

# Social Proposals Under Rule 14a-8: A Fall-Back Remedy in an Era of Congressional Inaction

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*More than a decade ago, institutional investors, notably labor unions and pension plans, began using shareholder proposals as a vehicle for advancing progressive social causes. These proposals have recently garnered heightened levels of shareholder support. While even majority support for a proposal does not insure its adoption by the board of directors, appreciable (even if not majority) support can nonetheless sometimes precipitate adoption, or at least negotiation (which can lead to adoption). This Essay argues, first, that with Congress now largely dysfunctional, social proposals have acquired a whole new role—that of a company-by-company, fall-back mechanism for solving social problems that Congress has failed to address. Second, a new dynamic may be just over the horizon. Once the legal community becomes fully cognizant of the successes of social proposals, it is probably only a matter of time before wealthy conservative activists identify the proposals as a mechanism that they may be able to co-opt. When that happens, boardrooms will, as never before, become important battlegrounds in the culture wars.*

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In the constellation of federal securities laws, none is more unusual than the shareholder proposal rule, otherwise known as Securities and Exchange Commission (SEC) Rule 14a-8.<sup>1</sup> Adopted at the height of World War II amid growing fears of totalitarianism,<sup>2</sup> the rule was intended as a gesture in favor of shareholder democracy.<sup>3</sup> The idea was to empower public company shareholders,<sup>4</sup> many of whom lacked the resources to mount their own proxy solicitations, by allowing their proposals to piggyback free of charge on management's proxy materials.<sup>5</sup> The idea was also to put management in the position where it would need to state its grounds for opposing a proposal: "The right to ask a question publicly and to require a public answer may serve a purpose even if the resolution does not carry."<sup>6</sup>

To be sure, a proposal that receives support from even a majority of the shareholders does not bind the board of directors, since state law dictates that the board manages the business.<sup>7</sup> On the other hand, sometimes the board will adopt a proposal that receives appreciable, even if not majority, support, or at least enter negotiations with the proponent (which in turn may lead to adoption).<sup>8</sup> Moreover, occasionally the board will agree to adopt or negotiate a proposal before circulating the proxy materials in order to avoid having to explain in those materials the reasons for its opposition.<sup>9</sup> Over the years, shareholder proposals

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1. Shareholder Proposal Rule, 17 C.F.R. § 240.14a-8 (2012).

2. See Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1547–53 (2006).

3. Shareholders in public corporations play a limited governance role, which consists primarily of electing directors, bringing derivative lawsuits against directors and officers for breaching their fiduciary duties, and exercising a veto power over certain non-routine transactions such as mergers. See generally Robert B. Thompson, *Defining the Shareholder's Role, Defining a Role for State Law: Folk at 40*, 33 DEL. J. CORP. L. 771 (2008).

4. The SEC adopted Rule 14a-8 pursuant to section 14(a) of the Securities Exchange Act of 1934, a section that encompasses only those companies registered pursuant to section 12 of that Act. Section 12 companies are often referred to as "public companies" since most public companies meet the requirements of section 12. For discussion of these requirements and the impact on them of the JOBS Act of 2012, see Donald C. Langevoort & Robert B. Thompson, "Publicness" in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. (forthcoming 2012).

5. Milton V. Freeman, *An Estimate of the Practical Consequences of the Stockholder's Proposal Rule*, 34 U. DET. L.J. 549, 552–54 (1957). Freeman, who worked in the SEC's General Counsel's Office from 1934 to 1942 and served as the agency's Assistant Solicitor from 1942 to 1946, see *id.* at 549 n.\*, was the drafter of the shareholder proposal rule. See Editorial, *The Seamless Symposium*, 34 U. DET. L.J. 517, 517 (1957).

6. See Freeman, *supra* note 5, at 555.

7. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2012) (providing that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation"); cf. *Auer v. Dressel*, 118 N.E.2d 590, 593–94 (N.Y. 1954) (upholding the shareholders' right to suggest the reinstatement of the company's former president). Rule 14a-8 effectuates this and other principles of state law by excluding any proposal that fails to comply with the law of the company's state of incorporation. 17 C.F.R. § 240.14a-8(i)(1) (2012).

8. See *infra* notes 58–59, 74, 84, 86–87, and accompanying text.

9. See, e.g., Michael Passoff, *Hot Issues: Global Warming, HIV/AIDS, Sexual Bias, PROXY*

have fallen into two principal categories: those aimed at the company's internal governance procedures, such as its method of electing directors<sup>10</sup> and those aimed at its policies and practices that subsume social issues, from racial segregation<sup>11</sup> to global warming.<sup>12</sup> For much of the history of shareholder proposals, those that have been put to a vote have tended to lose overwhelmingly.<sup>13</sup>

This Essay focuses on social proposals. These proposals have long been controversial because they implicate the debate between “shareholder primacy” and “corporate social responsibility.” Advocates of “shareholder primacy” assert that the purpose of a corporation is to generate profits for the benefit of its shareholders.<sup>14</sup> According to these advocates, social proposals tend to thwart this purpose and should not be allowed.<sup>15</sup> Supporters of “corporate social responsibility,” on the other hand, maintain that a corporation has obligations not only to its shareholders but also to its employees, customers, suppliers, and other constituencies with which it interacts.<sup>16</sup> For these supporters, social proposals address precisely the sorts of issues with which a corporation should be concerned.<sup>17</sup>

Social proposals have had the wind at their backs since sometime in the 1990s, when institutional shareholders, notably labor unions and pension plans, adopted them as a vehicle for advancing progressive causes.<sup>18</sup> Since then, social

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PREVIEW: HELPING FOUNDATIONS ALIGN MISSION AND INVESTMENT (As You Sow Found., Oakland, Cal.), Spring 2005, at 1, 3, [http://www.asyousow.org/publications/2005\\_proxy\\_preview.pdf](http://www.asyousow.org/publications/2005_proxy_preview.pdf) (noting that companies often prefer to avoid a fight in the proxy materials over whether to ban sexual orientation discrimination in their employment policies and thus are willing to discuss such a ban in exchange for withdrawal of the proposal). This reaction would probably not have surprised the drafter of the shareholder proposal rule. See Freeman, *supra* note 5, and *supra* text accompanying note 6.

10. See, e.g., Supervalu, Inc., SEC No-Action Letter, 2012 WL 1493953 (April 20, 2012).

11. See, e.g., Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D.N.Y. 1951).

12. See, e.g., Alcoa Inc., SEC No-Action Letter, 2009 WL 631185 (Feb. 3, 2009).

13. See Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 888 (1994). For a history of the shareholder proposal rule, see Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1142–62 (1993). For cross-cultural differences, see Bonnie Buchanan et al., *Shareholder Proposal Rules and Practice: Evidence from a Comparison of the United States and the United Kingdom*, 49 AM. BUS. L.J. 739 (forthcoming 2012).

14. See generally D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

15. See, e.g., H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 115–16 (2012); Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 492 (1972). To be sure, some social proposals may benefit the bottom line, but many do not. See Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1776 (2011).

16. See generally Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523 (2011).

17. See, e.g., Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929 (2005).

18. See Heidi Welsh & Michael Passoff, *Shareholder Proposal Trends*, PROXY PREVIEW: HELPING

proposals have not only grown in number,<sup>19</sup> but, far more significantly, have garnered dramatically increased percentages of shareholder support, rising from averages of less than ten percent in 2002 to more than twenty percent in 2011.<sup>20</sup> More than twenty proposals received greater than forty percent support in 2011, with a handful breaking the fifty percent barrier.<sup>21</sup>

This Essay makes two arguments concerning social proposals. First, now that Congress has become largely dysfunctional,<sup>22</sup> the proposals have acquired a whole new role—that of a company-by-company, fall-back mechanism for addressing problems as to which Congress has been unable or unwilling to act. This role was recently endorsed, perhaps unwittingly, by SEC Chairman Mary L. Schapiro, in her response earlier this year to a question about whether her agency planned to develop disclosure rules on corporate political spending—an issue on which Congress has taken no action.<sup>23</sup> While asserting that the SEC would address such disclosure at “some point,” she observed that a mechanism already exists through which shareholders can seek to obtain it—Rule 14a-8.<sup>24</sup>

Second, the successes of social proposals may lead to unexpected consequences. At present, the legal community seems generally unaware of these successes, but that may change.<sup>25</sup> If such change occurs, it is probably only a matter of time before wealthy conservatives identify social proposals as a mechanism that they can co-opt through a deft expenditure of funds.<sup>26</sup> If the

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SHAREHOLDERS VOTE THEIR VALUES (As You Sow Found., Oakland, Cal.), 2012, at 1, 54, <http://asyousow.org/download/proxypreview.shtml> (noting that shareholder activists tend largely to be liberal). For an overview of proposals filed in the 2012 proxy season, see *id.* at 17–57. For discussion of institutional shareholder activism, see Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315 (2008); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998).

19. See Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161, 188 (2010).

20. See Welsh & Passoff, *supra* note 18, at 11.

21. See *id.* at 13.

22. For illustrative recent discussions of congressional dysfunction, see Sanford Levinson, *Our Imbecilic Constitution*, N.Y. TIMES, May 29, 2012, at A23 (noting that “critics across the spectrum call the American political system dysfunctional, even pathological”); Jonathan Cohn, *Why the Justices Should Be Careful*, NEW REPUBLIC (May 1, 2012, 4:51 PM), <http://www.tnr.com/blog/jonathan-cohn/103055/supreme-court-obamacare-mandate-legitimacy-precedent> (attributing dysfunction to Congress as well as to other branches of government); Thomas E. Mann & Norman J. Orenstein, *Let’s Just Say It: The Republicans Are the Problem*, WASH. POST (April 27, 2012), [http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUII\\_story.html](http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUII_story.html) (noting that “[w]e have been studying Washington and Congress for more than forty years, and never have we seen them this dysfunctional”).

23. Sarah N. Lynch, *SEC’s Aguilar Seeks Political Spending Disclosures*, REUTERS (Feb. 24, 2012, 11:54 AM), <http://www.reuters.com/article/2012/02/24/sec-campaign-idusw1e7n800420120224>.

24. See *id.*

25. See *infra* Part III.

26. At present, there are a small number of conservative think tanks that file proposals seeking to challenge, among other things, monies spent to combat climate change or to promote

funds are used to hire able lawyers to draft persuasive conservative proposals and to retain other advisers to identify corporations with shareholders receptive to conservative arguments, some present advocates of corporate social responsibility may find an exclusive focus on corporate profits more to their liking.

This Essay proceeds as follows. After some brief background on Rule 14a-8 in Part I, Part II provides three examples of social proposals that have led to changed corporate behavior on matters untouched by Congress. Part III then assesses the potential consequences of widespread awareness of the proposals' successes.

### I. A BARE-BONES PRIMER ON THE SHAREHOLDER PROPOSAL RULE

Rule 14a-8 imposes a host of requirements on the would-be shareholder proponent. If, in the opinion of the company, the shareholder has failed to meet one or more of the requirements, the company must write a letter to this effect to the SEC's Corporate Finance Division, to which the shareholder can respond.<sup>27</sup> In addition, the company can request a "no-action" letter—a letter from a Division attorney stating that the company, based on the facts described, can omit the proposal from its proxy materials without causing the Division to recommend enforcement action to the SEC.<sup>28</sup>

Several Rule 14a-8 requirements are procedural in nature. The proponent must have owned at least \$2000 worth of stock or one percent of the outstanding voting shares, whichever is less, for a period of one year (as well as through the date of the shareholders' meeting at which the proposal will be considered).<sup>29</sup> For a given shareholders' meeting, the proponent may submit no more than one proposal,<sup>30</sup> which, together with its supporting statement, cannot exceed five hundred words in length.<sup>31</sup> Depending on the percentage of support the proposal receives, the proponent may (or may not) be able to resubmit it in a later year.<sup>32</sup>

The rule also lists thirteen grounds for excluding a proposal based on its subject matter.<sup>33</sup> Two of the grounds carry special relevance for purposes of this Essay. One such ground is the proposal's impropriety under state law.<sup>34</sup> For

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abortion rights. To date, these proposals have attracted only negligible shareholder support. *See* Welsh & Passoff, *supra* note 18, at 54–56.

27. *See* 17 C.F.R. § 240.14a-8(j)–(k).

28. For a comprehensive description and analysis of the no-action letter procedure and the different types of no-action letters, see Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 929–66 (1998).

29. *See* 17 C.F.R. § 240.14a-8(b)(1).

30. *See id.* § 240.14a-8(c).

31. *See id.* § 240.14a-8(d).

32. *See id.* § 240.14a-8(i)(12).

33. *See id.* § 240.14a-8(i)(1)–(13).

34. *Id.* § 240.14a-8(i)(1).

example, a proposal would be improper if it ordered the board to do something, since state law gives the board exclusive authority to manage the business.<sup>35</sup> Thus, virtually all proposals must be in precatory form.<sup>36</sup>

The other noteworthy ground for exclusion is if the proposal involves “a matter relating to the company’s ordinary business operations.”<sup>37</sup> The idea is to distinguish between items that are “mundane in nature,” which ought to remain within management’s exclusive province, from those with “significant policy, economic, or other implications” on which shareholders should be entitled to speak.<sup>38</sup> The SEC has explained:

Certain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.<sup>39</sup>

Consider the so-called Y2K problem of a few years back—the concern that unless businesses took appropriate precautions, their computers would implode at the stroke of midnight on December 31, 1999.<sup>40</sup> Suppose that before the critical date in question, a shareholder asked his company to issue a report describing the steps being taken to address Y2K. Seen one way, that proposal represents the prototype of “ordinary business,” since it involves technical computer adjustments arguably best left to management. Seen another way, however, the proposal oozes policy: newspapers at the time were awash in articles debating what to do about

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35. See, e.g., Bank of America Corp., SEC No-Action Letter, 2010 WL 4922470 (Feb. 24, 2010).

36. A note to Rule 14a-8 observes that a proposal formulated as a suggestion is likely to avoid conflicts with state law. See 17 C.F.R. § 240.14a-8(i)(1). The note states in pertinent part:

In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

*Id.*

37. 17 C.F.R. § 240.14a-8(i)(7).

38. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-12999, 1976 WL 160347, at \*11–12 (Nov. 22, 1976).

39. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 1998 WL 254809, at \*4 (May 21, 1998).

40. For background and discussion of the Y2K problem, see Peter A. Alces & Aaron S. Book, *When Y2K Causes “Economic Loss” to “Other Property,”* 84 MINN. L. REV. 1, 6–11 (1999).

Y2K,<sup>41</sup> Congress held hearings on the subject,<sup>42</sup> and the President named a Y2K “czar” to ensure that the problem received the attention it deserved.<sup>43</sup> Persuaded by the latter view, the Division attorney adopted the position that a Y2K proposal was not excludable on the ordinary business ground.<sup>44</sup>

Only proposals that meet the above-mentioned procedural and substantive requirements can appear in management’s proxy materials. Such proposals are thereafter put to a shareholder vote.

## II. SHAREHOLDER PROPOSALS AS A FALL-BACK REMEDY FOR CONGRESSIONAL INACTION—THREE ILLUSTRATIONS

With Congress at present dysfunctional, social proposals today often play a whole new role—that of a fall-back remedy with respect to problems on which Congress has been unable or unwilling to act. This Part provides three examples, all of which meet the requirements described in Part I. The examples involve employment discrimination on the basis of sexual orientation, the commercial use of Bisphenol-A, and corporate political spending.

### *A. Employment Discrimination on the Basis of Sexual Orientation*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin” but not sexual orientation.<sup>45</sup> Bills seeking to add sexual orientation as a protected category—whether by amending Title VII or by enacting a separate anti-discrimination statute—date back to 1974.<sup>46</sup> The likelihood that any of these bills will become law in the near future appears remote.<sup>47</sup>

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41. See, e.g., Rajiv Chandrasekaran et al., *Y2K Gloom May Bring on the Doom*, WASH. POST, Mar. 22, 1999, at A1, available at <http://www.washingtonpost.com/wp-srv/national/frompost/march99/panic22.htm>.

42. See, e.g., *Year 2000 Liability and Disclosure: Hearing Before the Subcomm. on Financial Services and Technology of the S. Banking, Housing and Urban Affairs Comm.*, 105th Cong. (1997); *Solving the Year 2000 Software Problem: Creating Blueprints for Success: Hearing Before the Subcomm. on Technology of the Comm. on Science*, 104th Cong. (1996).

43. See Philip Shenon, *Washington’s Man in the Middle of Millennium Madness*, N.Y. TIMES, Dec. 13, 1999, at A16.

44. See Tenet Healthcare Corp., SEC No-Action Letter, 1998 SEC No-Act. Lexis 678 (July 1, 1998).

45. 42 U.S.C. § 2000e-2 (2006).

46. See William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495–98 (2011) (recounting history).

47. See Craig Konnoth, *Section 5 Constraints on Congress Through the Lens of Article III and the Constitutionality of the Employment Non-Discrimination Act*, 120 YALE L.J. 1263, 1263 (2011) (describing the efforts as “stalled”); Steve Benen, *Is the RNC OK with ENDA or Is It DOA?*, MADDOW BLOG (May 14, 2012, 3:01 PM), [http://maddowblog.msnbc.com/\\_news/2012/05/14/11701809-is-the-rnc-ok-with-enda-or-is-it-doa](http://maddowblog.msnbc.com/_news/2012/05/14/11701809-is-the-rnc-ok-with-enda-or-is-it-doa) (describing the legislation as having “no realistic shot of success anytime soon,” despite the scheduling of hearings).

The employment policies of numerous public companies, however, do prohibit discrimination based on sexual orientation.<sup>48</sup> This development came about in no small measure as a result of shareholder proposals filed by institutional investors.<sup>49</sup> The saga began in 1991. Cracker Barrel Old Country Store, Inc. (Cracker Barrel) announced that homosexuality violated the company's "concept and values,"<sup>50</sup> after which it dismissed a number of gay employees.<sup>51</sup> Soon thereafter, a New York City pension plan (NYCERS) that owned shares in Cracker Barrel filed a proposal urging the company to amend its employment policy to ban discrimination on the basis of sexual orientation.<sup>52</sup> Seeking leave to exclude the proposal from its proxy materials, Cracker Barrel requested a no-action letter on the ground that the proposal involved "ordinary business."<sup>53</sup>

Remarkably, the Division agreed with Cracker Barrel and issued a no-action letter based on the ordinary business exclusion.<sup>54</sup> The letter went even further, announcing that in the future the exclusion would apply to all employment-related proposals.<sup>55</sup> According to the letter, "the line between includable and excludable employment-related proposals based on social policy considerations ha[d] become increasingly difficult to draw."<sup>56</sup>

The Division's Cracker Barrel letter created a ruckus, whereupon, in 1998, the SEC reversed the stance taken in that letter and reinstated the social policy exception for employment-related proposals.<sup>57</sup> NYCERS then resubmitted its proposal to Cracker Barrel, and the proposal was put to a shareholder vote. After more than half of its shareholders voted in favor of the proposal in 2002, Cracker

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48. See Shelley Alpern, *Sexual Orientation Non-Discrimination*, PROXY PREVIEW: HELPING FOUNDATIONS AND ENDOWMENTS ALIGN INVESTMENT AND MISSION (As You Sow Found., Oakland, Cal.), 2011, at 1, 18, [http://asyousow.org/publications/ProxyPreview\\_2011.pdf](http://asyousow.org/publications/ProxyPreview_2011.pdf).

49. See *id.* (noting that "activists have filed well over 200 resolutions that have led to better policies at 150 plus corporations").

50. *New York City Emps.' Ret. Sys. (NYCERS) v. SEC*, 45 F.3d 7, 9 (2d Cir. 1995). For further discussion of this decision, see *infra* note 56.

51. See *id.*

52. See *id.*

53. Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1992 WL 289095, at \*3 (Oct. 13, 1992).

54. *Id.*

55. See *id.* The letter specifically exempted from automatic exclusion proposals directed at the compensation of senior executives. See *id.*

56. *Id.* at \*1. NYCERS tried but failed to obtain reversal of the no-action letter from the SEC. See Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1993 WL 11016 (Jan. 15, 1993). NYCERS then sued the SEC in federal district court on the theory that the SEC had not submitted its new approach to the notice and comment process required under the Administrative Procedure Act. NYCERS convinced the trial court but lost on appeal. See *NYCERS v. SEC*, 858 (S.D.N.Y. 1994), *rev'd*, 45 F.3d 7 (2d Cir. 1995).

57. Amendments to Rules on Shareholder Proposals, Release No. 23200, 1998 WL 254809, at \*3-4 (May 21, 1998).

Barrel amended its employment policy to prohibit discrimination based on sexual orientation.<sup>58</sup>

Encouraged by this success, institutional shareholders made similar proposals at numerous other public companies. In no small measure due to these proposals, more than eighty-nine percent of the Fortune 500 companies—and ninety-five percent of the Fortune 100 companies—currently have employment policies prohibiting discrimination based on sexual orientation.<sup>59</sup> Proposals continue to be filed at public companies with employment policies that do not include such a prohibition.<sup>60</sup>

### B. *The Commercial Use of Bisphenol-A*

The Toxic Substances Control Act of 1976 (TSCA) is the principal federal statute regulating the commercial use of chemicals.<sup>61</sup> Administered by the Environmental Protection Agency (EPA), the TSCA draws a bright line between chemicals that were on the market as of December 1, 1979 (existing chemicals) and those not on the market as of that date (new chemicals).<sup>62</sup> While new chemicals are subject to a safety review, existing chemicals are presumed safe, regardless of whether their safety has ever been demonstrated.<sup>63</sup> Moreover, manufacturers of existing chemicals are not required to provide data concerning their impact on human health.<sup>64</sup> If scientific studies suggest that an existing chemical presents a significant health risk, the EPA must meet a daunting burden of proof in order to ban it.<sup>65</sup> Thus, when the EPA banned asbestos, broadly regarded in the scientific community as a carcinogen,<sup>66</sup> the ban did not survive judicial review.<sup>67</sup>

Largely because of its presumption favoring existing chemicals, the TSCA is widely regarded as in need of reform.<sup>68</sup> Various legislators have introduced bills

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58. See Sulkowski & Greenfield, *supra* note 17, at 941.

59. See Alpern, *supra* note 48.

60. See Welsh & Passoff, *supra* note 18, at 27.

61. Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2697 (2006).

62. See John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Reform*, 35 *ECOLOGICAL Q.* 721, 731–32 (2008).

63. See *id.* at 732.

64. See Laura Hall et al., *Litigating Toxic Risks Ahead of Regulation: Biomonitoring Science in the Courtroom*, 31 *STAN. ENVTL. L.J.* 3, 4–5 (2012).

65. See Noah Sachs, *Blocked Pathways: Potential Legal Responses to Endocrine Disrupting Chemicals*, 24 *COLUM. J. ENVTL. L.* 289, 348 (1999).

66. See *Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST., <http://www.cancer.gov/courttopics/factsheet/Risk/asbestos>.

67. See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1215 (5th Cir. 1991).

68. See, e.g., Noah M. Sachs, *Rescuing the Strong Precautionary Principle from Its Critics*, 2011 *U. ILL. L. REV.* 1285, 1287 (2011). While reforms have been proposed, they have not been adopted. Explanations for the lack of reform include the power of the chemical industry. See, e.g., Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 *VAND. L. REV.* 1817, 1832 (2009).

that would eliminate the presumption,<sup>69</sup> but the prospects for enactment appear bleak.<sup>70</sup>

Among the existing chemicals benefitting from the presumption is Bisphenol-A (BPA).<sup>71</sup> This chemical is used in dental sealants, toilet paper, and contact lenses, and also as a coating on cash-register receipt paper.<sup>72</sup> Over the last five years, there have been scientific studies, widely covered in the media, linking BPA to several types of cancer as well as to heart disease and diabetes.<sup>73</sup>

These studies have led institutional shareholders to file BPA-related proposals, typically taking the form of a request for a report concerning the company's plans for addressing the concerns raised by the chemical, including a search for substitutes. Companies receiving these proposals have included Dentsply International, a major dental products manufacturer, and two companies that used BPA-coated receipt paper—Yum Brands (owner of KFC, Pizza Hut, and Long John Silver), and Panera Bread Company (the restaurant chain owner). The proponents withdrew the proposals at Dentsply and Panera in response to assurances from the companies that they would address the proposal's concerns.<sup>74</sup> At Yum Brands, the proponent withdrew the proposal following the company's announcement that it would halt its use of BPA-coated cash register receipt paper.<sup>75</sup>

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69. See Rajiv Shah & Kelly E. Taylor, *Concealing Danger: How the Regulation of Cosmetics in the United States Puts Consumers at Risk*, 23 FORDHAM ENVTL. L. REV. 203, 247 (2012).

70. See Lynn L. Bergeson, *What Is to Come*, MANUFACTURING TODAY, <http://www.manufacturing-today.com/index.php/sections/columns1/566-what-is-to-come> (last visited Oct. 5, 2012) (describing chances as “dim”); Mark N. Duvall & Alexandra M. Wyatt, *Update on TSCA Developments in Congress and at EPA*, BEVERIDGE & DIAMOND 1 (2012), <http://www.bdlaw.com/news-1328.html> (describing chances as “slim”).

71. See Jane Houlihan et al., *Timeline: BPA from Invention to Phase-Out*, ENVIRONMENTAL WORKING GROUP, <http://www.ewg.org/reports/bpatimeline> (last updated Mar. 2011).

72. See *Bisphenol A Factsheet*, CTR. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/biomonitoring/BisphenolA\\_FactSheet.html](http://www.cdc.gov/biomonitoring/BisphenolA_FactSheet.html) (last updated Apr. 2, 2012). BPA is also used in food packaging and in beverage can linings. See *id.* BPA's food-related use falls under the jurisdiction of the Food and Drug Administration, but that represents only a small fraction of BPA's total use in this country. See A. Bryan Endres & Nicholas R. Johnson, *United States Food Update: Moving Toward a More Balanced Food Regulatory Regime*, 7 J. FOOD L. POL'Y 383, 409 (2011). Approximately eighty to ninety percent of that use falls within the ambit of the EPA's TSCA. See *id.* at 409.

73. See, e.g., Ian A. Lang et al., *Association of Urinary Bisphenol A Concentration with Medical Disorders and Laboratory Abnormalities in Adults*, 300 J. AM. MED. ASS'N 1303 (2008), available at <http://jama.jamanetwork.com/article.aspx?volume=300&issue=11&page=1303>; Editorial, *Heightened Concern over BPA*, N.Y. TIMES, Jan. 21, 2010, at A38; Nicholas D. Kristof, *Big Chem, Big Harm?*, N.Y. TIMES, Aug. 26, 2012, at SR11 (discussing BPA).

74. See *Shareholder Resolution: Report on Bisphenol A in Thermal Receipt Paper*, INVESTOR ENVTL. HEALTH NETWORK (2012), <http://iehn.org/resolutions.shareholder.detail.php?pageid=110>; *Shareholder Resolution: Bisphenol A Resolution*, INVESTOR ENVTL. HEALTH NETWORK (2011), <http://iehn.org/resolutions.shareholder.detail.php?pageid=97>.

75. See *Yum! Brands, Whole Foods Trash Paper Receipts Made with BPA*, REUTERS (May 20, 2011, 2:02 AM), <http://www.reuters.com/article/2011/05/20/idUS265695961020110520>.

*C. Political Spending*

In its watershed decision in *Citizens United v. Federal Election Commission*,<sup>76</sup> the Supreme Court held unconstitutional a provision of the Bipartisan Campaign Reform Act of 2002 that limited the amount corporations could spend on certain electioneering activities: “The Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>77</sup> But the Court did not completely preclude federal regulation of the area. Indeed, it accentuated the point that Congress (or for that matter the SEC) could, without offending free speech rights, subject corporate political spending to mandatory disclosure.<sup>78</sup>

In response to the Court’s invitation, members of Congress introduced several bills requiring disclosure of corporate political spending.<sup>79</sup> The likelihood that these bills will become law has been described as “uncertain and maybe even remote.”<sup>80</sup>

Proceeding down an alternative avenue, a committee of law professors filed a petition with the SEC urging it to use its rule-making authority to require disclosure of corporate political spending.<sup>81</sup> The prospect that the SEC will do so appears somewhat doubtful, at least in the near term. Recall SEC Chairman Mary L. Schapiro’s prediction that the agency would address such disclosure “at some point.”<sup>82</sup>

In the wake of *Citizens United*, there has been a dramatic increase in the number of shareholder proposals seeking disclosure of political spending.<sup>83</sup> And these proposals have met with at least some success. For example, proposals filed in 2012 at Chubb, CSX Corporation, Halliburton, Kroger, Reynolds American, R.R. Donnelly, Safeway, Sempra Energy, and State Street Corporation have culminated in some form of disclosure commitment from the companies.<sup>84</sup> At

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76. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

77. *Id.* at 913.

78. *See id.* at 915–17.

79. *See* Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010); Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010). For discussion and evaluation of these bills, see Note, *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*, 124 HARV. L. REV. 1528, 1545–47 (2011). For varying views of the wisdom in general of legislating in response to *Citizens United*, compare Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010), with Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019 (2011).

80. Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 HASTINGS BUS. L.J. 103, 159 (2012).

81. Letter from the Committee on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Sec’y, SEC, at 1, (Aug. 3, 2011), available at <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

82. *See* Lynch, *supra* note 23, and *supra* text accompanying note 24.

83. *See* Alpern, *supra* note 48, at 11. For a recent no-action letter taking the position that a proposal seeking disclosure on political spending cannot be excluded as ordinary business, see Home Depot, Inc., SEC No-Action Letter, 2011 WL 291324 (Mar. 25, 2011).

84. Bruce F. Freed, *2012 Proxy Season Political Spending Shareholder Resolutions*, HARVARD L. SCH.

Halliburton, R.R. Donnelly, and State Street, these commitments came in the wake of affirmative shareholder votes in 2011 that exceeded forty percent.<sup>85</sup> Similarly, at Norfolk Southern Corporation, affirmative shareholder votes of more than thirty percent in 2009 and 2010 led the company to agree in 2011 to disclose its political expenditures.<sup>86</sup> The company also agreed to announce on its website any respects in which it disagrees with the political spending of trade associations to which it belongs.<sup>87</sup>

As these three examples show, social proposals can effect change in a manner that is, to say the least, highly imperfect. Chief among the drawbacks is the necessity of proceeding company by company. Federal legislation, when available, has a far broader scope.

But social proposals also have several distinct advantages. Unlike mandatory legislation, the proposals can, and often do, lay the groundwork for a tailored agreement between the company and the proponent.<sup>88</sup> Moreover, unlike rules promulgated by the SEC, the proposals cannot be invalidated as improper agency action.<sup>89</sup>

### III. WHERE WE MAY BE HEADED AND WHY

The increasing effectiveness of social proposals may be taking us to a surprising destination. Consider the following.

I conducted an informal poll of corporate law faculty, who expressed surprise at the successful use of social proposals described in this Essay. In all likelihood, their lack of awareness is shared by their students, as well as by the wider legal community.

The collective lack of awareness can probably be traced to corporations casebooks, of which there are currently sixteen on the market.<sup>90</sup> The casebooks

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FORUM ON CORP. GOVERNANCE & FIN. REG. (June 1, 2012, 9:27 AM), <http://blogs.law.harvard.edu/corpgov/2012/06/01/2012-proxy-season-political-spending-shareholder-resolutions/#more-29167>.

85. *See id.*

86. *See* JOHN C. LIU, OFFICE OF THE N.Y.C. COMPTROLLER, 2011 SHAREOWNER INITIATIVES OF THE NEW YORK CITY PENSION FUNDS: FALL 2011 POSTSEASON REPORT 14 (2011), available at [http://www.comptroller.nyc.gov/bureaus/bam/corp\\_gover\\_pdf/2011-Shareholder-report.pdf](http://www.comptroller.nyc.gov/bureaus/bam/corp_gover_pdf/2011-Shareholder-report.pdf).

87. *See id.*

88. *See* Welsh & Passoff, *supra* note 18, at 14 (noting that “[a]bout one-third of all filed proposals end up getting withdrawn each year, almost always after companies and the proponents reach an agreement addressing the concerns raised”).

89. *See* Business Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (vacating Rule 14a-11 on the ground that the SEC acted arbitrarily and capriciously in the process of adopting it).

90. WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION (4th ed. 2012); JEFFREY D. BAUMAN, CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS (7th ed. 2010); DOUGLAS M. BRANSON ET AL., BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE, AND POLICY: CASES, MATERIALS, AND PROBLEMS (2009); ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES (2d ed. 2010); MICHAEL DIAMOND, CORPORATIONS: A CONTEMPORARY APPROACH (2d ed. 2008);

focus heavily on Rule 14a-8's requirements for eligibility and grounds for exclusion discussed in Part I.<sup>91</sup> But the casebooks largely ignore the changes in corporate behavior that recent proposals have precipitated. For example, close to half of the books reference the Cracker Barrel no-action letter,<sup>92</sup> but only one notes the subsequent reform of Cracker Barrel's employment policy.<sup>93</sup>

Why do the casebooks not mention such particulars? There are several possible explanations. Some authors, subscribers to "shareholder primacy," regard social proposals as inherently wasteful and thus perhaps unworthy of extended discussion.<sup>94</sup> Other authors may wish to avoid what might appear to be a socio-political minefield with the capacity to antagonize potential adopters. Still others may be averse to opining on the consequences of rules unless they can present a case or law review article that does the opining for them.

Even if the casebooks remain much the same, the story of successful social proposals may spread. Versions of the story may find their way into casebooks in other subject areas—for example, those on employment discrimination, civil rights, or environmental law. The media—perhaps chiefly the business sections of major newspapers—could also play a role in getting the story out.<sup>95</sup>

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MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS (10th ed. 2011); ROBERT W. HAMILTON ET AL., CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES (11th ed. 2010); THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES: CASES AND MATERIALS (3d ed. 2009); WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS (8th ed. 2012); LAWRENCE E. MITCHELL & DALIA TSUK MITCHELL, CORPORATIONS: CASES AND MATERIALS (2d ed. 2012); CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS (6th ed. 2010); ALAN PALMITER & FRANK PARTNOY, CORPORATIONS: A CONTEMPORARY APPROACH (2010); STEPHEN B. PRESSER, AN INTRODUCTION TO THE LAW OF BUSINESS ORGANIZATIONS: CASES, NOTES AND QUESTIONS (3d ed. 2010); LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS (4th ed. 2003); LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS (7th ed. 2010); D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES (3d ed. 2012).

91. See, e.g., ALLEN, *supra* note 90, at 195–205; EISENBERG & COX, *supra* note 90, at 374–84; HAMILTON, *supra* note 90, at 621–32; HAZEN & MARKHAM, *supra* note 90, at 668–94; KLEIN, *supra* note 90, at 542–62; O'KELLEY & THOMPSON, *supra* note 90, at 224–33; PALMITER & PARTNOY, *supra* note 90, at 479–90; SMIDDY & CUNNINGHAM, *supra* note 90, at 887–97.

92. See ALLEN, *supra* note 90, at 203–05; BAUMAN, *supra* note 90, at 516–17; BRANSON, *supra* note 90, at 301; HAMILTON, *supra* note 90, at 625–26; HAZEN & MARKHAM, *supra* note 90, at 688; O'KELLEY & THOMPSON, *supra* note 90, at 225–26; RIBSTEIN & LETSOU, *supra* note 90, at 308.

93. See BAUMAN, *supra* note 90, at 517.

94. See, e.g., PRESSER, *supra* note 90, at 289–90 (marshaling arguments against shareholder democracy at the conclusion of discussion of the shareholder proposal rule).

95. See Patrick McGeehan, *Two Giants of Finance Will Release Diversity Data*, N.Y. TIMES, Apr. 16, 2012, at A14 (noting agreement by Goldman Sachs and Metlife to release information about the racial and gender composition of their employees in response to shareholder proposals filed by pension funds).

Greater awareness will hasten the day when wealthy conservative activists—say, the Koch brothers or Sheldon Adelson—come to regard social proposals as a mechanism that they can co-opt with an infusion of funds. Indeed, they could hire outstanding lawyers to draft cogent conservative proposals, as well as retain advisers to identify the corporations with shareholders to whom such proposals would potentially appeal.

If reasonably successful, conservative social proposals might affect the debate about corporate purpose. Some who now champion corporate social responsibility could decide that the best defense against conservative proposals is shareholder primacy.

#### CONCLUSION

In a time of congressional dysfunction, social proposals provide a means to address some of the many social problems that interface with corporate behavior. To date, virtually all successful social proposals have had a progressive orientation, favoring such causes as gay rights, environmental regulation, and disclosure of political spending.<sup>96</sup> This pattern, however, may be short-lived. Assuming that the legal community becomes increasingly aware of the successes of social proposals, it is probably only a matter of time before wealthy conservative activists seize upon the proposals as a mechanism that they can co-opt.<sup>97</sup> Then, as never before, boardrooms will become significant battlegrounds in the culture wars.

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96. See Welsh & Passoff, *supra* note 18, at 16 (noting that “[g]roups that approach the shareholder resolution area with a conservative political viewpoint have never earned much support from investors”).

97. For overview of conservative proposals filed in 2012 proxy season, see Welsh & Passoff, *supra* note 18, at 54–56.