6] *See, e.g.*, Research Handbook on Corporate Purpose and Personhood (Elizabeth Pollman & Robert B. Thompson eds., 2021); Alex Edmans, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (2020); Colin Mayer, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (2018).

[7] Camila Domonoske, *General Motors Sets All-Electric Target for Vehicles by 2035*, NPR (Feb. 1, 2021), https://perma.cc/2TZV-QN7B.

[8] Eric Rosenbaum, *Oil Giant Exxon Mobil Pushes New Climate Change Plan as Activist Investors Circle*, CNBC (Dec. 14, 2020), https://perma.cc/AM5Q-ULQ5.

[9] Lawrence White et al., *HSBC Targets Net Zero Emissions by 2050, Earmarks $1 Trillion Green Financing*, REUTERS (Oct. 9, 2020), https://perma.cc/3YQH-QMXL.

[10] Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 98 (2020).

[11] *See, e.g.*, Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARV. BUS. REV. (Aug. 30, 2019), https://perma.cc/6S7J-Y3VA ("For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business.").

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support of a social policy would or should drive corporate action.[12] A meaningful change in corporate purpose would presumably require support by the board of directors and the shareholders.

SEC Rule 14a–8, the shareholder proposal rule,[13] offers a vehicle both for developing shareholder support for a reframed corporate purpose and demonstrating that support to the board of directors. Following the BRT statement, shareholders began to introduce proposals seeking to have corporations formalize their commitment to repurposing. This Article terms these "purpose proposals."[14] Purpose proposals take several forms including seeking disclosure about the corporation's existing commitments, restructuring the corporation to increase its focus on stakeholder capitalism, and advocating that the corporation amend its charter to convert to a public benefit corporation (PBC). For example, a purpose proposal introduced at Fox Corp.'s Nov. 10, 2021 annual meeting requested that the Fox "Board of Directors take steps necessary to amend our certificate of incorporation and, if necessary, bylaws (including presenting such amendments to the shareholders for approval) to become a public benefit corporation" and that "one of the public benefits included in the amendment be provision of the Company's viewers with an accurate understanding of current events through the exercise of journalistic integrity . . . ."[15]

Purpose proposals are consistent with a long tradition of shareholders using the shareholder proposal rule to encourage governance reform.[16] The modest ownership stake and relatively low-cost procedural requirements for introducing a shareholder proposal allow investors to place new issues before their fellow

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[12] *See About Us,* BUS. ROUNDTABLE, https://perma.cc/CVD9-8UFG (last visited Feb. 12, 2022) ("Business Roundtable is an association of chief executive officers of America's leading companies").

[13] 17 C.F.R. § 240.14a–8.

[14] The article uses the term purpose proposals to distinguish proposals that explicitly address corporate purpose from the broad range of shareholder proposals that address issues of ESG, social issues and stakeholder value. *See, e.g.*, *Say on Climate: Shareholder Voting on Climate Transition Action Plans*, CHILDREN'S INV. FUND FOUND., https://perma.cc/8H53-K9ME (last visited Feb. 12, 2022) (proposing "say on climate" shareholder votes on corporate climate transition plans); Lorraine Woellert Catherine Boudreau & Kellie Mejdrich, *Shareholders Target 'White Man's World' with Record Demands for Diversity Data*, POLITICO (Apr. 6, 2021), https://perma.cc/8KTN-BWPK (describing shareholder proposals addressing board and workforce diversity).

[15] Def. Schedule 14A, Fox Corp., Sept. 17, 2021, at 57, https://sec.report/Document/0001193125-21-276133/.

[16] *See generally* James D. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating a Corporate Public Square*, 3 COLUM. BUS. L. REV. 1147, 1163 (2021) ("[S]ome highly successful shareholder proposal campaigns influenced the broad adoption of various corporate governance practices.").

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shareholders, managers, and corporate boards. Although the subjects of shareholder proposals vary substantially, and some fade quickly into obscurity, others gradually build sufficient support leading not only to their implementation but to their incorporation into future standards of good governance.[17]

At the same time, shareholder proposals are controversial. Critics argue that there are too many such proposals, that they are frequently sponsored by retail investors with small stakes, termed "corporate gadflies," and that they do not enhance economic value.[18] These concerns led the SEC in September 2020 to revise the shareholder proposal rule to raise the ownership threshold required to submit or resubmit a shareholder proposal.[19] More recently (under a different administration), the SEC staff issued new interpretive guidance rejecting its previous company-specific approach to evaluating the permissibility of social policy proposals and stating that it would no longer approve the exclusion of shareholder proposals raising "issues with a broad social impact."[20]

Purpose proposals present a novel twist. On the one hand, they highlight the power of shareholder proposals to raise a new issue for shareholder debate. The structure of the shareholder proposal rule includes a mechanism by which the proponent and the issuer present arguments for and against the proposal.[21] Through the voting process, fellow shareholders communicate their evaluation of the strengths of these arguments. These evaluations may be further informed by third-party advisors

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[17] *Id.*; *see also* S'HOLDER RIGHTS PROJECT, THE SHAREHOLDER RIGHTS PROJECT REPORT FOR THE 2012 AND 2013 PROXY SEASONS (Oct. 20, 2013) (describing successful campaign by Harvard Shareholder Rights Project seeking declassification of corporate boards through the introduction of shareholder proposals), https://perma.cc/4NCN-WTMG.

[18] *See, e.g.*, Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy: Gadflies and Low-Cost Activism*, 34 REV. FIN. STUD. 5629, 5630 (2021) (finding that "proposals implemented by active individual sponsors destroy shareholder value if they are implemented"); Cox & Thomas, *supra* note 16, at 1198 ("Finally, we are concerned that gadfly investors are making an excessive number of proposals that decrease the value of targeted firms.").

[19] Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8, 85 Fed. Reg. 70,240 (proposed Nov. 4, 2020) (codified at 17 C.F.R. § 240.14a–8). The rule has been challenged in the D.C. District Court. *See* Complaint, *Interfaith Ctr. on Corp. Resp. v. U.S. Sec. & Exch. Comm'n*, No. 1:21–cv–01620 (D.D.C. filed June 15, 2021), https://perma.cc/4GAT-4EXK.

[20] SEC Staff Legal Bulletin No. 14L (Nov. 3, 2021), https://perma.cc/EJ5Y-5VTK; Sanford Lewis, *SEC Resets the Shareholder Proposal Process*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Dec. 23, 2021), https://perma.cc/8NTD-FDKV (explaining the significance of the bulletin and arguing that it will "make it easier for shareholders to write clear and specific proposals that will survive a no-action challenge—which is a good thing"); *see also* Letter from Frederick Alexander, CEO, S'holder Commons, to Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n (Aug. 20, 2021), https://perma.cc/6VYC-2YWR (expressing concern that SEC staff was inappropriately excluding shareholder proposals about company's externalization of costs).

[21] The rule allows the proponent to include a supporting statement so long as the proposal and supporting statement are limited to 500 words. 17 C.F.R. § 240.14a–8.

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such as proxy advisors.[22] The nonbinding nature of most shareholder proposals allows this debate to take place within a framework in which, regardless of the voting outcome, the decision to implement the proposal is ultimately made by the board of directors, subject to fiduciary constraints. The shareholder proposal thus offers a relatively low-cost and low-stakes procedure for introducing governance innovation.

On the other hand, the mechanics of modern shareholder voting offer new reasons for skepticism. Today, institutional shareholders cast the overwhelming majority of votes at shareholder meetings.[23] Voting power is concentrated in the hands of small number of asset managers who manage the money of participants in employer-sponsored 401(k) plans but who have no economic interest in the stock they are voting, a problem I have previously described as "empty voting."[24] The beneficiaries in these plans play little or no role in selecting the asset managers and determining their voting preferences.[25] As a result, there is a risk that the institutional votes that drive outcomes may not accurately reflect the interests of those with real economic stakes. This risk is exacerbated by the shift from proposals that focused primarily on economic value to proposals with societal and political implications, proposals on which asset managers may have particular reasons to vote differently from the way their beneficiaries would vote.[26]

This Article provides the first analysis of purpose proposals. It presents data on the introduction of and support for such proposals. It considers how the shareholder proposal rule provides a forum to debate stakeholder governance and corporate purpose. The data indicate that, at least in this context, the shareholder proposal rule is working as intended and provide evidence that the Trump administration's 2020 recent efforts to restrict its scope were misguided.[27]

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[22] *See, e.g.*, Douglas Sarro, *Proxy Advisors as Issue Spotters*, 15 BROOK. J. CORP. FIN. & COM. L. 371, 405–07 (2021) (describing studies on the effect of proxy advisor recommendations on support for shareholder proposals).

[23] Institutional investors control as much as 80% of the voting rights of large publicly traded companies. Sean Griffith & Dorothy Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. Rev. 1151, 1155 (2019). Moreover, institutions vote more than 90% of their shares, while retail investors vote fewer than 30%. Jill Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 14 (2018).

[24] Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem*, 16 BROOK. J. CORP. FIN. & COMM. L. 71 (2021).

[25] Id.

[26] *See, e.g.*, Jeff Schwartz, *Public Mutual Funds*, *in* CAMBRIDGE HANDBOOK ON INVESTOR PROTECTION (Arthur Laby ed., forthcoming Oct. 2022) (describing potential self-interested motives for asset managers to support socially oriented proposals).

[27] *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8, *supra* note 19.

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The data also indicate that, at present, shareholder support for repurposing the corporation, at least through conversion to a PBC, is limited. The Article identifies as one potential explanation the failure of stakeholder governance to confront the potential tradeoffs between shareholders and other stakeholders. Purpose proposals serve a valuable information-forcing role in this debate. Although purpose advocates justify formalizing stakeholder capitalism as necessary to enable corporate decisionmakers to prioritize non-shareholder interests, they offer no framework or limiting principle with respect to that prioritization.[28] This issue presents particular concern for institutional intermediaries. Purpose proposals force proponents to address these issues explicitly. Similarly, they force shareholders to consider whether and how corporations should trade off among shareholder and stakeholder interests.

The Article proceeds as follows. Part II briefly describes the evolving debate over corporate purpose. Part III explains the role of shareholder proposals in corporate governance reform. Part IV describes the new phenomenon of purpose proposals. Part V explores how purpose proposals can advance the debate over over stakeholder governance and, in doing so, demonstrates the value of the shareholder proposal rule.

II. THE DEBATE OVER CORPORATE PURPOSE

When the BRT introduced its "new" statement of corporate purpose in 2019, it made headlines around the world.[29] The BRT, an organization comprised of the CEOs of leading U.S. companies,[30] had long adhered to principles of corporate governance that endorsed shareholder primacy—"that corporations exist principally to serve shareholders."[31] The 2019 statement purported to supersede the organization's previous statements in favor of a commitment to lead corporations "for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders."[32]

This revised statement of purpose tapped into a growing and global corporate governance movement in support of stakeholder governance. Following the release of

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[28] I have identified elsewhere the limits of the PBC in addressing stakeholder governance. See Jill E. Fisch & Steven Davidoff Solomon, The "Value" of a Public Benefit Corporation, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds.) (2021).

[29] BUS. ROUNDTABLE, *supra* note 5; *see* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1310 (2021) (reporting that the BRT statement "made international headlines").

[30] *Members*, BUS. ROUNDTABLE, https://perma.cc/5UFT-UYBJ (last visited Feb. 12, 2022).

[31] BUS. ROUNDTABLE, *supra* note 5.

[32] Id.

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the BRT statement, the World Economic Forum published a manifesto stating that the corporation's purpose was to promote value creation for the benefit of all its stakeholders.[33] Subsequently, corporate leaders, major asset managers, and policymakers have embraced stakeholder governance.[34] As the Australian Institute of Company Directors put it, "it is increasingly recognised that the best interests of an organisation cannot be isolated from the interests of its stakeholders, including the community."[35]

Although support for stakeholder governance is widespread, there is considerably less agreement on what stakeholder governance entails. Lucian Bebchuk and Roberta Tallarita identify different versions of stakeholder governance.[36] In what they term "instrumental stakeholderism," corporate leaders consider the interests of stakeholders as a means to further long-term shareholder value.[37] In "pluralistic stakeholderism," by contrast, the welfare of stakeholders is an end in itself and is valuable independent of its effect on shareholder value.[38] By definition, therefore, pluralistic stakeholderism can entail the sacrifice of shareholder interests in favor of the interests of other stakeholders.

Stakeholder capitalism also raises questions of priorities—exactly which stakeholder interests count and what weight should be given to their respective interests?[39] Commonly cited stakeholders include employees, customers, and suppliers, but stakeholders might include the communities in which corporations operate or the public at large. Former Delaware Supreme Court Justice Leo Strine has argued that stakeholder governance should place particular weight on employee interests.[40] Other

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[33] Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), https://perma.cc/7QD3-3UXT ("The purpose of a company is to engage all its stakeholders in shared and sustained value creation.").

[34] *See, e.g.*, Martin Lipton & William Savitt, *Wachtell Lipton Discusses Myths About Advances in Stakeholder Governance*, CLS BLUE SKY BLOG (Aug. 25, 2021), https://perma.cc/Q5FT-URUM ("The signs of the step-up in the embrace of stakeholder governance by corporations and their major investors are everywhere.").

[35] *5 Basic Principles for Effective Stakeholder Governance*, AUST. INST. OF CO. DIRS. (May 1, 2021), https://perma.cc/A5LR-ZP4F.

[36] Bebchuk & Tallarita, *supra* note 10, at 108.

[37] *Id.* at 108–09.

[38] *Id.* at 114.

[39] *See id.* at 117–18 (noting the range of stakeholders identified in state constituency statutes).

[40] LEO E. STRINE, JR., ROOSEVELT INST., TOWARD FAIR AND SUSTAINABLE CAPITALISM (Aug. 13, 2020).

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commentators have focused on the role of stakeholder capitalism in addressing climate change and other environmental issues.[41]

To the extent stakeholder governance is merely a strategy for enhancing shareholder value, it is unclear that it represents anything novel from a corporate law perspective or requires a reexamination of legal constraints such as corporate purpose or managerial fiduciary duties. If, however, stakeholder governance is intended to authorize or even require the sacrifice of shareholder value, it raises questions both about the extent to which corporate law can or should permit that sacrifice as well as the process by which such decisions should be made. Should a decision by a corporation to pursue stakeholder governance be made by the board of directors? Should shareholders have a voice? And should the decision be formalized through recognition in the charter and bylaws, the corporation's governing documents, or by conversion to a distinctive legal structure such as a PBC?[42]

III. SHAREHOLDER PROPOSALS AND CORPORATE GOVERNANCE

As with many corporate governance developments,[43] stakeholder governance has become the subject of recent shareholder proposals. The Securities & Exchange Commission promulgated the shareholder proposal rule, Rule 14a–8, in 1942, pursuant to its authority to regulate the solicitation of proxies under the Securities Exchange Act of 1934.[44] Rule 14a–8 gives shareholders who meet designated criteria the right to submit a proposal. If the proposal meets the thresholds and limitations of the rule, it must be included in the issuer's proxy statement and voted upon by the other shareholders.[45] As a Ceres report explains: "For more than seven decades, the

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[41] *See, e.g.*, Sally Ho, *Stakeholder Capitalism: The Climate Crisis Solution You've Never Heard Of*, GREEN QUEEN (May 12, 2020), https://perma.cc/7CP9-YYPS.

[42] Notably, Senator Elizabeth Warren's Accountable Capitalism Act proposed using the public benefit corporation as a mechanism for holding corporations more accountable to stakeholder and societal interests. The Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

[43] See Paul Rose, *Shareholder Proposals in the Market for Corporate Influence*, 66 FLA. L. REV. 2179, 2180 (2014).

[44] *See* Jill Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1144 (1993) (recounting the history of the shareholder proposal rule).

[45] The rule explicitly authorizes the issuers to exclude proposals for a variety of reasons. 17 C.F.R. § 240.14a–8(i). The SEC staff oversee the criteria by which proposals are excluded pursuant to the no-action process. *See* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L. J. 262, 273 (2016) ("Rule 14a–8 allows a company to exclude a shareholder proposal based on several specified grounds with the approval of the SEC's Division of Corporation Finance in what is called a 'no-action letter.'"). During the period from 2007 to 2019, the SEC staff granted no-action requests in two-thirds of the cases in which they were requested. John G.

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shareholder proposal process has allowed both large and small shareholders to alert corporate boards and the investor community to their concerns and to request timely action on emerging, or neglected, issues."[46] Today Rule 14a–8 is considered to represent the "epicenter" of the shareholder rights movement.[47]

Shareholder proposals have largely been understood as a tool for shareholders to communicate their views to their fellow shareholders and the board of directors.[48] Although shareholders can and sometimes do seek to implement changes to corporate policy directly through the shareholder proposal rule—such as by proposing amendments to the corporate bylaws—the majority of proposals are precatory, meaning that they are not binding and simply request the board or the company to take action.[49] Even precatory proposals, however, increasingly lead to board action when they command the support of a majority of the shareholders.[50] The impact of shareholder proposals has been enhanced by the policy of leading proxy advisor Institutional Shareholder Services (ISS) to recommend that shareholders vote against the members of a board that fails to take action in response to a proposal that has received majority support.[51]

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

[46] Ceres, *The Business Case for the Current SEC Shareholder Proposal Process* 3 (Apr. 2017), https://perma.cc/WT4Y-DVWH.

[47] J. Robert Brown, *The Evolving Role of Rule 14a–8 in the Corporate Governance Process*, 93 DENV. L. REV. 151, 151 (2016).

[48] *See* Cox & Thomas, *supra* note 16 at 1197–1198 (arguing that the shareholder proposal rule should be understood as a "corporate public square" "where corporate management and directors can take the pulse of their shareholders . . . .").

[49] Emiliano Catan and Marcel Kahan identify four areas in which shareholders have the power "to initiate votes": removal of directors, amending the bylaws, filling board vacancies and adopting a precatory proposal. Emiliano M. Catan & Marcel Kahan, *The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent*, 99 B.U. L. REV. 743, 749–50 (2019). Accordingly, if shareholders want to initiate any other corporate action, their proposal must be framed as a precatory request or recommendation to the board of directors. Haan, *supra* note 45, at 273 ("most shareholder proposals—and virtually all social and environmental proposals—are precatory, which means that they are recommendations and are not binding on management.").

[50] Yonca Ertimur, Fabrizio Ferri & Stephen R. Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53, 54 (2010) (finding "reputation penalties" for directors that failed to implement a shareholder proposal supported by a majority of votes cast).

[51] *See* ISS, U.S. PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 12 (Nov. 19, 2020), https://perma.cc/NU96-SBKX (explaining that ISS will analyze, on a case-by-case basis whether to recommend voting against directors if "[t]he board failed to act on a shareholder proposal that received the support of a majority of the shares cast in the previous year . . . .").

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Historically, commentators have divided shareholder proposals into two categories: governance proposals and social policy proposals.[52] For four decades, a small number of individual investors, often termed "corporate gadflies" were virtually the only sponsors of shareholder proposals.[53] For many years, the proposals sponsored by these gadflies never received majority support.[54]

Subsequently, religious organizations became a major source of shareholder proposals. One of the most prominent was the Interfaith Center for Corporate Responsibility (ICCR).[55] Most of the proposals sponsored by the ICCR were social policy proposals.[56] Individual religious organizations have sponsored many high-profile proposals, such as Trinity Wall Street's proposal seeking to keep Wal-Mart from selling guns.[57] Other social investors, such as the People for the Ethical Treatment of Animals and the National Legal and Policy Center, also submitted shareholder proposals on social policy issues.[58] The Project on Corporate Responsibility, formed by Ralph Nader, was behind "Campaign GM," an effort to make General Motors more socially responsible.[59]

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[52] Haan, *supra* note 45, at 272 ("The academic literature generally divides shareholder proposals into a corporate governance category and a social and environmental category.").

[53] *See generally* Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569 (2021) (tracing the rise and dominance of corporate gadflies in the shareholder proposal process). A small number of individual shareholders continue to be responsible for most shareholder proposals. *Id.* at 581; James R. Copeland, *Frequent Filers: Shareholder Activism by Corporate Gadflies*, PROXY MONITOR (2014), https://perma.cc/HV4K-GPJB (reporting that, from 2006 to 2014, three individual shareholders have been the most frequent sponsors of shareholder proposals).

[54] Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J., 435, 479–80 (2012) ("[T]he shareholder proposal rule existed and was used for four decades despite the fact that shareholder proposals virtually never received majority approval . . . .").

[55] Jayne W. Barnard, *Shareholder Access to the Proxy Revisited*, 40 CATH. U. L. REV. 37, 80 n.266 (1990) ("The Interfaith Center for Corporate Responsibility, an affiliate of the National Council of Churches, has organized proxy campaigns among shareholding churches, religious orders, and others since 1971.").

[56] Janet E. Kerr, *Delaware Goes Shopping for a "New" Interpretation of the* Revlon *Standard: The Effect of the* QVC *Decision on Strategy Mergers*, 58 ALB. L. REV. 609, 610 n.7 (1995) ("[M]ost of [the ICCR's proposals dealt] with questions that loosely may be called 'social responsibility.'").

[57] *See Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3d Cir. 2015) (describing Trinity Wall Street's proposal and ruling that Wal-Mart could properly exclude it from the proxy statement).

[58] James R. Copeland with Yevgeniy Feyman & Margaret O'Keefe, *A Report on Corporate Governance and Shareholder Activism*, PROXY MONITOR (2012), https://perma.cc/LTE7-72VB.

[59] Richard Halloran, *Nader to Press for G.M. Reform*, N.Y. TIMES (Feb. 8, 1970), https://perma.cc/K66M-VBNC.

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Among mainstream institutional investors, public pension funds were the first to use the shareholder proposal rule, starting in the 1980s.[60] In the 1990s, labor unions began to use shareholder proposals to promote employment-friendly corporate policies or, more commonly, to promote general corporate governance reforms.[61] Institutions focused largely on governance proposals, leading to an increase both in the number of governance proposals and the support for such proposals.[62] The corporate governance scandals of the early 2000s accelerated investors' focus on governance practices.[63]

Over time, institutional support grew for shareholder proposals advocating the adoption of so-called good governance practices like majority voting and the declassification of boards of directors.[64] In 1987, for example, proposals to declassify boards of directors received the support, on average, of 16 percent of votes cast. In 2012, these proposals boasted an average of 81 percent level of support.[65] Traditionally, corporate directors were elected by a plurality vote, and the idea of electing directors in uncontested elections by majority was considered radical.[66] But shareholders used 14a–8 proposals successfully to implement majority voting systems.[67] In 2005, the California Public Employees' Retirement System adopted a plan that included sponsoring majority vote shareholder proposals, and, during the 2005 proxy season, majority vote proposals received an average 43 percent vote in favor.[68] By 2017, 90 percent of large-cap U.S. companies elected directors by

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[60] Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174 (2001).

[61] Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998).

[62] Jill E. Fisch, *The Transamerica Case*, *in* THE ICONIC CASES IN CORPORATE LAW 46, 60 (Jonathan R. Macey ed., 2008); Romano, *supra* note 60, at 185–86.

[63] Kosmas Papadopoulos, *The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance (2000–2018)*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), https://perma.cc/BT7N-ZDAE ("the number of shareholder proposal filings dealing with governance issues rose by 50 percent in 2003").

[64] *Id.*

[65] *See* CERES, *supra* note 42.

[66] Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1121 (2016).

[67] *See, e.g.*, Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1290–91 (2009) (describing growth in number of and support for majority voting shareholder proposals and the subsequent "dramatic shift" in "the voting standard at most major corporations").

[68] *Majority Voting for Directors: The Latest Corporate Governance Initiative*, LATHAM & WATKINS LLP (Dec. 9, 2005), https://perma.cc/2Z5K-EENW.

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majority vote.[69] NYC Comptroller Scott Stringer's Boardroom Accountability Project sponsored proxy access proposals at 75 companies in 2014 and reported that, of the proposals that went to a shareholder vote, two-thirds received majority support.[70] As of 2019, the project stated that it had contributed to a 10,000 percent increase in the number of companies that had proxy access.[71]

In the last several years, the focus of shareholder proposals has shifted to embrace issues involving stewardship, sustainability, ESG investing, and corporate purpose.[72] The SEC traditionally viewed social policy proposals with skepticism and, at various times, acted to restrict their use.[73] For example, in 1952, the SEC amended Rule 14a–8 to provide that issuers could exclude proposals made "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."[74] Similarly, institutional engagement focused on governance proposals, and proposals addressing social policy issues received more limited support.[75]

The growing public debate over a variety of social policy issues including climate change, employee rights, and racial justice, as well as the stakeholder capitalism movement, have increased the willingness of institutional investors to support environmental and social proposals.[76] In the 2021 proxy season, a record

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[69] *Id.* There have been similar developments with many other governance practices, including independent directors, requesting proxy access, diversity, and "say-on-pay" vote requirements. *Id.*

[70] *Boardroom Accountability Project*, N.Y.C. COMPTROLLER, https://perma.cc/PV39-DQTW (last visited Feb. 12, 2022).

[71] Id.

[72] Papadopoulos, *supra* note 63.

[73] *See* Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of* Peck v Greyhound (Temple Univ., Legal Studies Research Paper Series, Research Paper No. 2021–29, 2021), https://perma.cc/SQ2T-EE2Y (chronicling the SEC's increasingly restrictive approach to allowing shareholders to introduce social policy proposals).

[74] Solicitation of Proxies, Exchange Act Release No. 4775, 17 Fed. Reg. 11,430, 11,433 (Dec. 11, 1952). The SEC removed this restriction after Senator Edmund Muskie introduced legislation that would have barred "exclusion of shareholder proposals '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.'" S. 4003, 91st Cong., 2d Sess. (June 23, 1970); *see* Fisch, *supra* note 44, at 1154 (explaining that the SEC removed the restriction on social policy proposals in 1972, in response to this legislation).

[75] See Romano, *supra* note 60, at 185–86 (highlighting differing levels of shareholder support for corporate governance proposals versus social policy proposals).

[76] Kate Hilder, Mark Standen & Siobhan Doherty, *Institutional Investors have Changed Their Tune on Supporting ESG Shareholder Proposals?*, MINTER ELLISON (May 26, 2021), https://perma.cc/N2EG-JRU8 (citing research finding that "the level of support for climate change, political activity and diversity related shareholder proposals has spiked, due in part to the uptick in support from large institutional investors"); Jackie Cook, *How Fund Families Support ESG-Related Shareholder Proposals*, MORNINGSTAR (Feb. 12, 2020), https://perma.cc/62W3-HQ4E ("Asset-manager proxy voting

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thirty-three environmental and social proposals received majority shareholder support.[77]

As social policy proposals enter the mainstream, they have blurred the traditional line between governance and social policy proposals. For example, board diversity, which has received growing institutional support,[78] is generally understood to encompass both a social and a governance component.[79] Public pension funds are increasingly sponsoring proposals that address ESG issues.[80] Religious organizations like the ICCR have focused greater attention on governance and the relationship of governance to environmental and social issues.[81] And new organizations are emerging that function as ESG entrepreneurs. These include non-profits As You Sow,[82] the Shareholder Commons,[83] the Center for Political Accountability[84] and investment management firm Arjuna Capital.[85] Overall, the number of shareholders

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support for ESG-related shareholder resolutions has increased considerably over the past five years.").

[77] *Majority Support for E&S Proposals Almost Doubles in US*, IR MAG. (Oct. 26, 2021), https://perma.cc/SBJ4-HM76.

[78] Max Chen, *ESG Activists Are Calling for Greater Board Diversity*, ESG CHANNEL (Jan. 15, 2021), https://perma.cc/3XEB-GVPY (describing the "big three institutional investors BlackRock (BLK), Vanguard, and State Street (STT), along with proxy advisors Institutional Shareholder Services and Glass Lewis, [as] all pushing for diversity and inclusion as a major focus").

[79] *See* Jill E. Fisch & Steven Davidoff Solomon, Centros*, California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019) (questioning whether California's board diversity statute is aimed at promoting shareholder or stakeholder value); *SEC Approves New Nasdaq Board Diversity Rules*, GIBSON, DUNN & CRUTCHER LLP (Aug. 12, 2021), https://perma.cc/B7EY-989X (describing Nasdaq's new listing standards regarding board diversity as part of an effort "to improve corporate governance at listed companies").

[80] Emily Glazer, *Shareholders Press Facebook for Governance Changes*, WALL ST. J. (Dec. 13, 2021), https://perma.cc/89F5-CSHZ (citing proposals by the New York State Common Retirement Fund and Illinois State Treasurer).

[81] Id.

[82] *About Us*, AS YOU SOW, https://perma.cc/DH6G-X96Z (last visited Feb. 12, 2022).

[83] *About*, THE SHAREHOLDER COMMONS, https://perma.cc/DH6G-X96Z (last visited Feb. 12, 2022).

[84] The Center for Political Accountability developed a template for a shareholder proposal requesting that corporations disclose their political spending and coordinates shareholder activism on such disclosure. See Center for Political Accountability, Recent Shareholder Engagement, https://www.politicalaccountability.net/recent-shareholder-engagement/.

[85] *Arjuna Capital/Proxy Impact: Over Half of Top U.S. Companies Get an "F" on Racial and Gender Pay Scorecard*, BUS. WIRE (Mar. 23, 2021, 2:46 PM EDT), https://perma.cc/X2P6-PCN4 (describing Arjuna's engagement through the shareholder proposal process to seek issuers to close racial and equity pay gaps).

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submitting proposals, as well as the number of co-sponsors of proposals, has grown.[86]

Shareholder proposals take several approaches in seeking to generate greater incorporation of ESG principles into corporate decision-making. Many proposals request increased transparency.[87] In the 2020-2021 proxy season, for example, shareholders introduced proposals asking corporations to disclose the systemic costs of antibiotic use in the company's supply chain (McDonalds),[88] data on workforce and board diversity,[89] the climate risks faced by the company,[90] and how the company's climate lobbying activities align with the Paris Agreement.[91] Proposals also seek to impose greater accountability through board oversight of sustainability strategies or to encourage specific outcomes such as identification of greenhouse gas targets.[92] Finally, shareholders have submitted "say on climate" proposals, seeking to have issuers adopt a process by which shareholders could vote on the company's transition plan or climate strategy.[93]

In November 2021, the SEC staff announced a policy change designed to facilitate the use of Rule 14a–8 for social policy proposals by removing the requirement that a sponsor demonstrate that a social policy proposal has a significant economic effect on an issuer.[94] The number and scope of ESG proposals is likely to increase in light of this change.[95]

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[86] Elizabeth Ising, et al., *Shareholder Proposal Developments During the 2020 Proxy Season*, GIBSON, DUNN & CRUTCHER LLP (Aug. 4, 2020), https://perma.cc/2YGZ-QDK9.

[87] *See* Allison Herron Lee, *Climate, ESG, and the Board of Directors: "You Cannot Direct the Wind, But You Can Adjust Your Sails,"* U.S. SEC. & EXCH. COMM'N (June 28, 2021), https://perma.cc/Y96S-7KXP (describing ESG proposals during 2020–2021 proxy season).

[88] Mark Segal, *Amundi Files Proposal with McDonald's Calling for Transparency on Antibiotic Use in Supply Chain*, ESG TODAY (May 6, 2021), https://perma.cc/S6W8-QHQZ.

[89] Woellert et al., *supra* note 14.

[90] Caroline Flammer, Michael W. Toffel & Kala Viswanathan, *Shareholders Are Pressing for Climate Risk Disclosures. That's Good for Everyone*, HARV. BUS. REV. (Apr. 22, 2021), https://perma.cc/ZZL8-WMXD.

[91] Shareholders Approve a Climate Lobbying Proposal at Delta, Continuing a Winning Streak that Shows the Importance of Paris-Aligned Climate Policy, CERES (June 17, 2021), https://perma.cc/UYA9-J3H3.

[92] Peter Reali, Jennifer Grzech, & Anthony Garcia, *ESG: Investors Increasingly Seek Accountability and Outcomes*, HARV. L. SCH. F. ON CORP. GOV. (Apr. 25, 2021), https://perma.cc/NAJ7-5SBM.

[93] *See, e.g.*, Vanguard Inv. Stewardship Insights, *How We Evaluate Say on Climate Proposals* (May 2021), https://perma.cc/B6FD-Z9WM (explaining "say on climate" proposals).

[94] SEC Staff Legal Bulletin No. 14L, supra note 18.

[95] Ellen Myers, *Shareholders Seen Broadening ESG Proposals as SEC Changes Course*, ROLL CALL (Nov. 11, 2021), https://perma.cc/HE7P-ZE4Z.

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IV. PURPOSE PROPOSALS

Purpose proposals stem, in part, from the BRT revised statement of corporate purpose and the decision by the CEOs of major U.S. companies to sign that statement.[96] On November 12, 2019, Harrington Investments, a shareholder in Wells Fargo Co., filed a shareholder proposal requesting the company to commission an independent study and prepare a report on the feasibility of either converting to a PBC or amending its governing documents to adopt a similar enforceable public purpose.[97] The Harrington proposal appears to be the first example of what this article has termed a purpose proposal.

In support of his proposal, John Harrington explained that Wells Fargo had engaged in a variety of misconduct that had caused shareholders and regulators to lose confidence in the company and that had subjected it to a variety of sanctions.[98] He argued that converting to a PBC would cause the company to have "expanded accountability to shareholders for the interests of those materially affected by the corporation's conduct, including depositors, regulators and others who have lost trust in the Company."[99]

In response, Wells Fargo commissioned the law firm of Richards, Layton & Finger to prepare the requested study and report.[100] The report concluded that Harrington's suggestions were not in the best interests of the bank. It identified several relevant considerations. It stated that Wells Fargo was able to, and in fact already did, consider the interests of non-shareholder stakeholders. It highlighted the fact that the PBC was a new business form which meant significant legal and market uncertainty. It also noted that conversion to a PBC, at the time, required approval by two-thirds and that dissenting shareholders were entitled to appraisal rights.

Wells Fargo's board subsequently issued a statement reaffirming its commitment to promoting the interests of all its stakeholders and concluding that the company's "existing corporate governance structure provides our management team and Board with appropriate flexibility to promote the interests of our various

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[96] The CEOs of all of the issuers targeted with purpose proposals during the 2019–2020 proxy season, and of 86% of the issuers targeted with such proposals during the 2020–2021 proxy season were signatories. *See* Table One *infra*.

[97] Letter from John C. Harrington, President & CEO, Harrington Invs., Inc., to Wells Fargo Co. (Nov. 12, 2019), https://perma.cc/NU93-X6SD.

[98] Id.

[99] Id. at 32.

[100] Richards Layton & Finger, Report to the Governance and Nominating Committee of the Board of Directors of Wells Fargo & Company Regarding Public Benefit Corporations (Jan. 28, 2020), https://perma.cc/NU93-X6SD.

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stakeholders and to manage important environmental, social, and governance matters without the significant uncertainties, costs, and distractions that the [p]roposal's implementation would require."[101] Wells Fargo sought to exclude the proposal from its proxy statement, arguing that it had been substantially implemented, and Harrington withdrew the proposal.[102]

Harrington filed four other substantially similar proposals during the 2020 proxy season. Harrington's proposals all took the form of "first generation purpose proposals" in that they sought a report on the issuer's commitment to the BRT's revised statement of purpose, and all specifically targeted banks.[103] JP Morgan submitted a no-action request to the SEC stating that "the Company already operates in accordance with the principles set forth in the BRT Statement with oversight and guidance by the Board of Directors, consistent with the Board's fiduciary duties."[104] It therefore sought to exclude the proposal as substantially implemented. The SEC agreed.[105]

Bank of America and Citigroup unsuccessfully sought exclusion, arguing that the proposal was, inter alia, "vague and indefinite."[106] Harrington's proposals were submitted to a shareholder vote at both companies and received the support of 10 percent and 6.91 percent respectively.[107] Harrington submitted a slightly different proposal at Goldman Sachs, requesting that the board exercise oversight over the

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[101] WELLS FARGO & CO., RESPONSE OF WELLS FARGO & COMPANY (Jan. 30, 2020), https://perma.cc/NU93-X6SD.

[102] Letter from Elizabeth A. Ising, Gibson, Dunn & Crutcher LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Dec. 27, 2019), https://perma.cc/NU93-X6SD.

[103] Harrington continued to target banks in 2020-2021. *See* Table Two *infra*.

[104] Letter from Martin P. Dunn, Morrison & Foerster LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec & Exch. Comm'n (Jan. 13, 2020), https://perma.cc/KR22-V5TS.

[105] Letter from Lisa Krestyick, Special Couns., U.S. Sec & Exch. Comm'n, to Martin P. Dunn, Morrison & Foerster LLP (Feb. 5, 2020), https://perma.cc/KR22-V5TS.

[106] Harrington's proposal at Bank of America did not seek conversion to a PBC; it requested the board to "review the Statement of the Purpose of a Corporation to determine if such statement is reflected in our Company's current governance documents, policies, long term plans, goals, metrics and sustainability practices and publish its recommendations on how any incongruities may be reconciled by changes to our Company's governance documents, policies or practices." Letter from Ronald O. Mueller, Gibson Dunn & Crutcher LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec & Exch. Comm'n (Feb. 7, 2020), https://perma.cc/C3NH-GK6Y.

[107] Bank of America Corp., Form 8-K, Apr. 23, 2020, at 4, https://investor.bankofamerica.com/regulatory-and-other-filings/current-reports?form_type_custom=https%3A%2F%2Finvestor.bankofamerica.com%2Fregulatory-and-other-filings%2Fcurrent-reports&year=2020&page=73##document-2882-0000070858-20-000020-2; Citigroup, Inc., Form 8-K/A, Apr. 27, 2020, at 2, https://www.sec.gov/ix?doc=/Archives/edgar/data/831001/000110465920051733/c-20200421x8ka.htm.

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CEO's signing of the BRT statement and providing "oversight and guidance as to how our Company's full implementation of this new Statement should alter our Company's governance or management systems . . . ."[108] Harrington's proxy solicitation argued to shareholders that Goldman CEO's endorsement of the BRT statement and the commitment to stakeholder value reflected in that statement were "disingenuous and incongruent with Delaware law and fiduciary duty pursuant to conventional Delaware corporate law, unless our Company converts to a PBC."[109] As Harrington explained, however, the focus of his proposal was "the Company's sign on to the Statement" not the categories of stakeholder interests identified by the statement.[110]

As You Sow, working in conjunction with the Chang-Liu Family Living Trust, filed two additional purpose proposals during the 2019–2020 proxy season at McKesson and BlackRock. The proposals requested a board study and report on how the company planned to implement the BRT's Statement on Corporate Purpose.[111] Both issuers sought, unsuccessfully, to exclude the proposals on the ground that they related to ordinary business operations.[112] The proposals were therefore submitted for a vote at the annual meetings of both companies.

Table One below sets out the purpose proposals submitted during the 2019-2020 proxy season and the results. Of the seven proposals submitted, five went to a vote. The proposals received average support of almost 7 percent of the votes cast.[113] The level of support was substantially below the average level of support for shareholder proposals which was around 30 percent.[114] Significantly, the vote at each

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[108] Letter from John Harrington, President, Harrington Invs., Inc., to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Jan. 22, 2020), https://perma.cc/TP7G-3D22.

[109] Notice of Exempt Solicitation from Harrington Invs., Inc., to Goldman Sachs Invs. (2021), https://perma.cc/G3PJ-EXQH.

[110] Letter from John Harrington to Off. of Chief Couns., *supra* note 102, at 4.

[111] *See BlackRock: Implementation Plan for New Business Roundtable "Purpose of a Corporation*," AS YOU SOW (Dec. 12, 2019), https://perma.cc/UR57-MJ3U; Letter from Sanford J. Lewis to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (May 5, 2020), https://perma.cc/SL72-4N59. McKesson also argued that the proposal had been substantially implemented.

[112] Letter from Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Jan. 20, 2020), https://perma.cc/7VRG-9LH6; Letter from Scott Andrew Shepard, Nat'l Ctr. for Pub. Pol'y Rsch., to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Feb. 8, 2021), https://perma.cc/YDH4-WT4J (describing SEC staff's refusal to grant no-action relief to McKesson).

[113] *See* Table One *infra*.

[114] Elizabeth Ising et al., *Shareholder Proposal Developments During the 2021 Proxy Season*, GIBSON, DUNN & CRUTCHER LLP (Aug. 19, 2021), https://perma.cc/Y9C5-W9N2.

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issuer was sufficient to permit resubmission of the proposal the following proxy season.[115]

Table One

Issuer	Type of Proposal	Sponsor	Annual Meeting Date	Result/ Approval Rate
Bank of America	Report on BRT Statement	John Harrington	4/22/2020	10%
Wells Fargo	Report on BRT Statement	Harrington Investments	4/28/2020	withdrawn
BlackRock	Report on BRT Statement	As You Sow (the Chang-Liu Family Living Trust)	5/1/2020	3.85%
JP Morgan	Report on BRT Statement	Harrington Investments	5/19/2020	SEC excluded
Citigroup	Report on BRT Statement	Harrington Investments	5/21/2020	6.91%
Goldman Sachs	Report on BRT Statement	Harrington Investments	5/30/2020	5.77%
McKesson	Report on BRT Statement	As You Sow (the Chang-Liu Family Living Trust)	7/29/2020	8.09%

Abstentions are reflected as no votes in voting results

In the 2020–2021 proxy season, the approach to purpose proposals evolved. Two things drove this evolution. First, on July 16, 2020, Delaware amended its PBC statute to allow traditional corporations to convert to a PBC with a simple majority vote and without triggering appraisal rights for dissenting shareholders.[116] The amendments thus addressed one of the concerns identified by Richards Layton &

[115] At the time, Rule 14a–8 provided that a proposal was eligible for resubmission if it gained the support of 3% of votes cast. U.S. Sec & Exch. Comm'n, Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8: A Small Entity Compliance Guide (Dec. 28, 2020), https://perma.cc/38YJ-Y3QZ. In 2020, the SEC raised that threshold to 5%. *Id.*

[116] *See Delaware Makes It Easier for Corporations to Become Public Benefit Corporations,* POTTER ANDERSON CORROON, LLP (July 20, 2020), https://perma.cc/4HWH-ZF85.

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Finger in its report to the Wells Fargo board.[117] The amendments also provided greater protection from liability for directors in connection with the task of balancing the interests of the corporation's stakeholders.[118] Second, in January 2021, Veeva systems became the first Russell 1000 company to convert to a PBC.[119] Two other issuers, Vital Farms and Lemonade, conducted successful initial public offerings as PBCs, suggesting that the PBC could be a viable business form for a publicly traded company.[120] These IPOs addressed, at least in part, the concern flagged by Richards Layton & Finger about market uncertainty.[121]

These changes led shareholders to shift their strategy. A number of proposals, which this Article terms "second generation proposals" directly requested that issuer boards take the necessary steps to convert to PBCs.[122] John Harrington again led the way, submitting shareholder proposals at all five of the banks he had previously targeted. At four of the five banks, Harrington submitted second generation

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[117] The standards in other states for conversion to a PBC differ and are generally more onerous than the amended Delaware standard. *See* Elizabeth A. Diffley, Elizabeth K. Lange & Jennifer M. Lucas, *Shareholder Proposals Requesting Conversion to Public Benefit Corporations: A Fleeting Trend or the Future?,* FAEGRE DRINKER BIDDLE & REATH LLP n.4 (Aug. 11, 2021), https://perma.cc/YRE5-FTVE.

[118] *Id.* This addressed the concern identified by Richards Layton & Finger about the legal uncertainty of directors' obligations in a PBC. *See* RICHARDS LAYTON & FINGER, *supra* note 95, at 6 ("[T]here is no case law in Delaware that provides guidance regarding the balancing obligation of directors of public benefit corporations.").

[119] *Veeva Becomes First Public Company to Convert to a Public Benefit Corporation*, VEEVA (Jan. 13, 2021) https://perma.cc/R7J5-L84L. An overwhelming majority of Veeva's shareholders voted in favor of the conversion. *Id.*

[120] Lemonade was the "best IPO debut of 2020." Wallace Witkowski, *Lemonade Logs Best U.S. IPO Debut of 2020 with More Than 140% Gain,* MARKETWATCH (July 2, 2020), https://perma.cc/UY44-K7LF. Vital Farms' IPO was described as a "blockbuster." Chloe Sorvino, *Vital Farms' Blockbuster IPO Proves Wall Street Has an Appetite for Sustainable Farming*, FORBES (Aug. 1, 2020), https://perma.cc/L2KJ-CVAZ. PBCs had already achieved substantial success in private companies. *See, e.g.*, Fisch & Davidoff, *supra* note 28, at 72 (reporting that there were more than 10,000 PBCs formed as of 2021).

[121] RICHARDS LAYTON & FINGER, *supra* note 95, at 7 (stating that "it would be difficult to predict the impact [converting to a PBC] would have on a company's short and long-term stock price and market capitalization"). Prior to 2020, the most visible benefit corporation story was that of Etsy, which offered a cautionary tale of the potential for market forces to overcome a corporation's commitment to stakeholder value. *See* Fisch & Solomon, *supra* note 120, at 82–83 (describing Etsy's history).

[122] Under the Delaware statute, conversion requires both board and shareholder approval and cannot be implemented unilaterally through a shareholder vote. Amy Simmerman Ryan J. Greecher, Brian Currie & Richard C. Blake. *Converting to a Delaware Public Benefit Corporation: Lessons from Experience*, WILSON SONSINI GOODRICH & ROSATI LLP (Jan. 27, 2022), https://perma.cc/T2EC-BRRX.

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proposals.[123] The advantage of these second generation proposals was that issuers could not exclude them as substantially implemented simply by commissioning a report. Moreover, there was some precedent for shareholder proposals seeking effect governance changes by implementing a structural change; after North Dakota amended its corporation statute to grant shareholders greater governance rights, shareholders filed proposals with at least fifteen issuers seeking to have the issuers reincorporate in North Dakota.[124] As will be discussed below, however, the extent to which conversion to a PBC is an effective or necessary mechanism for implementing stakeholder governance is unclear.

Other shareholders also introduced second generation purpose proposals. Shareholders James McRitchie and Myra Young,[125] working separately and jointly with the Shareholder Commons, introduced seven similar proposals, starting with a proposal at Tractor Supply Inc. on November 21, 2020 for the annual meeting on May 6, 2021.[126] The Shareholder Commons also partnered with Arjuna Capital to introduce PBC transition proposals at Chevron and Exxon.[127] The Shareholder Commons focused on issuers whose CEOs had signed the BRT statement.

Two other shareholders introduced purpose proposals in 2020-2021. The National Center for Public Policy Research introduced six first generation proposals. All but one of the issuers sought and received a no-action letter from the SEC indicating that the proposals could be excluded on the grounds that they had been substantially implemented.[128] The John Bishop Montgomery Trust introduced second

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[123] At the fifth bank, JP Morgan, Harrington against requested "a report to shareholders … regarding potential conversion of JP Morgan Chase to a Delaware Public Benefit Corporation." Letter from Brian V. Breheny, Skadden, Arps, Slate, Meagher & Flom LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Jan. 11, 2021), https://perma.cc/332Y-ZBBE. The JP Morgan board commissioned such a report and then argued to the SEC that the proposal had been substantially implemented. *Id.* at 5.

[124] See Harleigh E. Brown, *Reincorporation in North Dakota? How the North Dakota publicly traded Corporations Act may impact corporate governance*, Sept. 2009, https://s3.amazonaws.com/documents.lexology.com/7a68ca4b-c56e-4637-bcbb-adff864fabd7.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1648763757&Signature=P14aDC5c0iL24LA2xzEQNYY7gk0%3D . At least one of the proposals appears to have resulted in the issuer reincorporating in North Dakota. Id.

[125] McRitchie & Young are husband and wife. Copeland*, supra* note 53, at 18.

[126] See Table Two, *infra.*

[127] BlackRock, Inc., Notice of Exempt Solicitation (Form PX14A6G) (2021), https://perma.cc/6NJN-GNKV.

[128] Ising et al., *supra* note 108; *see also* Letter from Amy C. Seidel, Partner, Faegre Drinker Biddle & Reath LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Feb. 5, 2021), https://perma.cc/8ALB-FK64. Apple also argued that the proposal was inconsistent with California law. See Apple Inc., 2021 SEC No-Act LEXIS 546 (Dec. 22, 2021), *11 ("California law does not recognize the corporate form of a PBC."). https://www.sec.gov/divisions/corpfin/cf-

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generation proposals at 3M and Amazon. 3M unsuccessfully sought to exclude the proposal on the grounds that it dealt with ordinary business matters.[129] Amazon was able to exclude the proposal on the basis that the Trust failed to provide the necessary proof of share ownership.[130]

As the foregoing discussion indicates, issuers were generally unsuccessful in their attempts to exclude second generation purpose proposals.[131] As the SEC staff explained, "the Company's corporate structure is not a matter relating to the conduct of its ordinary business operations, but rather, an important issue that is appropriate for stockholders to address at a meeting."[132] As table two shows, most second generation proposals were submitted to a shareholder vote. The level of support they received ranged from approximately 1 percent at Alphabet and Facebook (which both have dual class voting structures) to almost 12 percent at Yelp. Of the fifteen transition proposals that went to a vote, the average support received was 3.3 percent. By way of comparison, Georgeson reported that average support for environmental shareholder proposals during the 2021 proxy season exceeded 39 percent, and support for social proposals averaged 33 percent.[133] Notably, neither ISS nor Glass Lewis recommended in favor of the proposals.[134]

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noaction/14a–8/2020/ncpprapple121720-14a8.pdf. The Wal-Mart proposal was voted on at the annual meeting where it received the support of 2.32% of votes cast. See Table 2 below.

[129] Letter from Alan L. Dye, Hogan Lovells US LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Dec. 31, 2020), https://perma.cc/C95X-JCQP.

[130] Letter from Ronald O. Mueller, Gibson, Dunn & Crutcher LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Jan. 25, 2021), https://perma.cc/2558-9U4W; *see* Ising, et al., *supra* note 108 at 27 (concurring that the proposal is excludable since the proponent failed to substantiate his eligibility to submit the proposal under Rule 14a–8).

[131] Letter from Jennifer H. Noonan, Bass Berry & Sims PLC, to Off. of Chief Couns., Div. of Corp. Fiin., U.S. Sec. & Exch. Comm'n (Jan. 29. 2021), https://perma.cc/H3U7-M2MA; Nathan J. Stuhlmiller & Ryan A. Salem, *Elimination of Statutory Barriers May Lead to New Wave of Public Benefit Corporations*, DEL. BUS. CT. INSIDER (Feb. 24, 2021), https://perma.cc/VL7N-S4Q8.

[132] *See* The S'holder Commons, *The Shareholder Commons Reaches Agreement to Withdraw Shareholder Proposal*, PR NEWSWIRE (Oct. 18, 2021), https://perma.cc/3MUF-QC6S (describing the basis for the SEC's decision at Broadridge); Broadridge Fin. Sols., Inc., SEC Staff No-Action Letter, 2021 SEC NO-ACT. LEXIS 422 (Sept. 22, 2021).

[133] *Majority Support for E&S Proposals Almost Doubles in US,* CORP. SECRETARY (Oct. 28, 2021), https://perma.cc/D28L-4JMH.

[134] SULLIVAN & CROMWELL LLP, 2021 PROXY SEASON REVIEW: PART I, RULE 14A–8 SHAREHOLDER PROPOSALS (July 27, 2021), https://perma.cc/2C6G-GTBZ (ISS did not recommend in favor of any); GLASS LEWIS, PROXY SEASON REVIEW 2021 (2021), https://perma.cc/6VGP-66TF (Glass Lewis did not recommend in favor of any); THE SHAREHOLDER COMMONS, THE BETA STANDARD PROXY REVIEW 2021 (August 2021), https://perma.cc/JB6D-ZBSQ ("[N]either ISS nor Glass Lewis—the two biggest and most

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Table Two sets out the purpose proposals submitted during the 2020–2021 proxy season, whether issuers sought to exclude the proposal from their proxy statements, and the decisions by the SEC staff on those requests, where available. [135]

Table Two

Issuer	Type of Proposal	Sponsor	Annual Meeting Date	Result/Approval Rate	SEC involvement
Bank of America	Transition to a PBC	John Harrington	4/20/2021	2.62%	Not Challenged
Johnson & Johnson	Report on BRT Statement	National Center for Public Policy Research	4/22/2021	Not Voted on	
Wells Fargo	Transition to a PBC	Harrington Investments	4/27/2021	3%	Not Challenged
Citigroup	Transition to a PBC	Harrington Investments	4/27/2021	2.49%	Not Challenged
Goldman Sachs	Transition to a PBC	Harrington Investments	4/29/2021	2%	Not Challenged
S&P Global	Transition to a PBC	The Shareholder Commons (Myra Young)	5/5/2021	3.86%	Not Challenged
Tractor Supply Corp.	Transition to a PBC	The Shareholder Commons (James McRitchie)	5/6/2021	3.47%	Challenged/ Not Excluded
Duke Energy	Report on BRT Statement	National Center for Public Policy Research	5/6/2021	Not Voted on	
3M	Transition to a PBC	The John Bishop Montgomery Trust	5/11/2021	2.92%	Challenged/ Not Excluded
United Parcel Service	Transition to a PBC	The Shareholder Commons (Myra Young)	5/13/2021	3.40%	Not Challenged

powerful proxy advisors—supported any of our proposals in 2021, despite both firms continuously increasing support for ESG-oriented proposals.").

[135] In 2019, the SEC changed its longtime practice of responding in writing to issuer requests to exclude a shareholder proposal. *See Announcement Regarding Rule 14a–8 No-Action Requests*, U.S. SEC. & EXCH. COMM'N (Sep. 6, 2019), https://perma.cc/48UV-M4X9. As a result, it is not possible to determine the percent of purpose proposals at which an issuer unsuccessfully requested exclusion. In December 2021, the SEC announced a reversal of this policy. *See Announcement Regarding Staff Responses to Rule 14a–8 No-Action Requests*, U.S. SEC. & EXCH. COMM'N (Dec. 13, 2021), https://perma.cc/MP9D-TRJV.

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JP Morgan	Report on BRT Statement	National Center for Public Policy Research	5/18/2021	Withdrawn/ Substantially Implemented	
BlackRock	Transition to a PBC	The Shareholder Commons (James McRitchie)	5/26/2021	2.39%	Not Challenged
Facebook	Transition to a PBC	The Shareholder Commons	5/26/2021	1%	Not Challenged
Chevron	Transition to a PBC	Arjuna Capital and The Shareholder Commons	5/26/2021	3%	Not Challenged
Amazon	Report on BRT Statement	National Center for Public Policy Research	5/26/2021		Not Voted on
Alphabet	Transition to a PBC	The Shareholder Commons (James McRitchie and Myra K. Young)	6/2/2021	1.16%	Challenged/ Not Excluded
Wal-Mart	Report on BRT Statement	National Center for Public Policy Research	6/2/2021	2.32%	N/A
Yelp	Transition to a PBC	Shareholder Commons (James McRitchie)	6/3/2021	11.80%	Not Challenged
Caterpillar	Transition to a PBC	The Shareholder Commons (Myra Young)	6/9/2021	2.92%	Not Challenged
Target	Report on BRT Statement	National Center for Public Policy Research	6/9/2021		Not Voted on
Salesforce	Transition to a PBC	Shareholder Commons	6/10/2021	3.50%	N/A
Salesforce	Report on BRT Statement	National Center for Public Policy Research	6/10/2021		Not Voted on

Abstentions are reflected as no votes in voting results

As the 2022 proxy season begins, shareholders have submitted several purpose proposals.[136] Notably, at least in the case of Fox Corp., the proposal identifies a specific public benefit for Fox to pursue upon conversion to a PBC, the "provision of

[136] See Table Three, *infra*.

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the Company's viewers with an accurate understanding of current events through the exercise of journalistic integrity."[137] Including a specific public benefit in the proposal responds to a concern I have identified elsewhere about the failure of PBCs to articulate adequately their intended public benefits.[138] This enhanced precision in the description of the shareholder's objectives in seeking PBC conversion reflects an evolution in the purpose proposal that I describe as a third generation proposal. Table Three identifies the proposals that have been introduced for the 2021-2022 proxy season for which information is available.

Table Three

Issuer	Type of Proposal	Sponsor	Annual Meeting Date	Result/ Approval Rate	SEC involv.
Fox Corp.	Transition to a PBC	Shareholder Commons and Principles for Responsible Investment	11/10/2021	1.1%	N/A
Broadridge	Transition to a PBC	James McRitchie	11/18/2021	Settled/ Withdrawn	Challenged Not Excluded
Apple	Transition to a PBC	National Center for Public Policy Research	Upcoming	Pending	Challenged
Apple	Transition to an PBC	Myra K. Young and James McRitchie	Upcoming	Pending	Challenged

Because most of these proposals will not become public until the issuers file their proxy statements, as this article goes to press, it is impossible to determine how many such proposals will be introduced. Shareholders may continue to explore the role of PBC conversion in facilitating stakeholder governance through purpose proposals. Notably, issuers have not generally succeeded in excluding such proposals under Rule 14a-8. The SEC staff appears to have taken the view that purpose

[137] Def. Schedule 14A, Fox Corp., Sept. 17, 2021, at 57, https://sec.report/Document/0001193125-21-276133/.

[138] See Fisch & Davidoff, *supra* note 28. See also Simmerman, et al., *supra* note 122 (noting the importance of "craft[ing] an appropriate public benefit purpose to include in the company's certificate of incorporation.").

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proposals are a proper subject for a shareholder proposal and not excludable on the ground that they relate to an issuer's ordinary business operations.[139]

At the same time, there are reasons to question the continued viability of purpose proposals. As noted above, the conversion proposals submitted during the 2020-2021 proxy season received very limited support. The major proxy advisory firms did not recommend in favor of them, although neither has documented a formal position on purpose proposals generally.[140] Large institutional investors, which command substantial voting power, did not support purpose proposals, an issue that this Article explore in further detail in the next Part. In the near term, shareholders may focus on more traditional disclosure requests in shareholder proposals to focus on societal or stakeholder issues.[141] Whether or not, they continue to submit purpose proposals, however, those proposals offer important insights into both the debate over stakeholder governance and the role of shareholder proposals. The next Part considers these insights.

V. Purpose Proposals and Stakeholder Governance

Purpose proposals provide a useful case study by which to examine in detail the debate over stakeholder governance, the utility of the PBC for implementing stakeholder governance, and the role of shareholder proposals in identifying and sharpening arguments for governance reform in the public corporation. This Part explores how purpose proposals provide insights into these issues.

A. The Information-Generative Role of Purpose Proposals

As the preceding discussion documents, purpose proposals have served several functions in the debate over stakeholder governance. They empowered shareholders to bring a key governance reform to the forefront. They required proponents to identify the scope of their proposal and the manner in which it would affect corporate behavior with a reasonable degree of precision. They provided a forum in

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[139] SEC Staff No-Action Letter, *supra* note 126 ("[T]he Company's corporate structure is not a matter relating to the conduct of its ordinary business operations, but rather, an important issue that is appropriate for stockholders to address at a meeting.").

[140] Proxy advisory firms currently consider proposals for PBC conversion on a case-by-case basis, and, as with other voting issues, may distinguish between a shareholder proposal and a management-sponsored effort to convert to a PBC. See Simmerman, et al., *supra* note 122 (providing guidelines for management-sponsored PBC conversion).

[141] See, e.g. The Shareholder Commons, System Stewardship Shareholder Proposals – 2022, https://theshareholdercommons.com/system-stewardship-shareholder-proposals/ (identifying shareholder proposals introduced during 2021-2022 proxy season as of April 3, 2022 and identifying only two purpose proposals).

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which both the proponent and management could articulate arguments for and against the proposal. They then allowed the rest of the shareholder base to communicate support for the reform through the voting process. In so doing, Rule 14a–8 creates a process in which corporate participants can address and refine critical questions regarding the meaning and significance of stakeholder governance.

Critically, the structure of Rule 14a–8 facilitates the generation of information relevant to the stakeholder governance debate. The structure of Rule 14a-8 itself generates information. In addition to the proposal itself, the rule allows the shareholder to submit a supporting statement. Although the shareholder is limited to 500 words in the proxy statement itself, shareholders can supplement that information with additional soliciting material without filing a separate proxy statement.[142] In addition, some shareholders have recently begun making voluntary filings of additional solicitation materials with the SEC. [143] These notices of "exempt solicitations" are required only of institutional shareholders (those who own more than $5 million of securities).[144] Still, smaller shareholders are making these filings voluntarily to provide additional support for their proposals or respond to management's arguments without being limited to 500 words. Significantly, these posts appear on the issuer's EDGAR page and are accessible by the general public.[145] Harrington, the Shareholder Commons, and Arjuna Capital have all filed exempt solicitations to provide further details about their arguments and to respond to the company's opposition.[146] In addition, issuers address shareholder proposals in the proxy statement as well, providing responses to the shareholder arguments and, in the case of purpose proposals, articulating the reasons why conversion to a PBC is not in the corporation's best interests. Significantly, these issuer responses are not subject to the 500-word limit, and as James Cox and Randall Thomas explain, the

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[142] Such solicitations are exempt under Rule 14a–2(b). 17 C.F.R. § 240.14a–6(g).

[143] Elizabeth Ising & Ronald Mueller, *New Twist for Old Shareholder Proposal Tactic*, GIBSON DUNN SEC. REGUL. & CORP. GOVERNANCE MONITOR (Mar. 16, 2018), https://perma.cc/WJC7-C6FA.

[144] Rule 14a–6(g) imposes this requirement. 17 C.F.R. § 240.14a–6(g).

[145] Id.

[146] *See, e.g.*, United Parcel Serv. Inc., Notice of Exempt Solicitation (Form PX14A6G) (2020) [hereinafter United Parcel Serv. Inc., Notice of Exempt Solicitation], https://perma.cc/KB3V-5XDK (exempt solicitation by the Shareholder Commons); Chevron Corp., Notice of Exempt Solicitation (Form PX14A6G) (2021) [hereinafter Chevron Corp., Notice of Exempt Solicitation by Arjuna Capital and The Shareholder Commons], https://perma.cc/2YC5-7ZM7 (exempt solicitation by Arjuna Capital and The Shareholder Commons at Chevron); Chevron Corp., Notice of Exempt Solicitation (Form PX14A6G) (2021), https://perma.cc/L9YP-JL2V (exempt solicitation by Harrington Capital at Wells Fargo).

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proxy statement typically includes "a detailed and long explanation [by management] of why shareholders should reject the proposal."[147]

Importantly, because the statements by both the proponent and, especially, the statements by management are made as part of the proxy solicitation process, they are subject to Rule 14a-9's prohibition on proxy fraud.[148] This context matters. At least one court has recognized that even statements which might otherwise be viewed as generic or aspirational can be actionable in the context of a proxy solicitation in which they are part of an effort to influence the vote on a shareholder proposal.[149] In *First Energy*, the court observed that, where management statements of compliance were proffered as a rationale for voting against a shareholder proposal seeking increased oversight, they could not be defended as "mere 'puffery' or 'corporate cheerleading.'"[150] This potential liability exposure should provide heightened incentives for accurate disclosures.

This information-generative process is advancing the debate over stakeholder governance. First, purpose proposals enable their proponents to explain why there is a need for change in corporate objectives. Second, proponents explain how stakeholder capitalism can respond to that need by enabling corporate decision-makers to shift their objective from an exclusive focus on shareholder profit toward a broader consideration of stakeholder interests. Third, purpose proposals defend the role of the PBC both in empowering corporations to engage in stakeholder capitalism and providing a meaningful commitment to its goals.

As John Harrington explained in his initial proposal to Wells Fargo, stakeholders, regulators, and the public at large have generally lost confidence in the willingness of corporate decision-makers to do the right thing.[151] Similarly, Arjuna Capital argued in support of its PBC transition proposal that Chevron's pursuit of

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[147] Cox & Thomas, *supra* note 16, at 1166.

[148] 17 C.F.R § 240.14a-9.

[149] See In re FirstEnergy Corp. Sec. Litig., 2022 U.S. Dist. LEXIS 39308, *31-32 (S.D. Ohio 2022) (describing management statements of a compliance policy that was "presented as a reason to defeat a shareholder proposal for increased political oversight but was not then being followed by the Company or its senior management" as potentially false and misleading).

[150] *Id.* at *29-20 ("Context changes the meaning of those statements from aspiration to assurance; the speakers are claiming that increased oversight is not necessary because the Company is compliant and has effective controls.").

[151] *See* Letter from Elizabeth Ising, Gibson, Dunn & Crutcher LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n (Feb. 11, 2020), https://perma.cc/PF8S-H9H3 (describing the company's misconduct and arguing that becoming a PBC would cause Wells Fargo to "have expanded accountability to shareholders for the interests of those materially affected by the corporation's conduct including depositors, regulators and others who have lost trust in the Company . . . .").

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financial returns was contrary to the interests of diversified universal investors who were exposed to "growing and widespread climate costs."[152] At UPS, the Shareholder Commons cited concerns about the company's impact on climate change, its role in fostering discrimination and inequality, and its use of political influence.[153] It argued that, as a PBC, "the Board could work toward meaningful, long-term solutions to noxious inequality."[154]

The proposals and supporting statements thus reflect two themes. One is that corporations are pursuing profits to an excessive degree. The other is that, in doing so, corporations are taking actions that have a detrimental effect both on broadly diversified investors and other corporate stakeholders. Purpose proposals offer stakeholder governance as a proposed solution to these concerns. They argue that stakeholder governance, as implemented through the PBC form, empowers corporate decision-makers to consider a broader range of corporate objectives rather than focusing exclusively on profit maximization and that, specifically, those objectives can include the interests of non-shareholder stakeholders.

At the same time, the statements by both proponents and issuers highlight some uncertainties in the current debate over stakeholder governance. Significantly, the statements convey ambiguity about the appropriate relationship between shareholder and stakeholder interests. Proponents argue that, for issuers to adopt stakeholder governance, they must convert to a PBC, stating that, at least in Delaware, the requirement of shareholder primacy prohibits directors in a traditional corporation from giving adequate weight to stakeholder interests. This argument is based on the "pluralistic" conception of stakeholder governance that demands a focus on stakeholders at the expense of shareholders.[155] The Richards Layton Report to the JP Morgan board thus characterized stakeholder governance as a departure from current law, warning that although directors of traditional corporations may consider stakeholder value instrumentally, "[i]f the interests of the stockholders and the other constituencies conflict, however, the board's fiduciary duties require it to act in a manner that furthers the interests of the stockholders."[156]

As the Shareholder Commons, a frequent proponent of purpose proposals, explains in its inaugural annual report, "[w]ithout forcing some companies to surrender financial value that relies on cost externalisation, there is no way to realistically address climate change, mass extinction, growing inequality, or

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[152] CHEVRON CORP., 2021 PROXY STATEMENT (May 26, 2021), https://perma.cc/UYS9-K4SE.

[153] United Parcel Serv. Inc., Notice of Exempt Solicitation, *supra* note 136.

[154] Id.

[155] Bebchuk, *supra* note 10.

[156] RICHARDS LAYTON & FINGER, *supra* note 118, at 3.

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pandemics, to name just a few major systemic risks."[157] Consequently, it maintains that a traditional corporation cannot legally operate in accordance with the stakeholder governance model reflected in the BRT statement, stating that "'the law of the companies' states of incorporation precludes authentic commitment to the stakeholder model acclaimed in the BRT Statement, unless the corporations adopt benefit corporation law."[158]

At the same time, those promoting PBC conversion maintain that stakeholder governance is consistent, rather than in tension with maximizing shareholder value. Veeva explained in its proxy materials that "we do not believe that balancing the interests of all stakeholders will require us to take actions that do not maximize shareholder value over the long term."[159] And even as it argues that stakeholder governance is illegal because it is inconsistent with shareholder primacy, the Shareholder Commons stated in its proxy materials at UPS that "[t]he stakeholder orientation permitted by the PBC form is more likely to create value for diversified shareholders than the prevailing 'profit at any cost' approach that imposes substantial costs on those same shareholders."[160] Wachtell, Lipton, Rosen & Katz has opined that pursuing a corporation's purpose "requires consideration of all the stakeholders who are critical to its success" and that this "is fully consistent with the fiduciary duties of the board of directors, and the concomitant stewardship obligations of shareholders."[161] And Fox News, in arguing that shareholders should not vote for the purpose proposal, stated in its proxy statement that Fox already considers stakeholder interests and that "A conversion to a PBC would not result in any meaningful change or better serve the interests of our stockholders or other stakeholders."[162] Similarly 3M explained "3M is already carrying on its purpose-driven mission by taking all stakeholders into consideration in our long-term strategies and business operations, and living the five principles of the BRT Statement, all of which are consistent with the General Corporation Law of Delaware under which 3M is organized."[163] Citigroup stated that "The Board believes that Citi's existing form of corporate organization

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[157] THE SHAREHOLDER COMMONS, *supra* note 128, at 3.

[158] Id.

[159] Veeva Sys. Inc., Definitive Proxy Statement (Form DEF 14A) (Dec. 4, 2020), https://perma.cc/7AXT-XL9V.

[160] United Parcel Serv. Inc., Notice of Exempt Solicitation, *supra* note 136.

[161] Martin Lipton, *Stakeholder Governance and Purpose of the Corporation*, HARV. L. SCH. F. ON. CORP. GOVERNANCE (Jan. 21, 2022), https://perma.cc/N8ZH-5ALD.

[162] Fox Corp. 2021 Notice of Annual Meeting of Shareholders and Proxy Statement, Sept. 17, 2021, at 58, https://investor.foxcorporation.com/static-files/78c86a70-8635-4bc6-9e17-2b3f274672c7.

[163] Definitive Proxy Statement, *supra* note 152, at 120.

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provides the appropriate flexibility to promote the interests of our various stakeholders and to manage important diversity and ESG matters without the significant uncertainties, costs, and distractions that the Proposal's implementation would require; therefore the Board recommends a vote [against] this Proposal 10."[164]

Importantly, issuers defend their consideration of stakeholder interests as consistent with, rather than in tension with, promoting shareholder value. Wal–Mart explained, "We think good ESG practices go hand in hand with long-term financial value creation for our shareholders by enhancing customer trust, securing future supply of products and services, catalyzing new product lines, increasing productivity, and reducing costs."[165]

These positions are obviously in tension. Moreover, at least some data suggest that "more stakeholder influence, instead of 'growing the pie', can in fact shrink it and can undermine the very 'stakeholderism' model it is supposed to promote."[166] Part of the challenge for the stakeholder model is that trade-offs among stakeholders are inevitable.[167] The conflict is not simply between shareholders and stakeholders; it also exists among stakeholders—should a firm respond to the pandemic with plastic protective equipment to prioritize employee safety or restrict its use of products that are harmful to the environment? In addition, there are practical limits to the extent to which the interests of any stakeholder group can be sacrificed—irrespective of legal obligation—without risking the flight of those stakeholders elsewhere. As Mark Roe explains, "Purpose, if taken seriously, can be costly. Cutting into the tight profit margins of a firm in a competitive industry will destabilize that firm: some will suffer and shrink. Some will not survive."[168] At least as a matter of Delaware law, the question of how far the business judgment rule would allow a board to consider stakeholder interests without a clear nexus to shareholder economic value remains unclear.[169]

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[164] CITIGROUP INC., 2021 NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 136 (Apr. 27, 2021), https://perma.cc/VZF8-5T5G.

[165] WALMART, NOTICE OF 2021 ANNUAL SHAREHOLDERS' MEETING 97 (June 2, 2021), https://perma.cc/9JXW-4YTJ.

[166] *See, e.g.*, Shantanu Banerjee Sudipto Dasgupta & Rui Shi, *The Dark Side of Stakeholder Influence: The Surprising Effect of Customer Fraud on Suppliers* (Eur. Corp. Governance Inst., Finance Working Paper No. 800/2021, 2021), https://perma.cc/KS68-7TW3 (finding customers that are able to exercise greater influence over supplier firms reduce shareholder value in those firms).

[167] *See, e.g.*, Bebchuk & Tallarita, *supra* note 10, at 120 ("[P]otential trade-offs between shareholders and stakeholders are ubiquitous.").

[168] Mark J. Roe, *Corporate Purpose and Corporate Competition* (Eur. Corp. Governance Inst., Law Working Paper No. 601/2021, 2021), https://perma.cc/JE2J-TP8Y.

[169] *Cf.* Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 372 (2021) (emphasis added) ("Whenever courts have been confronted with an

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In addition, although purpose proponents defend stakeholder governance for its power to enable corporate decision-makers to consider non-shareholder interests, they neither explain why, under a stakeholder model, decision-makers would be compelled to do so, nor how that consideration would address the problems they attribute to an excessive focus on profit maximization, such as climate change and inequality.[170] As Matteo Gatti and Chrystin Ondersma warn, it is also plausible that stakeholder governance will be ineffective, either because the problems it addresses are beyond the capacity of corporate leaders or because those leaders will use their increased discretion to "maintain their advantageous status quo."[171]

PBC transition proposals, in particular, place great weight on the PBC form as a tool to promote an issuer's adherence to stakeholder governance. The PBC has been around for several years, and a substantial number of private corporations have adopted the PBC form.[172] Yet the PBC's acceptance among public corporations is more limited. As of June 2021, there were at least ten publicly traded PBCs, and the changes to the Delaware statute have made the process of converting far easier.[173] Critics have questioned, however, whether the PBC provides a meaningful tool for public companies that want to commit to stakeholder governance or a public purpose.[174] Similarly, they have challenged the claim that traditional corporations lack the legal power to make such commitments.[175]

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inescapable conflict between the interests of shareholders and the interests of other stakeholders, *and have not been able to dodge the question by deference to board discretion under the business judgment rule*, the courts have affirmed the primacy of shareholder interests.").

[170] As The Bishop Montgomery Trust explained, in support of its proposal in 3M's proxy statement, "A company required to balance stakeholder interests *could* prioritize lowering these costs, even if doing so sacrificed higher return." 3M Co., Definitive Proxy Statement (Form DEF 14A) (Mar. 24, 2021) (emphasis added), https://perma.cc/Q3VS-B7GS. The statement provided no basis for concluding that a company *would* do so. Similarly, in support of the shareholder proposal at Chevron, although arguing that as a PBC, "Chevron could take actions that reduce any number of externalities," Arjuna Capital and The Shareholder Commons acknowledged that the proponent conceded that "[a]s a PBC, Chevron would not be obligated to take these actions, but it would have the option to do so . . . ." Chevron Corp., Notice of Exempt Solicitation by Arjuna Capital and The Shareholder Commons, *supra* note 136.

[171] Matteo Gatti & Chrystin D. Ondersma, Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera, 46 J. CORP. L. 1, 9 (2020).

[172] See *supra* note 120 and accompanying text.

[173] Christopher Marquis, *Public Benefit Corporations Flourish in the Public Markets*, FORBES (June 14, 2021), https://perma.cc/Z5AS-W2WT.

[174] *See* Fisch & Solomon, *supra* note 28, at 82 (questioning the PBC's effectiveness as a commitment device for public companies).

[175] *See* Fisch & Solomon, *supra* note 29, at 1323 ("[W]e reject the proposition that existing law prohibits corporate decision makers from considering and incorporating the interests of

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The PBC form, however, offers distinctive advantages in that, it requires corporations to specify the specific public benefits they intend to pursue. As a result, purpose proposals can potentially identify and generate agreement on the specific stakeholders or public benefits that an issuer should prioritize. For example, when Veeva converted to a PBC, it identified employees and customers as the stakeholder interests it intended to prioritize.[176] Third generation proposals, like that introduced at Fox Corp. can have the same effect. Notably, however, purpose proposals only achieve this objective if they designate the issuer's intended public benefit with some specificity.[177]

B. The Process Advantages of Purpose Proposals

Purpose proposals also highlight the process advantages of the shareholder proposal process for exploring governance reform. First, shareholder proposals enable shareholders to initiate governance change. Second, because most shareholder proposals are precatory, a shareholder proposal is part of a bilateral decision-making process, in which adoption of the change requires both board and shareholder support.[178]

The shareholder proposal rule is unique in that it allows a single small shareholder, with a relatively modest ownership stake, to put forward a proposal for change. As Lucian Bebchuk has explained, U.S. corporate law does not permit shareholders unilaterally to introduce structural or governance changes, except within

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stakeholders and society; we conclude that corporations currently have the power—and indeed the obligation—to consider those interests irrespective of their articulated purpose.").

176 *Veeva: A Public Benefit Corporation*, VEEVA, https://perma.cc/R2AT-Q649 (last visited Feb. 12, 2022).

177 In that regard, the purpose proposal at Salesforce offers an example of a problematically vague articulation of the corporation's stakeholder orientation, requiring Salesforce to balance "three considerations:

1. The shareholders' financial interests;

2. The best interests of those materially affected by the corporation's conduct; and

3. A public benefit or benefits chosen by the Board and specified in the amendment." Salesforce.com, Inc., Notice of Exempt Solicitation (Form PX14A6G) (2021), https://perma.cc/4NE8-MVTR.

178 *See* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 956 (2021) (describing relative advantages of joint board-shareholder action over unilateral decisionmaking).

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the limited scope afforded through amendments to the bylaws.[179] It is this limitation that has led to the use of precatory proposals.

Yet precatory proposals have become an increasingly powerful tool. As institutional investors increasingly vote independently of management recommendations, shareholder proposals are more likely to obtain majority support. In many cases, shareholder efforts are fueled by the support of proxy advisory firms like ISS and Glass Lewis. And proposals that receive strong shareholder support are increasingly likely to result in change.[180] The potential value of shareholder proposals is not limited to cases in which they obtain majority support. As Cox and Thomas explain, "dramatic instances exist where practices first advanced as shareholder proposals became widely adopted across public companies, not because they initially won a majority vote but because their proponents' persistence over a multi-year campaign shined a light on the need for reforms."[181]

Significantly, however, because the proposals are nonbinding, the changes they propose require affirmative action by the board, and that action is subject to fiduciary principles. The board's duties require it to consider, inter alia, the interests of minority shareholders and the corporation itself, preventing it from merely acting as a rubber stamp in support of the will of the majority of shareholders. Accordingly, reforms triggered by the shareholder proposal process are the product of a degree of both consensus and accountability.

These attributes are particularly appealing in the context of stakeholder governance. In contrast, unilateral actions to stakeholder governance by the CEO—such would occur if the CEO's decision to sign the BRT statement constituted a commitment by the corporation, or by the board—would raise concerns both about the authority of corporate decision-makers to identify and prioritize particular stakeholder interests as well as potential agency problems.

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[179] Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. F. 833, 844–46 (2005).

[180] As the Council for Institutional Investors explained to the SEC, "shareholder proposals have been the most important vehicle by which shareholders raised—and helped change—corporate policies on a wide range of core governance issues, including majority voting for and annual election of directors, independent board leadership, appropriate forms of compensation of outside directors, proxy access, board diversity, clawbacks of unearned executive compensation, appropriate accounting for stock options, fair employment practices and meaningful sustainability reporting, to name a few." Letter from Kenneth A. Bertsch, Exec. Dir., Council of Institutional Invs. & Jeffrey P. Mahoney, Gen. Couns., Council of Institutional Invs., to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 6 (Jan. 30, 2020), https://perma.cc/9S97-5BKZ.

[181] Cox & Thomas, *supra* note 16, at 1195; *see also* Letter from Kenneth A. Bertsch & Jeffrey P. Mahoney to Vanessa A. Countryman, *supra* note 163, at 19–21 (describing the impact of shareholder proposals that failed to receive majority support).

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By facilitating stakeholder governance through private ordering, purpose proposals also enable issuers to make decisions about the relative importance of financial success, stakeholder interests, and other public benefits on a firm-specific basis.[182] The extent to which a stakeholder governance model is appropriate is likely to vary across firms and industries. Additionally, firm-specific experimentation can generate evidence about the effectiveness of stakeholder governance in furthering public goals as well as the potential costs such governance may impose on corporate viability. Given the uncertainty associated with a significant shift in operational norms, a private ordering solution is likely superior to a one-size-fits-all mandate such as that contemplated by Elizabeth Warren's Accountable Capitalism Act.[183]

C. Potential Problems with Purpose Proposals

Purpose proposals are a promising way of enriching the debate over stakeholder governance. At the same time, there are several distinctive ways in which they may be problematic. First, Rule 14a–8 requires only a small ownership stake, enabling shareholders without a meaningful economic stake in an issuer to access the voting process. Second, Rule 14a–8 can be readily co-opted by stakeholders whose interests may be in direct tension with those of shareholders, through the simple mechanism of buying a limited number of shares. Third, the ability of the shareholder proposal rule to identify and coordinate shareholder preferences depends critically on the integrity of the shareholder voting process. This part briefly considers all three concerns.

As noted above, an extensive literature documents that individual small investors or gadflies are the primary proponents of shareholder proposals. Purpose proposals continue this pattern. To date, James McRitchie, Myra Young, and John Harrington have submitted the overwhelming majority of purpose proposals. Commentators have expressed concern that this pattern allows small shareholders to introduce proposals for personal reasons that have little to do with enhancing corporate value, that the proposals subject issuers to excessive costs, and that the proposals in question may reduce issuer value.[184] Indeed, these concerns played a role in the SEC's 2020 amendments to the federal proxy rules that substantially raised the

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[182] On the role of private ordering in corporate law, see Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637 (2016); D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125 (2011).

[183] Accountable Capitalism Act, S. 3348, 115th Cong. § 6 (2018). Notably, Warren's legislation would prioritize employees over other stakeholders by giving them board representation. Private ordering is also likely to enable market discipline to generate information about the most effective scope of stakeholder capitalism and to provide network effects.

[184] *See* Cox & Thomas, *supra* note 16.

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ownership thresholds required to use Rule 14a–8.[185] The SEC justified these amendments as helping to ensure that the proponent of a shareholder proposal has "a meaningful 'economic stake or investment interest' in a company." In that purpose proposals contemplate sacrificing shareholder value in favor of other objectives, the relatively limited stake required for a shareholder to introduce such a proposal may be particularly troubling.

At the same time, the effectiveness of a shareholder proposal requires that it receive significant voting support. If a small shareholder submits a proposal that is out of touch with the objectives of other shareholders, that proposal is unlikely to impact an issuer. Moreover, Rule 14a–8 prohibits the resubmission of proposals that fail to achieve a designated level of support, and the SEC's 2020 amendments increased the threshold for resubmission as well.[186] The costs associated with an additional shareholder proposal, in terms of its inclusion in the proxy statement and the vote tabulation, have always been minimal, and technology has reduced those costs further. On the other side of the scale, although small shareholders have traditionally been responsible for submitting the majority of shareholder proposals,[187] their proposals have frequently identified significant governance issues and led to broad-based reforms.[188]

A related but potentially more concerning problem is the ability of other stakeholders to access the voting machinery to shift control of the corporation's objectives. Again, commentators argued that the shareholder proposal rule has been "hijacked by a few special interest groups" to promote personal interests or to

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[185] Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8, *supra* note 19, at 70,244 ("[T]he required dollar amount and holding period should be calibrated such that a shareholder has some meaningful 'economic stake or investment interest' in a company—and therefore is more likely to put forth proposals reflecting an interest in the company and its shareholders than to use the proxy process to promote a personal interest or general cause—before the shareholder may draw on company and shareholder resources to require the inclusion of a proposal in the company's proxy statement . . . .").

[186] Id.

[187] Retail shareholders may be more likely to submit shareholder proposals for a variety of reasons including herding and risk aversion by institutional investors as well as a fear of antagonizing corporations on whom they rely for 401(k) business. *See* Dorothy S. Lund, *Asset Managers as Regulators* 171 U. PA. L. REV. (forthcoming 2022) (noting that a concern over pleading corporate clients may lead institutional investors to be more conservative with respect to the issues on which they challenge management). As noted, however, institutional support is required for a shareholder proposal to have an impact. Proxy advisors play a key role in generating and coordinating institutional support, an issue that is beyond the scope of this article.

[188] See Kastiel & Nili, *supra* note 53, at 604 (describing corporate gadflies as "setting the agenda for what is to be voted on by shareholders").

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"publicize a general cause."[189] The concern is that the shareholder proposal rule will be used to "push the company in a direction that benefits special interest shareholders such as labor unions, public pensions, and environmental groups."[190] In addition, the shareholder proposal rule does not require a shareholder to continue to hold his or her stock after the annual meeting. If stakeholders can access the proxy statement simply by purchasing stock, they may seek to advance short-term goals at the expense of the long-term best interests of the corporation.[191]

Despite these concerns, there are deep historical roots both to stakeholder use of the shareholder proposal rule and to proponents of social change buying stock in order to use the shareholder voting process as a tool for publicizing the need for change.[192] One of the best illustrations is the effort by the Medical Committee for Human Rights, which owned five shares of Dow Chemical stock, to use the shareholder proposal rule to seek to prohibit Dow from selling napalm.[193] Another was civil rights activists' attempts to target Greyhound's segregation policy through a shareholder proposal.[194] Indeed, the SEC's shift to a broader acceptance of social policy proposals responded to potential congressional action that would have expressly authorized shareholders to introduce proposals aimed at advancing "the general welfare."[195] That shareholder proposals might be motivated less by the

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[189] Christopher P. Giordano, Sanjay M. Shirodkar & Daniel O'Neill, *Shareholder Proposal Rule Modernized—Now What?*, DLA PIPER LLP (Oct. 1, 2020), https://perma.cc/U89A-R9AB.

[190] John G. Matsusaka, *Why Do Managers Fight Shareholder Proposals? Evidence from No-Action Letter Decisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 20, 2017), https://perma.cc/M7QM-2Q7T; *see also* John G. Matsusaka Oguzhan Ozbas & Irene Yi, *Opportunistic Proposals by Union Shareholders*, 32 REV. FIN. STUD. 3214 (2018) (finding evidence that unions may use value-decreasing shareholder proposals to increase their bargaining leverage).

[191] On the debate over short-termism versus long-termism, see generally Jesse Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554 (2015). Notably, this concern is somewhat mitigated by the 2020 amendments to Rule 14a–8 that increase the minimum ownership requirement and that apply specifically to shareholders who have held their stock for less than three years.

[192] *See also* Sarah Haan, *Civil Rights and Shareholder Activism*: SEC v. Medical Committee for Human Rights, 76 WASH & LEE L. REV. 1167, 1214–1218 (describing how civil rights would buy "one or two shares of stock - to gain admittance to the [shareholders'] meeting").

[193] See Med. Comm. for Human Rights v. Sec. & Exch. Comm'n, 432 F.2d 659 (D.C. Cir. 1970), vacated, 404 U.S. 403 (1972).

[194] *See generally* Wells, *supra* note 73 (describing Greyhound campaign). Wells further describes the broader connection between the shareholder proposal rule and social justice.

[195] In 1970, Senator Edmund Muskie introduced this proposition in the Corporate Participation Bill, S. 4003, 91st Cong. § 2 (1970). The SEC responded to this pressure. *See* Wells, *supra* note 69, at 33 ("In the face of Congressional pressure the SEC soon retreated from its hard-line opposition to social proposals, changing Rule 14a–8 in 1972 to make it easier to make such proposals.").

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economics of the issuer and instead reflect a broader social objective is consistent with a practice that extends back to at least the 1960s.[196]

Because of the ability of stakeholders to access the annual meeting agenda by acquiring a relatively modest ownership stake in a company, purpose proposals seem particularly well suited as a mechanism for debate among shareholders and other potentially competing shareholder groups. Moreover, enabling stakeholders to raise their concerns through the shareholder proposal process may be the most efficient mechanism for placing these issues on the corporate agenda because institutional investors are likely to be poorly positioned to identify those social policy problems most appropriate for corporate consideration.[197]

The potential pitfalls of allowing small shareholders and stakeholders to submit purpose proposals are largely mitigated by the fact that, for a shareholder proposal to have a meaningful impact, it must command a substantial amount of voting support. The voting process thus serves to discipline the wasteful or inappropriate use of the rule. The evolution of shareholder voting, however, may interfere with this process. Today, an overwhelming majority of the votes cast at large publicly traded companies are cast by institutional intermediaries.[198] Those intermediaries are agents; they exercise voting authority over the shares they control, but individual pension fund beneficiaries and mutual fund customers hold the economic interest in those shares.

This separation of voting power and economic interest, which I have characterized elsewhere as "empty voting,"[199] gives rise to potential agency costs. Cathy Hwang and Yaron Nili present data indicating that shareholders have been the driving force behind stakeholder governance.[200] The efforts they document, however, are by institutional intermediaries.[201] Institutional investors may have a variety of

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196 "The use of shareholder proposals to advance social policy goals became prevalent in the 1960s and 1970s when shareholder proponents discovered the device's utility." Eric A. Welter, Note, *The Shareholder Proposal Rule: A Change to Certainty*, 60 GEO. WASH. L. REV. 1980, 1981 n.8 (1992).

197 *See* Fisch, *supra* note 24, at 14 ("It is unclear that asset managers have the skill set to solve complex social problems.").

198 *Id.* at 2 ("[I]nstitutional investors own 70–80% of the stock in large publicly traded companies in the United States.").

199 Id.

200 Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, 2020 U. CHI. L. REV. ONLINE 1 (2020).

201 *See, e.g.*, *id.* at 10 (describing shareholder influence over ISS and Glass Lewis voting policies). The shareholders that influence those policies are institutional investors. *See ISS Opens 2021 Policy Surveys; Glass Lewis Seeks Informal Feedback*, COOLEY LLP (Aug. 16, 2021), https://perma.cc/7Q8N-C624 (explaining that, as part of its annual vote recommendation updates, "ISS collects information from

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reasons for favoring social policy proposals or stakeholder governance, but those preferences may not be shared by their beneficiaries.[202] Given the outsized influence that institutional intermediaries exercise over voting outcomes, the potential impact of the interests of fund sponsors and managers over institutional voting behavior is particularly problematic.[203]

Intermediation may result in institutional investors supporting stakeholder governance to a greater degree than their beneficiaries would prefer.[204] It may, alternatively, produce the opposite result. As detailed above, advocates of stakeholder governance have been inconsistent as to whether their objective is to increase long-term shareholder value or to enable corporations to sacrifice shareholder value in favor of other goals. Intermediaries exercise their voting power subject to fiduciary duties to their beneficiaries and, although they can perhaps plausibly defend support for stakeholder governance that instrumentally increases shareholder value,[205] at the end of the day, their loyalty runs to shareholders and not society more generally. Indeed, to the extent that proponents defend conversion to a PBC as necessary to enable corporations to sacrifice shareholder value in favor of the interests of other stakeholders, it is unclear that intermediaries can support such

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institutional shareholders, corporate issuers, corporate directors and other market constituents in the form of an annual survey").

[202] These reasons may include marketing, avoiding adverse regulatory action and currying political favor. *See* Schwartz, *supra* note 26.

[203] As Bernie S. Sharfman observes, "the Big Three's voting power is even greater than the percentage of shares they hold under management since they have a much greater propensity to vote their shares relative to those retail investors who hold their shares directly in brokerage accounts." *Opportunism in the Shareholder Voting of the "Big Three" Investment Advisers to Index Funds*, 48 J. CORP. L. 1, 5 (Feb. 5, 2022).

[204] In fact, institutional assets are subject to a double layer of intermediation because a substantial amount of mutual fund money is invested through pension and 401(k) plans in which plan sponsors choose the menu of investment options that are available to plan participants. *See* Lund, *supra* note 187 ("The bulk of the Big Three's revenue comes from corporate and public pension plans and not individuals.").

[205] Some commentators have defended stakeholder governance as consistent with a "portfolio approach" that would "increase returns across the portfolio if even not maximizing for particular firms." *See, e.g.*, Jeffrey Gordon, *Systemic Stewardship*, J. CORP. L. (forthcoming 2022); *see also* Notice of Exempt Solicitation, *supra* note 123 (explaining that "as a PBC, BlackRock would be more likely to take actions that reduce any number of externalities in order to improve local and global economies and returns to diversified shareholders even if the actions reduced its long-term internal rate of return"). Systemic stewardship claims assume, however, that a socially responsible investment will reduce the overall level of business activities that harm an investor's portfolio, such as carbon-intensive practices. These claims depend on the assumption that a fully diversified institutional investor owns the entire universe of companies that could engage in such harm. It is likely, however, that an investor's pressure on its portfolio companies to, for example, sell dirty assets, may simply result in those assets being sold to a company that is outside the investor's portfolio, a result that does not reduce the level of socially harmful activity.

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proposals consistent with their fiduciary duties.[206] Proponents of purpose proposals have defended the PBC as a tool that enables a corporation to commit to not putting shareholders first.[207] If a corporation commits to not putting shareholders first, can a fiduciary investing the money of its beneficiaries buy the stock?[208]

As a result, it is plausible that the intermediation associated with public company voting has the effect of suppressing the level of support that purpose proposals would enjoy if those with skin in the game were able to express their preferences directly.[209] Moreover, concern about their fiduciary obligations may prevent institutions from fully participating in the debate over stakeholder governance. In particular, institutions may be constrained from arguing in favor of

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[206] Julia D. Mahoney and Paul G. Mahoney observe that an admission that institutions were sacrificing value for values would constitute a breach of fiduciary duty. *See* Julia D. Mahoney & Paul G. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840 (2021) (arguing that institutions cannot sacrifice value for values consistent with their fiduciary duties); *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 385–86 (2020) (maintaining that a trustee's authority to consider ESG factors is only appropriate if: "(1) the trustee reasonably concludes that the ESG investment program will benefit the beneficiary directly by improving the risk-adjusted return; and (2) the trustee's exclusive motive for adopting the ESG investment program is to obtain this direct benefit").

[207] *See, e.g.*, Goldman Sachs Grp. Inc., Notice of Exempt Solicitation (Form PX14A6G) (2021), https://perma.cc/D734-DGED ("[T]ransitioning to a PBC is consistent with the aforementioned commitment to obligate our company directors' fiduciary duties to all stakeholders alike, not just shareholders.").

[208] The Department of Labor (DOL) adopted a rule in 2020 that appeared to limit the power of retirement plan fiduciaries to consider non-pecuniary factors. *See* Quinn Curtis, Jill Fisch & Adriana Robertsonet al., *Do ESG Funds Deliver on Their Promises?,* 120 Mich. L. Rev. 393, 416–18 (2021) (describing history and scope of DOL rule). The Biden Administration announced its disapproval of the rule, and on Oct. 14, 2021, the DOL proposed a new rule that would authorize ERISA fiduciaries to consider ESG factors. *Id.* at 418. Nonetheless, ERISA fiduciaries continue to be concerned about potential litigation risk from decisions that explicitly favor stakeholder governance over shareholder value. *Id.* For example, BlackRock's 2022 voting guidelines appear deliberately ambiguous on this issue. BlackRock explains that:

Corporate form Proposals to change a corporation's form, including those to convert to a public benefit corporation ("PBC") structure, should clearly articulate how the interests of shareholders and different stakeholders would be augmented or adversely affected, as well as the accountability and voting mechanisms that would be available to shareholders. We generally support management proposals *if our analysis indicates that shareholders' interests are adequately protected.* Corporate form shareholder proposals are evaluated on a case-by-case basis.

BLACKROCK INVESTMENT STEWARDSHIP, PROXY VOTING GUIDELINES FOR U.S. SECURITIES 20 (Jan. 2022) (emphasis added), https://perma.cc/VZ2Q-S4RL.

[209] One poll reports, for example, that 75% of millennial investors "would be willing to sacrifice some performance on their investments to achieve an ESG goal."), *Kiplinger – Domini Poll: ESG Investing Is Gaining Traction*, KIPLINGER (Oct. 12, 2021), https://perma.cc/3T7A-HHLL.

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stakeholder governance that sacrifices shareholder interests in favor of societal value, even if such sacrifices are the most compelling rationale for stakeholder governance.

Although these concerns about the integrity of the voting process extend beyond purpose proposals, stakeholder governance offers a particularly compelling example of the potential tension between Rule 14a–8 and the heavily-intermediated voting process. If Rule 14a–8 is to function effectively as a tool for bringing debates over social policy inside the corporation, corporations will need to find a way to engage the voices of their true shareholders, not just those who manage their assets. I have identified elsewhere potential mechanisms for such engagement, including pass-through voting, allowing mutual fund shareholders to convey their voting preferences to mutual fund managers, and increased product differentiation in the mutual fund industry.[210]

A separate but related concern about shareholder proposals is the prospect that they can induce changes in corporate behavior irrespective of the outcome of a shareholder vote if they are settled without being submitted to the shareholders. A substantial number of shareholder proposals are settled and, as Sarah Haan warns, such settlements threaten to undermine the value of the shareholder proposal process both in enhancing transparency and providing a mechanism for ascertaining the preferences of a majority of shareholders.[211] Haan also questions the degree to which corporate obligations incurred in connection with the settlement of a shareholder proposal are enforceable.[212] As with intermediation, the risk of settlement is not unique to purpose proposals. Notably, however, although shareholders have only introduced a limited number of purpose proposals to date, one such proposal, submitted by James McRitchie at Broadridge, has already been settled and withdrawn.[213]

VI. CONCLUSION

Purpose proposals currently present both a good news story and a bad news story. The good news story is that shareholder proposals are again doing the work of bringing a key governance issue—the desirability of stakeholder governance—to the

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[210] Fisch, *supra* note 24; *see also* Sharfman, *supra* note 203, at 28–29 (summarizing several feasible mechanisms by which retail investors could convey their voting preferences to fund managers).

[211] *See* Haan, *supra* note 45, at 292 ("Regardless of which theory we adopt to justify the shareholder proposal, its ends are only served when a qualifying proposal leads to publication in the proxy and a shareholder vote.").

[212] Id. at 322.

[213] The S'holder Commons, *supra* note 141.

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forefront. Shareholders are using proposals to articulate their views, generate management responses, and determine the extent to which their concerns are shared by other shareholders. Moreover, purpose proposals allow this debate to occur on a firm-by-firm basis, engaging market forces to test the viability of the stakeholder model.

The bad news story is that purpose proposals expose the challenges that intermediated stock ownership presents for shareholder democracy. Although intermediated voting can be defended as an efficient tool for pursuing a single, clearly-defined objective such as price maximization, intermediaries are poorly positioned to evaluate the normative trade-offs presented by the debate over stakeholder governance.

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