Securities and Exchange Commission

"Rescission of Rule 14a–8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a–4"

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The Competitive Enterprise Institute (CEI) is pleased to comment on the Securities and Exchange Commission's proposal to rescind its shareholder proxy proposals and amendments rule. Since 1984, CEI has published research in support of free markets and limited government and has long advocated for policies that increase consumer choice, free investors from undue government burdens, and protect Americans from abuse by government agencies. CEI policy experts frequently comment on a wide variety of economic policy topics, including property rights, finance, and regulatory reform.

Introduction

In its current notice of proposed rulemaking, the Commission asks, "Should Rule 14a–8 be rescinded as proposed?" The answer is an emphatic "Yes." The proposal correctly diagnoses the agency's lack of statutory authority, conflict with state law, and related policy concerns. Rule 14a-8, over its long history, has functionally preempted the emergence of both state law guidance and private ordering at the firm level that could have provided superior outcomes for investors – both at any given point in time and over the long

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run, as competitive pressures would have generated evolved norms of governance outside of government direction. The SEC is especially wise to acknowledge the negative incentives created by its exercise of rulemaking authority, even when regulated entities are not explicitly required to achieve a particular outcome. The current rescission proposal is a valuable document that could teach other federal agencies a lesson about long-term mission creep and getting back-to-basics with respect to their statutory duties.

Primacy of State Chartering Authority

The Commission is correct to emphasize in the present notice of proposed rulemaking that corporations are primarily "creatures of state law."[4] While the Securities Exchange Act of 1934 gave the SEC the authority to regulate the proxy solicitation process, that authority was neither a license nor a requirement to commandeer the longstanding authority of states to be the primary actors in regulation of corporate governance. Even when firms are following the regulations that emerged under Rule 14a-8, state law continues to provide the applicable standard for questions like which proposals are "a proper subject for action" by shareholders.[5]

That proper distinction between federal and state authority in financial regulation is one that has gradually eroded over time, requiring action to correct.[6] The current proceeding is a good example of how even when the text of regulations doesn't overreach, the mere fact that they exist can have a crowding-out effect on other players. State legislatures, industry associations, and individual firms are much less likely to invest time and resources in generating better solutions to the conflicts presented by the shareholder proposal and proxy voting process if market participants perceive the SEC's own rules to be dispositive.

Rescission, as the agency proposes, would not eliminate other federal proxy requirements or automatically establish replacement state-law standards. It would, however, help remedy the longstanding atrophy of state guidance and private ordering in this area.

Virtues of Federalism

Federalism creates a competitive ecosystem in which both firms and investors can navigate away from worse policy environments and toward better ones. This competitive pressure encourages state policymakers to observe outcomes in their peer states, imitate

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[4] *Cort v. Ash*, 422 U.S. 66, 84 (1975), at 91 FR 59905.
[5] Securities and Exchange Commission, "Rescission of Rule 14a–8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a–4," *Federal Register*, Vol. 91, No. 181, September 21, 2026, pp. 59905-59906, https://www.govinfo.gov/content/pkg/FR-2026-09-21/pdf/2026-19260.pdf.
[6] J.W. Verrett, "Ending the Specter of a Federal Corporate Law," in *Reframing Financial Regulation Enhancing Stability and Protecting Consumers*, Hester Peirce and Ben Klutsey, eds., Mercatus Center, 2016, pp. 437-459, https://www.mercatus.org/research/books/reframing-financial-regulation.

what works and abandon what fails, producing a continuous process of institutional improvement that no central authority could plan. States with more competitive business regulation attract population, capital, and employment at the expense of less adaptive peers.[7]

Corporate chartering law offers one of the most time-honored demonstrations of interstate competition to attract firm siting. Since the late nineteenth century, states have deliberately used their incorporation statutes as instruments of competitive advantage, with Delaware's rise to preeminence reflecting more than a century of refinement in statutory precision and judicial specialization in the Court of Chancery.[8] Professor Roberta Romano of Yale Law School, writing for the American Enterprise Institute, has described this iterative process as "the genius of American corporate law," a system whose competitive pressures have delivered substantive improvements rather than the race to the bottom that its critics once predicted.[9] Nevada, Wyoming, Texas, and others continue to differentiate their definitions of corporate fiduciary duty, director liability, anti-takeover protection, and shareholder rights, each refining its law in response to how firms and capital respond. That competition applies as well to the law's treatment of pass-through entities, licensing regimes, non-compete enforcement, and the responsiveness of state commercial courts, all of which inform where firms choose to incorporate, headquarter, and invest.

The Mercatus Center's analysis of the nineteenth-century transition from special to general incorporation, which spread from Connecticut and New York in the 1840s to every state by 1913, shows that interstate competition, rather than any coordinated federal direction, drove American corporate law from a regime of discretionary legislative privilege toward one of impersonal, open-access rules.[10] State legislators who had profited from the rents associated with special chartering nonetheless abandoned that system under pressure from the threat that their state's own firms would relocate to a jurisdiction with a more liberal incorporation procedure. The historical record points to defensive competition, the

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[7] Arthur B. Laffer, Stephen Moore, and Jonathan Williams, *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index*, 19th ed., American Legislative Exchange Council, 2026, https://www.richstatespoorstates.org/app/uploads/2026/04/ALEC_RSPS-2026-2.pdf; see also William P. Ruger and Jason Sorens, *Freedom in the 50 States: An Index of Personal and Economic Freedom*, 7th ed., Cato Institute, 2023, p. 79, https://www.cato.org/sites/cato.org/files/2026-10/freedom-in-the-50-states-print-edition-2023.pdf.

[8] Christopher Grandy, "New Jersey Corporate Chartermongering, 1875–1929," *The Journal of Economic History*, Vol. 49, No. 3, September 1989, pp. 677–692, https://www.jstor.org/stable/2122510; on the Court of Chancery, see Lewis S. Black, Jr., *Why Corporations Choose Delaware*, Delaware Department of State, Division of Corporations, 2007, https://corpfiles.delaware.gov/whycorporations_web.pdf; John Armour, Bernard Black, and Brian Cheffins, "Is Delaware Losing Its Cases?" *Journal of Empirical Legal Studies*, Vol. 9, No. 4, December 2012, pp. 605–656, https://doi.org/10.1111/j.1740-1461.2012.01268.x.

[9] Roberta Romano, *The Genius of American Corporate Law* (Washington, D.C.: AEI Press, 1993), https://www.aei.org/research-products/book/the-genius-of-american-corporate-law/.

[10] Molly Cohn, "The Political Economy of Corporate Charters," Mercatus Working Paper No. 10-20, Mercatus Center at George Mason University, April 2010, https://www.mercatus.org/research/working-papers/political-economy-corporate-charters.

desire to retain in-state firms, as the primary mechanism of interstate competition in the regulation of enterprise.

Once states may observe one another's rules and firms respond to them in the choice of location, competitive pressure incentivizes neutral rules governing the relationship between corporations and their shareholders. A national, one-size-fits-all rule crowds out that process just as it discourages companies from adopting their own individualized shareholder-engagement standards in their governing documents. Rescinding Rule 14a-8 would return shareholder-proposal policy to this well-established, competitive framework.

Fully rescinding Rule 14a-8 will allow each state to experiment with individualized minimum-ownership thresholds for shareholders to include a proposal in proxy materials, more or less subject-matter criteria, or distinct attitudes toward board discretion, just as states already compete on fiduciary standards, board structure rules, or the requirements for incorporation. Firms will select the chartering state whose rules best suit their capital-raising strategy, enabling them to compete to attract capital by implementing shareholder voting rules tailored to a spectrum of investors' preferences. Rules that fail to attract firms or investors will prompt reform; successful innovations will spread through imitation just as general incorporation statutes gradually out-competed special incorporation.

Rather than preserving a single federal settlement in amber, rescinding Rule 14a-8 will foster the discovery process that has repeatedly produced better corporate-governance institutions than central design could achieve. Full rescission represents not a departure from established practice but a return to the long tradition within which American business law has produced its most durable and distinctive achievements.

The Importance of Ideological Neutrality

The current proceeding is especially important given related controversies and other regulatory reforms of the past several years. Trends in corporate management like environmental social, and governance (ESG) theory and "race-conscious" diversity, equity, and inclusion (DEI) policies have been frequent topics of shareholder proposals, with prominent activist groups sponsoring proposals to advance their preexisting political and ideological agendas into a variety of prominent public companies.

Shareholder proposals and the proxy voting process that they are connected to are intended for shareholders to recommend policies that will advance the success of the underlying enterprise and better achieve its goals of creating value. It has been clear to many observers, however, that many of the environmental and social proposals of recent years were proposed in bad faith by parties that, while complying with the formal

requirements for participation, clearly were more concerned with advancing their own ideological agenda than supporting the long-term success of the firms in question.[11]

This is, as the Commission points out, exactly what agency staff, commissioners, and chairmen feared and warned about in previous decades. Political activists, often holding a bare minimum of shares to qualify, have used the process as a "publicity mechanism" for their preferred cause of the moment, and as an excuse for making "a stump speech for some [ideological cause]," if not (as in the original quotation) a political party.[12] The rescission proposal's chief antagonists are precisely the people who have so misused it in the past and those most ambitious to abuse it in the future.

The debate over Rule 14a-8 and similar regulations on corporate governance has thus revolved around which future rules will benefit which set of political interests rather than which will actually serve shareholders and protect their rights. The Commission rightly recognizes that it should not have the role of refereeing substantive questions of politics or policy via the shareholder resolution process and favoring one flavor or another of politically motivated proposal – be it progressive, conservative, environmental, or otherwise. Rescinding Rule 14a-8 as the Commission now proposes to do will be a welcome move away from any such implicit policy going forward.

The current proposal will also be consistent with other recent moves, like the proposed rescission of the Commission's climate disclosure rule. That rule has also been widely criticized as a pretextual attempt to influence environmental policy and substantive market outcomes in the direction of climate change activism rather than, as originally asserted, a neutral attempt to aid investors evaluating competing equities and investment products.[13] The recent rulemaking from the Federal Reserve and related joint rulemaking from the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation on reputational risk also support this depoliticization of financial regulation.[14] By distancing the Commission from these political debates and refusing to put its thumb on the scale of financial markets in one ideological direction or another, it will be returning to its intended duties and historical function.

Federal Control vs. State Control vs. Private Ordering

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[11] Stone Washington, "The Stop Woke Investing Act and 'ESG fatigue'," Competitive Enterprise Institute, March 4, 2024, https://cei.org/blog/the-stop-woke-investing-act-and-esg-fatigue/.
[12] SEC, p. 59916.
[13] Richard Morrison et al., "CEI Comments to SEC on Proposed Climate-Related Disclosures Rule," Competitive Enterprise Institute, June 16, 2022, https://cei.org/regulatory_comments/cei-comments-to-sec-on-proposed-climate-related-disclosures-for-investors-rule/.
[14] Richard Morrison, "CEI Comments on Federal Reserve Notice of Proposed Rulemaking," Competitive Enterprise Institute, April 27, 2026, https://cei.org/regulatory_comments/cei-comments-on-federal-reserve-notice-of-proposed-rulemaking-prohibition-on-use-of-reputation-risk-or-other-supervisory-tools-to-encourage-or-compel-banking-organizations-to-engage-in-politicized-or/.

While much of the public commentary about proposed changes to Rule 14a-8 and the shareholder process in general have focused on the issue of federal vs. state authority, the Commission is correct to repeatedly emphasize that not all questions of corporate governance need to be positively specified by *any* level of governmental regulation. Many can be reserved to the discretion of corporate boards and managers themselves, and in fact should be, to the maximum extent possible.

Some observers and legal theorists err on the side of maximal oversight of corporate affairs, both because they assume malfeasance and fraud would be endemic without it, but also because they believe uniformity and consistency in financial markets are values to be maximized and will yield benefits to investors. But that view is misguided and ignores the significant benefits from a system regulated by a heterogeneous mix of market players rather than a single governmental regulator.

Provisions of corporate governance can be competitive signals to potential investors just as much as price and quality are to a firm's customers. New firms have broad discretion to create charters that provide for different classes of stock with different voting rights. The recent rise of initial public offerings of firms with dual-class shares, for example, has significantly disaggregated voting and economic rights at a variety of public companies.[15] The fact that many successful firms, especially in the technology industry, have employed this firm structure suggests that the current generation of investors has found this to be an attractive strategy.

Governance structures embedded in corporate charters can serve as a means by which a firm signals its strategy and priorities. Investors, both retail and institutional, respond to those choices and navigate toward or away from firms according to their preferences. A firm's policies on when and how it considers shareholder resolutions can serve the same purpose. Allowing firms to thus differentiate themselves in the marketplace and incorporate these governance options into their wider operational strategy is good and valuable. A more fluid, differentiated market leads to more efficient price discovery. Firm managers who are free to adopt a wider range of customized business strategies are better able to generate gains for their own shareholders than are ones forced to operate under a single mandated standard.

Under such a liberalized framework, some investors will no doubt want to prioritize their own ability to influence management, even when they might hold only a small number of shares. Such an investor would thus be likely to prioritize stakes in companies with low bars to participation in the shareholder resolution and proxy voting process. Another, equally well-informed investor, however, may decide that the same firm is particularly valuable because its current management is unusually effective and likely to deliver long-

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[15] Dhruv Aggarwal, Ofer Eldar, Yael Hochberg, and Lubomir P. Litov, "The Rise of Dual-Class Stock IPOs," NBER Working Paper 28609 (2021), https://doi.org/10.3386/w28609.

term value. Such an investor may then want the firm in which they're invested to have an extremely high bar for shareholder involvement, because they believe that small-stake shareholders are more likely to harass, distract, and annoy the current well-functioning management team with petty complaints.

"Shareholder democracy" is not a universal value that every investor necessarily wants more of, and regulators at every level of government should not attempt to implement policy as if it were. Some organizations involved in debates over finance policy, such as the Council of Institutional Investors (CII), have lamented the rise of dual-class ownership. The CII has declared that "'One share, one vote' is a bedrock principle of good corporate governance."[16] But that analysis is simplistic and misguided. Property rights are bundles and can be successfully parceled out, traded, and priced independently. U.S. investors, for example, have been able to buy preferred rather than common stock since the 1830s.[17] Allowing firms to specify different thresholds for shareholder participation in general is not substantively different from them offering different share types which come with distinct bundles of ownership rights.

To the extent that rescinding Rule 14a-8 puts more firm-level discretion back into corporate governance (in states that choose to allow it), that will be good for competition and innovation within the world of corporate management. The last couple of decades have seen significant ferment and diversity in the world of corporate charter provisions.[18] State regulators, who will likely soon have more responsibility to make such decisions, should welcome an analogous trend in proxy voting governance. The Commission should also categorically reject advice from parties who claim that it should retain some or all of its current authority in this realm on the grounds that every public company needs to have identical shareholder resolution and proxy voting processes for the benefit of the public.

Potential Delays to Implementation

The agency should consider the arguments of commenters who support the rescission of Rule 14a-8 but caution against moving too quickly. Allen Mendenhall and Stefan Padfield of The Heritage Foundation, for example, suggest that "rescinding Rule 14a-8 too quickly would turn laudable federalism into problematic favoritism by sealing in conflicted gains just when free-market proponents have started making material gains getting corporations

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[16] "Dual-Class Stock," Council of Institutional Investors, https://www.cii.org/dualclass_stock, accessed November 12, 2026.
[17] George Heberton Evans, Jr., "The Early History of Preferred Stock in the United States," *The American Economic Review*, Vol. 19, No. 1 (March 1929), pp. 43-58, https://www.jstor.org/stable/1809584/
[18] Hillary Holmes, Gerry Spedale, and Jason Ferrari, "Lone Star Governance: Recent Amendments to the Texas Corporate Statute," *Harvard Law School Forum on Corporate Governance*, June 17, 2025, https://corpgov.law.harvard.edu/2025/06/17/lone-star-governance-recent-amendments-to-the-texas-corporate-statute/.

back to neutral."[19] State finance expert Derek Kreifels, as part of the current rulemaking, acknowledges that Rule 14a-8 has created "a system of administrative agency overreach and politicized corporate governance." But he also suggests that moving too quickly could give a future SEC chairman the opportunity to "bring back 14a-8 or something worse."[20] The agency should not put off final rescission so far into the future so that it causes observers to question its sincerity, but it should also not move so quickly that it creates hazards for the successful long-term implementation of the rescission itself.

Conclusion

The SEC deserves praise for finally moving to rescind Rule 14a-8, which the current proposal states exceeds the Commission's statutory authority under section 14(a). Beyond that essential distinction, allowing states and individual firms to provide alternate frameworks for governing the shareholder proposal process will create a virtuous discovery process that would never have been possible under a single mandatory national standard.

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[19] Allen Mendenhall and Stefan Padfield, "Rule 14a-8: Perhaps Slow-Walking Recission is Best," *Harvard Law School Forum on Corporate Governance*, November 1, 2026, https://corpgov.law.harvard.edu/2026/11/01/rule-14a-8-perhaps-slow-walking-recission-is-best/.

[20] Derek Freifels, "Re: Rescission of Rule 14a-8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a-4, Release No. 34-106383, File No. S7-2026-32," Prospr Aligned, October 30, 2026, https://www.sec.gov/comments/S7-2026-32/s7202632-1113939-3955266.pdf.