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Statement to the House Committee on Financial Services

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Protecting Investor Interests:
Examining Environmental and Social Policy in Financial Regulation

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The Rise of ESG Investing and the Appropriate Regulatory Responses

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The Manhattan Institute for Policy Research does not take institutional positions on legislation, rules, or regulations. Although my comments draw upon my long-running research on shareholder regulation and corporate governance as an Institute scholar, my statement before the subcommittee is solely my own, not my employer's.

Written Statement

Chairman McHenry, Ranking Member Waters, and members of the Committee, I would like to thank you for the invitation to testify today. My name is James R. Copland. Since 2003, I have been a scholar with the Manhattan Institute for Policy Research, a nonprofit public-policy think tank in New York City, where I have long been a senior fellow and directed the Institute's legal policy research. Although my comments draw upon such research conducted for my employer,[1] my statement before the Committee is solely my own.

I am very pleased that this Committee is tackling the injection of environmental and social policy into financial regulation in such an extensive way—holding this hearing, and considering as many as 18 pieces of legislation designed to tackle this subject. This hearing is timely, in light of unprecedentedly aggressive new rulemaking at the Securities and Exchange Commission that exacerbates the trend of centering our large corporate boardrooms on divisive policy concerns; as well as new SEC "staff guidance" that has already led to a precipitous increase in activist pressure on corporate board decision making.

Background

I have been studying these issues for years. As far back as 2006, I testified before this committee's Subcommittee on Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises about threats to America's capital markets leadership.[2] Overall, U.S. capital markets continue to lead the world.[3] But we have seen the number of companies listed on U.S. public exchanges decline more than 50% since the mid-1980s.[4]

Among the factors discouraging the public listing of companies in America are the intense pressures placed on publicly traded companies by the two major proxy advisory firms, ISS and Glass Lewis, as well as by various asset management companies holding aggregated capital, particularly through passive-index investment vehicles—notably the "Big Three" asset managers, BlackRock, State Street, and Vanguard. Underlying these pressures is the system of shareholder proposals included on the proxy statements of U.S.–listed companies, overseen by

[1] Some language in this testimony may be substantially similar to, or in some places identical, to that in my previous publications and earlier testimony before this or other government bodies.

[2] *See* James R. Copland, "America's Capital Markets: Maintaining Our Lead in the 21st Century," Testimony before Subcommittee of the House Financial Services Committee, Apr. 26, 2006, *available at* https://www.manhattan-institute.org/html/testimony-james-r-copland-united-states-house-representatives-committee-financial-services-6053 (noting that "in 2005, Europe passed the United States in initial public offerings" and pointing to regulation, reporting requirements, and litigation as American disadvantages at the time). *See also* James R. Copland, *The Capital Market Crackup*, CHIEF EXECUTIVE, Dec. 1, 2006, *available at* https://manhattan.institute/article/the-capital-market-crackup (discussing trends); James R. Copland, *Are U.S. IPOs DOA?*, WASHINGTONPOST.COM, Apr. 12, 2007 (same).

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

[4] *See, e.g.*, Nicole Goodkind, *America has lost half its public companies since the 1990s. Here's why*, CNN BUSINESS, June 9, 2023, *available at* https://www.cnn.com/2023/06/09/investing/premarket-stocks-trading/index.html (observing decline in U.S. number of publicly listed companies on American exchanges to approximately 3,700 from peak of 8,000 in 1996).

the Securities and Exchange Commission through Rule 14a-8.[5] I have been studying the shareholder-proposal process since before 2011, when, under my leadership, the Manhattan Institute launched our Proxy Monitor database,[6] which contains current and historical data on more than 5,700 shareholder proposals introduced at America's largest publicly traded companies, dating back to 2006.

In 2016, I testified before this committee's Subcommittee on Capital Markets and Government-Sponsored Enterprises on this subject.[7] I observed then:

- That the shareholder-proposal process operating under the auspices of the SEC's Rule 14a-8 "has strayed far from the principal legal purpose authorizing the rule under the Securities Exchange Act—namely ensuring that shareholders obtain adequate, non-deceptive disclosures to inform their investment decisions";
- That the "shareholder-proposal process has been used almost exclusively by a small number of investors, with a focus potentially or actually centered on concerns other than maximizing share value"; and
- That the "shareholder-proposal process has actually operated to permit such minority shareholders to extract corporate rents or influence corporate behavior to the detriment of the average diversified shareholder."

These assessments still hold true. But since 2016, the use of this rule as a linchpin of policy-oriented shareholder activism has only intensified. On March 7, 2017, State Street Global Advisers, the world's third-largest institutional investor, launched a campaign to pressure companies to add more women to their boards— symbolically installing a bronze statue, "Fearless Girl," facing the iconic "Charging Bull" that has graced Wall Street since 1989. Less than a week later, BlackRock, the world's largest mutual fund company, announced that it, too, would prioritize talking with companies on "gender balance on boards," as well as "climate risk." In a winter 2018 letter to shareholders, BlackRock chief executive officer Laurence Fink suggested "a social purpose" for corporations benefitting all "stakeholders," not merely corporate shareholders:

> Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.

BlackRock manages more assets than any other institutional investor in the world. To some degree, Fink's evoked a truism. But his letter nevertheless provoked controversy because it weighed in on one side of a debate that has raged on for a century—and, in one reading, embraced what has generally been the minority view, at least in terms of legal responsibilities.[8]

[5] *See* 17 C.F.R. § 240.14a-8.

[6] *See* ProxyMonitor.org.

[7] *See* James R. Copland, "SEC Rule 14a-8: Ripe for Reform," Testimony before the House Financial Services Subcommittee on SEC Rule 14a-8, Sept. 21, 2016, *available at* https://media4.manhattan-institute.org/sites/default/files/T-JC-0916.pdf (arguing that "the SEC's outdated and overly permissive standards" had enabled activists "to push policy agendas in an effective end-run around Congress").

[8] Shareholder primacy—the notion that corporate managers have a near-exclusive fiduciary obligation to shareholders rather than other corporate "stakeholders"—is deeply rooted in American law. It traces at least as far back as *Dodge v. Ford Motor Company*, in which the Michigan Supreme Court ruled that Henry Ford had a fiduciary duty to manage Ford Motor Company for the benefit of shareholders rather than employees or the broader community. 170 N.W. 668. (Mich. 1919).

Recent Trends

More recently, efforts to utilize the 14a-8 process to influence corporate behavior have substantially intensified. Over the last two years, we have seen a sharp uptick in the number of shareholder proposals on the proxy ballots of publicly traded companies. From 2019 through 2021, the *Fortune* 250 companies listed in the Manhattan Institute's Proxy Monitor database received, on average, a total of 271 shareholder proposals annually. In 2022, these companies received 360 such proposals, an increase of 33% over the three-year average. To date in 2023, with approximately 10% of companies yet to file a proxy statement in advance of an annual meeting, these companies have already seen 392 such shareholder proposals—a record number in our database, which goes back to 2006.

The increase in the number of shareholder proposals over the last two years has been driven principally by a large uptick in the filing of proposals related to environmental, social, or policy goals with an attenuated—or inverse—relationship to share value. To date in 2023, *Fortune* 250 companies filing proxy statements have considered 243 shareholder proposals with a social or environmental focus—up from 218 proposals submitted in 2022, and more than double the numbers seen in 2021, 2020, and 2019 (112, 107, and 104 proposals respectively). For the second consecutive year, more than 60% of shareholder proposals have had a social or environmental focus—62% to date in 2023—which had never before happened dating back to 2006, the first year covered by the Proxy Monitor database.

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

In the academic literature, Adoph Berle and Gardiner Means were early defenders of the primacy of shareholders' interests in governing corporate managers' fiduciary duties. See Adolph A. Berle & Gardiner C. Means, The Modern Corporation and Private Property (1932) (the classic exploration of agency costs in the American corporation). Shareholder primacy was buttressed by later law and economics articles conceiving of the corporate form as a nexus of contracts. *See, e.g.*, Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am. Econ. Rev. 777 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).

Notwithstanding the more modern push for "corporate social responsibility," *cf.* Christopher Stone, Where The Law Ends (1975); Ralph Nader, Mark Green & Joel Seligman, Taming The Giant Corporation (1976); *but see* David L. Engel, *An Approach to Corporate Social Responsibility*, 32 Stan. L. Rev. 1, 1 (1979) ("Any mandatory governance reforms intended to spur more corporate altruism are almost sure to have general institutional costs within the corporate system itself. . . . But the proponents of 'more' corporate social responsibility have never bothered to analyze or examine, from any clearly defined starting point, even just the benefits they anticipate from reform . . . ."), the legal duties of corporate managers have remained essentially shareholder-focused. *Cf.* Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, Wall St. J., Aug. 15, 2018 (implicitly acknowledging shareholder primacy as the operative legal norm in pushing a reorienting of legal duties through the Accountable Capitalism Act); James R. Copland, *Senator Warren's Bizarro Corporate Governance*, Economics21.Org, Aug. 16, 2018, *available at* https://economics21.org/warren-backwards-corporate-governance (criticizing Senator Warren's proposal as inconsistent with three pillars of U.S. corporate law—corporate federalism, shareholder primacy, and director independence).

policy significance of the issue that is the subject of the shareholder proposal."

In essence, the SEC staff's new guidance turns the old rules on their head. Now, the SEC purports to force publicly traded corporate issuers to include on their proxy ballots *any* shareholder proposal related to issues of "social policy significance," even if immaterial to the corporation's economic interests. And as I noted in a comment to a 14a-8 rulemaking at the SEC last fall:

> It is curious indeed that such a substantial policy change—incorporating via staff "interpretation" a novel "significant social policy exception" to rules promulgated through notice-and-comment rulemaking—would be done via the vehicle of staff "guidance." In my view, Legal Bulletin No. 14L is clearly an end-run around proper administrative rulemaking, designed to skirt notice and comment and proper judicial review.[9]

The Dubious Legality of Rule 14a-8

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

Under its statutory mandate, the SEC is empowered to promulgate rules and regulations to dictate *disclosure* rules, while *substantive* matters related to the distribution of authority between shareholders and corporate boards are left to state law.[10] As the Supreme Court has long observed, "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."[11]

Recent statutory changes have somewhat interfered with the distribution of authority between federal and state securities and corporation law—particularly the Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002[12] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[13]. But in general, that states rather than the federal government have the "authority to regulate domestic corporations, including the authority to define the voting rights of shareholders" remains what the Supreme Court has called the most "firmly established" principle of American corporation law.[14]

[9] James R. Copland, Comment, File Number S7-20-22, Release No. 34-95267, "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8," Sept. 12, 2022, *available at* https://www.sec.gov/comments/s7-20-22/s72022-20138931-308628.pdf.

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

[11] Santa Fe v. Green, 430 U.S. at 479.

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

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

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

To be clear, under modern conceptions of the Commerce Clause power,[15] Congress almost certainly has the authority to preempt significantly, if not wholly,[16] state corporate law. *But Congress has not done so.* And that is for the best. The "genius of American corporate law," as characterized by Yale law professor Roberta Romano,[17] is its distribution of authority between federal and state regimes. Federal primacy in the disclosure regime enables investors to price securities efficiently on an apples-to-apples basis with adequate, accurately information. State primacy in allocating the substantive rights of shareholders vis-à-vis boards prevents a one-size-fits-all lock-in of inefficient rules—and facilitates a "race to the top" given shareholders' ability to incorporate variations in state legal regimes into securities pricing.[18]

Under the substantive state corporate law governing most large publicly traded corporations in America, no shareholder has a right, even as a default rule, to speak in a corporate annual meeting or to introduce a proposal for vote at the meeting. Most largely publicly traded American companies are incorporated in Delaware,[19] and Delaware's General Corporation Law details rules governing annual meetings;[20] shareholder voting rights;[21] and shareholder rights to inspect shareholder lists and corporate books and records.[22] But apart from certain matters requiring a shareholder vote by law, or as otherwise specified in corporate bylaws or articles of incorporation, Delaware law—the governing law for most large publicly traded companies—makes whether to take a shareholder vote on a matter wholly an issue of board discretion.[23]

Contrary to this state law, and without foundation in the laws actually enacted by Congress, the SEC through its proxy process rules essentially compels publicly traded companies to hold votes on various subjects demanded by certain shareholders. And the SEC also compels companies to publish those shareholders' statements in support of their ideas, even if controversial and opposed by the company's fiduciary board, and without regard to such statements' accuracy.

The SEC first promulgated a "shareholder proposal rule"—the antecedent to the current Rule

[15] *Cf.* Gonzales v. Raich, 545 U.S. 1 (2005); Wickard v. Filburn, 317 U.S. 111 (1942).

[16] *Cf.* Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 221-22 (1947) (finding Congress had preempted the field related to grain warehousing, precluding even complementary state regulations of those fields, by vesting with the Secretary of Agriculture "exclusive" authority over federally licensed warehouses).

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

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

[19] *See* 8 Del. C. § 101 *et seq.* For a variety of reasons, most large publicly traded companies in the United States are incorporated in Delaware. This phenomenon has long been the subject of academic debate. *Compare* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 663, 705 (1974) (lamenting a "race to the bottom" in U.S. corporate law) *with* Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (arguing that, *contra* Cary, the federal structure of corporate law creates a "race to the top"); Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989). *See also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (finding the "race to the top" hypothesis more supported than the "race to the bottom" hypothesis in empirical testing).

[20] *See id.* at §§ 211, 222, 228.

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

[22] *See id.* at §§ 219, 220.

[23] *See id.* at § 146.

14a-8—in 1942.[24] Then–SEC chairman Ganson Purcell explained the purpose of the rule to the House Interstate and Foreign Commerce Committee as follows:

> Once a shareholder could address a meeting[;] today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has of expressing his judgment comes at the time when he considers the execution of the proxy form, and we believe, whether we are right and whether we are wrong—and I think we are right—that that is the time he should have the full information before him and the ability to take action as he sees fit.
>
> The proxy solicitation is now in fact the only means by which a stockholder can act and can perform the functions which are his as owner of the corporation. It, therefore, seems clear to us that only by making the proxy a real instrument for the exercise of those functions can we obtain what the Congress and this committee called for in the form of "fair corporate suffrage."[25]

The allusion to "fair corporate suffrage" is not to the statutory text of the Securities Exchange Act of 1934[26] but rather to legislative history included in the House Report.[27] The actual section of the Securities Exchange Act upon which Rule 14a-8 is promulgated, § 14(a), is principally designed to ensure corporate disclosures to shareholders to afford investment information and prevent deception. The Supreme Court noted as much in its *Borak* decision in 1964: "The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation."[28]

Although the unvoted-on legislative history in the House Report for the 1934 Act does allude to "fair corporate suffrage," the statute hardly wrests the allocation of substantive shareholder rights from the states and transfers them to the federal government.[29] As the D.C. Circuit explained in its 1990 *Business Roundtable* decision: "While the House Report indeed speaks of fair corporate suffrage, it also plainly identifies Congress's target—the solicitation of proxies by well informed insiders 'without fairly informing the stockholders of the purposes for which the proxies are to be used.'"[30] In *Business Roundtable*, the court rebuffed the Commission's "immensely broad" and "unbounded" view of its powers based on the allusion to "fair corporate suffrage" in the House Report;[31] the Court explained in no uncertain terms: "That proxy

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

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

[26] Pub. L. No. 73-291, Ch. 404, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 78a–78oo (2006 & Supp. II 2009)), at §§ 78m, 78n & 78u.

[27] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 14 (1934).

[28] J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

[29] *See* Business Roundtable v. SEC, 905 F.2d 406, 412 (D.C. Cir. 1990) (rejecting the premise that the SEC could "establish a federal corporate law by using access to national capital markets as its enforcement mechanism").

[30] *Id.* at 410. The court emphasized that "The Senate Report contains no vague language about 'corporate suffrage,' but rather explains the purpose of the proxy protections as ensuring that stockholders have 'adequate knowledge' about the 'financial condition of the corporation ... [and] the major questions of policy, which are decided at stockholders' eetings.'" *Id.* (citing S.Rep. No. 792, 73d Cong., 2d Sess. 12 (1934) (characterizing purpose of proxy protections as ensuring stockholders' "adequate knowledge" about the "financial condition of the corporation")).

[31] *Id.* at 407, 412 (rejecting SEC Rule 19c-4 because "the rule directly controls the substantive allocation of powers among classes of shareholders . . . in excess of the Commission's authority under Sec. 19 of the Securities Exchange Act of 1934, as amended").

regulation bears almost exclusively on disclosure stems as a matter of necessity from the nature of proxies. Proxy solicitations are, after all, only communications with potential absentee voters."[32]

But the SEC in its oversight of corporate proxy statements filed in advance of annual meetings has long exercised authority far beyond overseeing "communications" to ensure their general truthfulness. Remember: a corporate board can, under Delaware law, refuse to grant speaking rights to a shareholder at an annual meeting—or refuse to allow a shareholder to put a matter up for a shareholder vote at all. The SEC's contrary insistence is an implicit preemption of state law—notwithstanding the Supreme Court's general pronouncement that such would require "a clear indication of congressional intent."[33]

Simply put: there is no statutory justification for the SEC to require any corporation, by virtue of trading securities on a national exchange, to submit various shareholder issues to a vote of all shareholders, absent the consent of the corporate board of directors or a contrary directive under state law. Yet that is precisely what the SEC has long done.

Moreover, in its role as "shareholder-proposal gatekeeper," the SEC has often modified its substantive approach in diametrically varying ways. Consider the SEC's handling of shareholder proposals that it in 1952 described as "primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes."[34] The SEC's longtime position was that it "was not the intent of [the shareholder-proposal rule] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature."[35] Thus, the SEC permitted companies to exclude shareholder proposals of such a nature from their proxy ballots.[36] In 1972, however, the SEC modified its substantive screen; its new rule merely permitted companies to exclude shareholder proposals "not significantly related to the business of the issuer or not within its control."[37] And in 1976, the SEC issued an interpretive release recalibrating the new standard in a way that essentially *inverted* the pre-1972 rule: a company could exclude a shareholder proposal related to the "ordinary business" of the corporation only if the proposal "involve[d] business matters that are mundane in nature and do not involve any substantial policy or other considerations."[38]

[32] *Id.* at 410.

[33] Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations . . . particularly where established state policies of corporate regulation would be overridden.").

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

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

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

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

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

And of course, in November 2021, through "staff guidance," the SEC essentially dropped the requirement that the social and policy issues it requires companies to list on their proxy ballots and consider for votes at annual meetings bear any relationship to corporations' underlying business interests at all.

Even were the SEC's shareholder-proposal rule to be a legal assertion of the Commission's statutory power, it is doubtful that its current iteration satisfies the Commission's modern statutory mandate to develop rules that "promote efficiency, competition, and capital formation."[39] To be sure, corporations are wise to communicate with shareholders—particularly those that list securities on actively traded exchanges. But it is instructive that no foreign regime has any equivalent to the SEC's Rule 14a-8; nor, to my knowledge, has any company not subject to the SEC rule voluntarily adopted anything remotely equivalent.

There's good reason for that. Large shareholders—including both ordinary institutional investors managing passive stock portfolios and actively managed hedge funds seeking to modify corporate behavior to drive returns—make almost no direct use of the shareholder-proposal process. Rather, the SEC's shareholder-proposal rule in its current form typically enables shareholders with a limited investment interest in the corporation[40]—and/or an investment interest oriented around principles other than share value—to co-opt the corporate agenda for their own purposes.

For example, in February 2019, jeans-maker Levi Strauss filed the paperwork to become a publicly traded corporation. In March, the People for the Ethical Treatment of Animals (PETA) announced it was acquiring shares in Levi's in order to propose shareholder resolutions involving the manufacturer's use of leather patches. PETA's decision was not related to investment concerns; it announced it was acquiring the minimum number of shares required to reach the SEC's $2,000 threshold to place a shareholder proposal on the ballot.[41] Today, navigating such special-interest investors is simply an expected cost of being a publicly traded corporation—complicated by the SEC's extralegal regulatory regime that vests groups like PETA with special authority to compel corporate speech and dictate corporate actions.

As I have argued previously, allowing shareholders to exploit the shareholder-proposal process on behalf of far-flung social and environmental causes can be expected to hurt shareholder value.[42] As a general matter, equity ownership through outside common shareholders has

corporate democracy," 432 F.2d at 681—very likely influenced the SEC's retreat and indeed U-turn from its prior position.

[39] 15 U.S.C. § 78c(f).

[40] Although the currently proposed legislation before the Committee does not include proposed adjustments to the SEC's submission thresholds for placing a shareholder proposal on proxy ballots, it is worth considering just how small an interest is required under current rules to co-opt large corporations' agendas at their annual meetings. A company like Apple, with a market capitalization of more than $3 trillion, can be forced to hold annual meeting votes if demanded by owners of a mere $2,000 in stock. Even if that threshold were increased more than fourfold, it would be the functional equivalent of allowing a single U.S. citizen, on demand, to place an item up for consideration as a referendum in a national election.

[41] Tanya Garcia, *PETA Takes a Stake in Levi's to Press for Vegan Leather Patches*, MARKETWATCH, Mar. 22, 2019, https://www.marketwatch.com/story/peta-takes-a-stake-in-levis-to-press-for-vegan-leather-patches-2019-03-22.

[42] *See, e.g.*, Statement of James R. Copland, "Who's Monitoring the Monitors? The Rise of Intermediaries and the Threat to Capital Markets," Hearing before the Senate Committee on Banking, Housing, and Urban Affairs: The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries, Apr. 2, 2019, *available at*

substantially *higher* agency costs than alternative forms of ownership, such as employee ownership, customer ownership, or supplier ownership.[43] Yet ordinary common-stock ownership remains the *dominant* form of organization for large, profit-seeking enterprises in the United States. One reason why is that common-stock ownership minimizes collective decision-making costs.[44] Thus, shareholder voting rights, like state common-law fiduciary duties, exist for the limited purpose of mitigating agency costs—not to facilitate miniature "corporate democracies."[45]

One need not be an expert in public-choice theory to comprehend that aggregating disparate voting interests along multiple factors can make collective action difficult.[46] Democratic and republican institutions have many virtues, but "efficiency" is not among them. Corporations are something else entirely. And for publicly traded companies, the ability to share one's shares is by far the greatest form of "investor protection"—provided investors receive adequate, truthful information upon which to act, which is precisely why the SEC's traditional focus on disclosure has been generally so successful.[47]

In sum, in its current guise, the SEC's shareholder-proposal rule exceeds Congress's statutory mandate to the agency, tramples on state corporate law without Congressional authorization, and impedes the efficiency and capital formation that Congress has insisted the agency prioritize.[48]

https://www.banking.senate.gov/imo/media/doc/Copland%20Testimony%204-2-191.pdf; James R. Copland, *Getting the Politics out of Proxy Season*, WALL ST. J., Apr. 23, 2015, *available at* https://www.manhattan-institute.org/html/getting-politics-out-proxy-season-5461.html.

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

[44] *See id.*

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

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

[47] These concerns are theoretical, but the comport with at least some empirical evidence as well. As the SEC staff rightly notes in its analysis, it can be difficult to parse out long-term stock effects of shareholder proposals due to the host of confounding factors. *See* Rel. No. 34-87458 at 113 & n.214. In an effort to assess this relationship, however, the Manhattan Institute commissioned an econometric study of shareholder activism and firm value by Tracie Woidtke, an economics professor at the University of Tennessee. *See* The University of Tennessee Knoxville: Tracie Woidtke, http://finance.bus.utk.edu/Faculty/TWoidtke.asp. In her study, published in 2015, Professor Woidtke examined the valuation effects associated with public pension fund influence, measured through ownership, on Fortune 250 companies. Woidtke found that "public pension funds' ownership is associated with lower firm value" and, more particularly, that "social-issue shareholder-proposal activism appears to be negatively related to firm value." *See* Tracie Woidtke, *Public Pension Fund Activism and Firm Value*, at 16 (Manhattan Institute 2015), *available at* https://www.manhattan-institute.org/html/public-pension-fund-activism-and-firm-value-7871.html.

[48] Beyond these statutory, federalist, and efficiency concerns, the shareholder proposal rule, at least in its current form, also likely violates the First Amendment. The First Amendment's protections clearly apply to corporate speech. *Cf. Citizens United v. FEC*, 558 U.S. 310 (2010). That said, the First Amendment's reach with regard to commercial speech is more "limited" than in other contexts. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771–72 (1976). A form of "intermediate scrutiny" applies to restraints on commercial speech. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of NY*, 447 U.S. 557 (1980). A lesser standard yet applies to compelled government speech in the professional or corporate context. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 652-53 (1985); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

Critically, however, the Supreme Court's precedents limiting the First Amendment's reach in the context of government-compelled commercial and professional disclosures hinge on the government disclosure rules involving

Brief Discussion of Select Proposed Legislation

On the whole, the panoply of legislative proposals under consideration by the Committee is a thoughtful collection of ideas that would, if enacted, significantly ameliorate the current trend toward excessive environmental and social policymaking under the guise of securities disclosure rules and other financial regulations. The legislative proposals presented for the Committee's consideration include proposals intended to:

- Reform directly the SEC's shareholder-proposal process
- Regulate in various fashions the actions of certain proxy voting advisors
- Clarify voting requirements and fiduciary duties for certain institutional investors
- Clarify materiality requirements for the SEC's disclosure rules
- Limit certain financial service providers' ability to deny fair access to customers
- Require various disclosures and reporting requirements
- Require certain studies and establish advisory committees

I will touch briefly on three categories of proposal in the battery of promulgated discussion bills: those dealing with shareholder proposals and proxy advisors (the subject of earlier hearings and much recent rulemaking); those dealing with "materiality" in required disclosures under the securities laws (from which the SEC has been stepping away); and those dealing with voting requirements and fiduciary duties for various institutional investors (particularly as related to "passive" index fund vehicles).

Shareholder Proposals and Proxy Advisors

The first two category of proposals parallel SEC rulemaking conducted in 2020, as well as subsequent SEC rulemaking conducted in 2022. I submitted three separate comment letters to the SEC as it considered those proposed rules.[49] In addition, in my 2016 testimony before a subcommittee of this Committee,[50] I discussed at some length two of the currently proposed ideas: (1) the appropriateness of increasing the voting "resubmission" thresholds under which

"purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 642 (permitting regulation of commercial advertising requiring disclosure of "purely factual and uncontroversial information"); *Becerra*, 138 S. Ct. at 2372 (finding Free Speech violation when regulation required disclosure of "information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic").

Applying this principle to securities regulation, the D.C. Circuit struck down as unconstitutional the SEC's "conflict minerals" rule, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015); *see* Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b)—notwithstanding Congress's express authorization to craft one, *see* 15 U.S.C. § 78(m).

[49] *See* James R. Copland, Comment, File Number S7-20-22, Release No. 34-95267, "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8," Sept. 12, 2022, *available at* https://www.sec.gov/comments/s7-20-22/s72022-20138931-308628.pdf; James R. Copland, Comment, File No. S7-23-19, Release No. 34-87458, "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8," Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6741164-207698.pdf; James. R. Copland, Comment, File No. S7-22-19, Release No. 34-87457, "Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice," Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-22-19/s72219-6742842-207818.pdf.

[50] *See* James R. Copland, Testimony before the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, Sept. 21, 2016, *available at* https://media4.manhattan-institute.org/sites/default/files/T-JC-0916.pdf (discussing Rule 14a-8 and various possible reforms).

the SEC requires companies to reintroduce identical proposals the very year after they are rejected by a majority of shareholders; and (2) the appropriateness of reverting to the SEC's prior rule permitting companies to exclude from shareholder proxy ballots proposals relating to matters of general economic, political, or social concern. I have cited each of these comment letters, and that testimony, in addition to various reports on the shareholder proposal process and proxy advisory firms, in a list of resources appended to this written testimony. I incorporate each by reference.

In my view, each of the ideas being proposed with regard to rein in the SEC's shareholder-proposal regulatory adventurism would be a salutary and significant shift in policy, relative to the status quo. It is a strange system indeed that requires corporations to hold votes year after year on shareholder proposals, even after they are soundly defeated; and to incorporate duplicative and in some cases contradictory proposal for consideration on proxy ballots. And as I have long argued,[51] the SEC should never have reversed its earlier sound judgment that permitted companies to exclude from proxy ballots shareholder proposals of general social or environmental concern—rather than concerning matters directly and materially related to shareholders' rights and corporate returns.

All that said, my legal position remains, as articulated before, that the *entirety* of the SEC's shareholder-proposal rule structure is an improper arrogation of agency power beyond that authorized by Congress, which illegally tramples on substantive state corporate law. I note that the National Association of Manufacturers has adopted just this position in a current legal challenge to the SEC's decision on a "no action" letter involving a submitted shareholder proposal.[52] If Congress can pass legislation substantially improving on the existing shareholder-proposal process—but cannot reach a consensus on clearly repudiating the agency's system unless fully consistent with state law—it should do so if and only if it articulates that it is not affirming the SEC's longstanding adoption of Rule 14a-8 and its predecessors, so as to preserve appropriate judicial review.

Materiality

"The concept of materiality is a bedrock feature of American securities law and regulation,"[53] tracing to the original 1933 Securities Act.[54] Consistent with this understanding, in 1947, the SEC defined the term "material" in Rule 405 as limiting required disclosures to "the information

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

[52] Nat'l Center for Public Pol'y Research v. SEC, No. 23-60230 (May 24, 2023) (motion for leave to intervene by the National Association for Manufacturers), *available at* https://documents.nam.org/law/NAM_Intervention_Motion_NCPPR_v_SEC.pdf. *See id.* at 4–7 (arguing that the SEC improperly "claims authority to subvert state corporate law" through its shareholder proposal regime). Other legal challenges are also contesting the SEC's reversal of position on proxy advisor regulation, *see* Chamber of Commerce v. SEC, Case No. 22-00561 (M.D. Tenn. Apr. 24, 2023), as well as other SEC rulemaking that intersects with First Amendment concerns, *see* Chamber of Commerce v. SEC, Petition for Review of an Order of the Securities and Exchange Commission Release Nos. 34-97424; IC-34906, Case No. 23-60255 (5th Cir.) (brief filed July 3, 2023).

[53] David A. Katz & Laura A. McIntosh, *Corporate Governance Update: "Materiality" in America and Abroad*, N.Y.L.J. (May 1, 2021), *available at* https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/.

[54] *See* Pub. L. 73–22, 48 Stat. 74 (codified at 15 U.S.C. § 77a), at 15 U.S.C. § 77j(b) (limiting SEC enforcement authority in registration statements to "material fact[s]").

required to those matters to which an average prudent investor ought reasonably to be informed before purchasing the security registered."[55] In his decision for the Supreme Court in its 1976 *TSC Industries, Inc. v. Northway Inc.* decision, Justice Thurgood Marshall affirmed the importance of materiality to the securities laws.[56]

Of late, however, the SEC has been acting as if it is not constrained by traditional notions of materiality—*i.e.*, that it may require disclosures *not* material to a reasonable investor in determining the financial picture of the corporation and deciding whether to buy or sell a security. Such is the only explanation for the SEC's inclusion of non-material disclosures in its proposed climate-disclosure rule, as well as in the 14L staff guidance letter requiring companies to include non-material shareholder proposals on their proxy ballots if they involved matters of public concern.

The SEC's novel non-materiality approach may follow from a speech made by then–Commissioner Allison Lee in May 2021, in which she argued that the SEC has broad authority to require such disclosures if "in the public interest," whether or not material.[57] As Bernard Sharfman and I discussed in our comment letter on the proposed climate-disclosure rule,[58] Commissioner Lee used an "overly cramped" reading; she purported to infer a lack of required materiality in the statute, despite consistent longstanding usage, from the fact that Congress did not append the word "material" to various prefatory grants of rulemaking authority in the enacted statute. But as we explained:

> Congress's delineation of the information required in annual and quarterly reports in 15 U.S.C. § 78m(b)(1) clearly lists items required for a reasonable investor to make financial decisions regarding an investment in an issuer's securities—precisely the sort of disclosures the Supreme Court has pointed to repeatedly in defining materiality under the securities laws. Similar abutting textual constraints exist in the other chapters, once a reader gets beyond the prefatory language. Moreover, Commissioner Lee's speech fails to grapple with the express, clarifying definitional command Congress added to the securities laws in 1996, which universally requires the Commission to consider in its rulemaking, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." This Congressional addition of a prophylactic definition limiting SEC rulemaking was notably after—and implicitly incorporates—the Supreme Court's 1977 and 1988 decisions in *TSC Industries* and *Basic*, which articulated a materiality constraint in the federal securities laws.[59]

While I think the "bedrock principle" of materiality in the federal securities laws is relatively clear as a legal matter, notwithstanding Ms. Lee's obfuscations, the very fact that the SEC has

[55] *See* 17 CFR § 230.405.
[56] 426 U.S. 438, 448 (1976).
[57] Allison Herren Lee, Living in a Material World: Myths and Misconceptions about "Materiality," U.S. SEC. & EXCH. COM. (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421 [https://perma.cc/F8FSPF6U].
[58] *See* Bernard S. Sharfman & James R. Copland, Comment, File No. S7-10-22, Release Nos. 33-11042; 34-94478, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," June 16, 2022, *available at* https://www.sec.gov/comments/s7-10-22/s71022-20131661-302049.pdf.
[59] *Id.* at 3–4 (citations omitted). *See also* NAACP v. FPC, 425 U.S. 662, 669 (1976) (noting that the Supreme Court's "cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.").

been behaving as if it is *not* constrained by a materiality standard demonstrates the prudence of Congress acting to make it explicit.

Institutional Investor Voting Standards

By definition, passive index fund managers buy and sell securities not based on any subjective market viewpoint gleaned from disclosed information but based on trying to replicate a basket of securities representing all or a slice of the broader stock market—a basket selected by Standard and Poor's or another third party. Index investing is exceptionally valuable for ordinary investors, who lack the sophistication to assess active investment advisers' stock-market strategies. And because they operate at such low cost—merely replicating, not analyzing—they pass through savings to their investors. A wealth of research suggests that it is hard for ordinary stock pickers to best passive investing in the market basket, after expenses.

But precisely because passive index investors do *not* act upon information to buy or sell securities with a view toward any mismatch between current market pricing and underlying value, it is rather peculiar that the now-large share of investing capital held through passive index vehicles has increasingly been flexing its voting muscle over all of corporate America. And the passive index investment companies have a lot of shareholder-voting muscle indeed. As Mr. Sharfman and I observed in our comment letter to the SEC in response to its proposed climate-disclosure rule, "The Big Three asset managers—BlackRock, Vanguard, and State Street—together control more than $20 trillion in assets and in 95% of those public companies that make up the S&P 500, one of the Big Three is the largest shareholder. The growth of these asset managers has been largely spurred by the rise of passively managed funds."[60]

The picture is thus: investment vehicles that by definition eschew *any* discernment in a company's valuation are nevertheless playing a major role in telling that same company how to reorganize its affairs. The substantial concentration of definitionally uninformed ownership, increasingly exercising its authority, doubtless introduces very real systemic risks into the capital markets. Moreover, that concentration of ownership combined with an increasing willingness to weigh in on matters of general economic, environmental, or social concern—regardless of whether material to a specific company's business interests—obviously threatens an oligarchic end-run around our constitutional lawmaking process, which involves consensus-building policy through bicameral legislative enactment, and supermajorities absent executive consent.

Moreover, it is clearly the case, as Mr. Sharfman and I have observed, that there is a necessary conflict of interest between large asset management companies' "*fiduciary* duties to their customers" and their own "*pecuniary* interests." Customers' interests "lie with maximizing rates of return"; but asset managers' interests lie with "maximizing assets under management and increasing fees."[61] Both of those interests are in conflict with asset managers' fiduciary duties to ordinary retail investors. As Michal Barzuza, Quinn Curtis & David H. Webber argue in a recent law review article:

> With fee competition exhausted and returns irrelevant for index investors, signaling a commitment to social issues is one of the few dimensions on which index funds can

[60] *Id.* at 10–11 (citations omitted).
[61] *Id.*

> differentiate themselves and avoid commoditization. For index funds, the threat of millennial migration to another fund is more significant than the threat of management retaliation.[62]

Also, asset managers generate significantly higher fees from socially oriented "ESG" funds than commoditized passive index funds—giving them incentives to orient their "shareholder engagement" programs around ESG funds' priorities.[63]

In light of the foregoing, the proposed legislation requiring passive index funds either to "pass through" voting to underlying investors—or else vote with corporate issuers or abstain from shareholder votes—is eminently sensible. However, because law and corporate bylaws can treat abstentions differently, the legislation does still permit gamesmanship on the part of asset managers in some cases.

In addition, before enacting any such voting requirement under the Investment Company Act, Congress should carefully consider its implications for *true* proxy contests led by *actual* activist investors, *i.e.*, those taking large stock positions in researched companies and trying to change corporate behavior to unlock latent value limited by existing management agency costs. Such shareholder activism, on average, creates share value (and activists who *fail* to create value, on average, find themselves quickly without funds). While a full analysis of these implications is beyond the scope of this testimony, Congress needs to be very careful not to entrench incumbent management with this rule. Preventing passive funds from shirking their fiduciary duties to play politics with their investors' money is a noble goal—but we should not, in our effort to reduce institutional investor agency costs, inadvertently increase management agency costs by undercutting value-enhancing shareholder activism.

Finally, I want to stress that passive index funds' shareholder *voting* is only a piece of the shareholder engagement strategy utilized by large asset management fund families to influence company behavior. Tying the hands of passive fund voting would mitigate the ability of such funds to strong-arm essentially all corporate management in the American stock market, but it would hardly eliminate it. Ultimately, Congress may have to decide whether or not to treat index funds completely separately under the investment laws—and indeed whether to require *both* unique voting rules for index funds *and* ownership separation between index and active investors, not unlike the "Glass-Steagal" separation of commercial and investment banking under the Depression-era 1933 Banking Act.[64] I will be exploring this concept in more detail in a forthcoming report.

[62] *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 U.S.C. L. REV. 1243, 1244 (2020).

[63] Beyond the conflicts of interest, institutional investors are of course themselves subject to agency costs, just like corporations. Particularly for index funds in which returns simply follow the market, management can be relatively unconstrained in subordinating investors' interests to their own, assuming cost structures remain competitive. For a further discussion of agency capture of institutional investors, see James R. Copland, Testimony before the Senate Committee on Banking, Housing, and Urban Affairs, Apr. 2, 2019, *available at* https://www.banking.senate.gov/imo/media/doc/Copland%20Testimony%204-2-191.pdf (discussing the rise of financial intermediaries and the threat to capital markets).

[64] *See* Pub. L. 73–66, 48 Stat. 162 (1933).

Conclusion

U.S. securities laws have had a remarkable history of success, underlying the robust capital markets so essential to America's long-run economic growth. That said, the genius of American corporate law has been strained by overreaching SEC rulemaking. And changes in capital market structures—aided and abetted by federal law and regulation, as well as market innovations—have concentrated shareholder voting in two proxy advisory firms and three asset management companies principally focused on passive index investing, none with significant, real *investment* knowledge, and each subject to agency costs and institutional capture.

These trends both imperil American prosperity and interfere with our democratic, republican form of government—weakening the competitive federalism that has undergirded our corporate law and threatening an end-run around Congress, with large decisions increasingly led by a small coterie of unsophisticated and unrepresentative players in the proxy advisory and asset management space.

It is thus highly appropriate that this Committee is thoughtfully—and broadly—considering changes to our system of capital market regulation. I encourage members of the committee to ask questions, which I will endeavor to answer to the best of my ability. I am also more than willing to follow up later with members and staff.

A selected list of writings I have authored or published follows, and should be incorporated by reference.

Further Resources

Congressional Testimony

James R. Copland, Testimony before the House Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, May 15, 2019, *available at* https://manhattan.institute/article/testimony-before-a-u-s-house-financial-services-committee-subcommittee (discussing various "investor protection" bills under consideration).

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C. Boyden Gray, Comment, Comment, File No. S7-10-22, Release Nos. 33-11042; 34-94478, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," June 17, 2022, *available at* https://www.sec.gov/comments/s7-10-22/s71022-20132160-302652.pdf (Attachment 3: Affidavit of James R. Copland).

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Book

James R. Copland, *The Unelected: How an Unaccountable Elite Is Governing America* (Encounter Books 2020) (see especially chapter 13, “Stock Market Politics,” at pp. 191–202).

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