Putting Human Rights on the Agenda: The Use of Shareholder Proposals to Address Corporate Human Rights Performance

By Adam M. Kanzer*

"[M]ost of those fail dismally when they come up on the ballot. They never get anywhere near the majority. … a few people are very interested or agitated about it, but not the many."

"I would suggest that Nelson Mandela didn't think they failed."

Exchange between Paul Atkins, Commissioner, Securities & Exchange Commission and Damon Silvers, Associate General Counsel, AFL-CIO at SEC Roundtable Discussion on Shareholder Proposals (2007)[1]

The preamble to the Universal Declaration of Human Rights (UDHR) commits "every individual and every organ of society" to keep the Declaration "constantly in mind" as a "common standard of achievement for all peoples and all nations." This essay considers the role of two such organs of society—investors and the Securities and Exchange Commission (SEC)—in furthering this common standard.

Investors have a responsibility to society to consider the social and environmental implications of their investment decisions. By using social and environmental criteria to select holdings, and by communicating with companies about these issues, socially responsible investors have built a tremendous demand for corporate social and environmental performance data. Corporations have responded with a proliferation of increasingly transparent sustainability reports. To borrow a phrase from Louis Brandeis, these commitments to regular public reporting can serve as a "continuous remedial measure" to address human rights abuses.

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* Managing Director & General Counsel, Domini Social Investments LLC. This essay is based on a paper prepared at the request of Professor John Ruggie, the Special Representative of the United Nations Secretary-General on business and human rights. The author would like to thank Jonas Kron, Steven Lydenberg, Paul Neuhauser, and Vanessa Zimmerman for their comments and suggestions.

This essay focuses on the use of shareholder proposals in the United States, filed pursuant to Rule 14a-8 of the Securities and Exchange Act of 1934 (the Exchange Act).[2] Shareholder proposals have been the primary mechanism for placing human rights issues on the agenda of U.S. corporations for nearly forty years, and have served as a critical tool for initiating long-term productive dialogues with corporate management. Many of these dialogues have resulted in policy and behavioral changes and greater public transparency on a broad range of human rights issues.

Institutional investors—including mutual funds, investment advisers, and public and private pension funds—have a fiduciary duty to vote their proxies in the best interests of their clients or beneficiaries. Fiduciaries, therefore, have a legal obligation to carefully consider any and all human rights issues presented to them on corporate proxy statements. An increasing number of institutional investors view human rights and other social and environmental issues as "material" to their investment decisions, and are therefore willing to support shareholder proposals addressing these issues. This increasing institutional support helps to increase the leverage of the proposal, and to encourage corporate management to address the concerns raised by its proponents.

Background: The SEC's Public Interest Mandate

There are no current statutes mandating that U.S. corporations comply with international human rights standards.[3] There are also certain gaps between U.S. law and international human rights norms that place corporate stakeholders at risk and subject corporations to a range of litigation, operational and reputational risks. Allegations of corporate human rights abuses continue to surface.[4]

Securities regulation in the United States is based on compelled disclosure of information by issuers in order to allow investors to make prudent decisions. This disclosure regime is based in part on the notion that investors have a duty to monitor the behavior of the companies they own and that compelled disclosure provides a means to correct corporate behavior if it strays from the public interest.

In 1913 *Harper's Magazine* published a series of articles by Louis Brandeis on the money trusts that helped inspire this approach to securities regulation. In "What Publicity Can Do", Brandeis made the case that "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[5] Brandeis' reasoning, now taken as self-evident, was that investors will make better decisions if they have relevant information and their informed decision making will serve as a check on fraudulent behavior. "Require full disclosure to the investor of the amount of commissions and profits paid," Brandeis reasoned, "and not only will investors be put on their guard, but … [e]xcessive commissions—this form of unjustly acquired wealth—will in large part cease."[6]

Brandeis stressed that disclosure to *investors* advanced the *public* interest: "Compliance with this requirement should also be obligatory, and not something which the investor could waive. For *the whole public* is interested in putting an end to the bankers' exactions." (emphasis added)[7] The investor, therefore, can be said to be serving a quasi-regulatory function on behalf of the general public. The disclosure is not for the investor's sole use—it should not be "something which the investor could waive." When the SEC was formed in 1934, in the midst of the Great Depression, these words were very much in Congress' mind.

Describing the "necessity for regulation", section two of the Exchange Act declares that "[n]ational emergencies, which produce widespread unemployment and the dislocation of trade … and adversely affect the general welfare are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets…." In short, securities regulation in the U.S. was instituted to address the broad social and economic harm caused by unregulated capital markets.

The SEC is empowered by Section 14(a) of the Exchange Act to require proxy disclosure "as necessary or appropriate in the public interest *or* for the protection of investors." (emphasis added) The "or" in this clause suggests an independent public interest mandate.[8] According to the Third Circuit Court of Appeals,"[i]t was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a)."[9]

One legal scholar has argued that "Congress may have intended disclosure generally under the federal securities laws to be used to enhance corporate social accountability."[10] The original public interest mission of the SEC, however, has often been conflated into an exclusive mission to serve investors and vindicate state law rights. This was most evident during recent "roundtable" hearings convened by the SEC to revisit the purpose of the proxy rules.[11]

The Mechanics of the Shareholder Proposal Rule

Rule 14a-8 permits shareholders to place proposals on the corporate proxy for all shareholders to vote on. [12] Any shareholder holding at least $2,000 worth of stock in the company for at least one year as of the date of submission may file a proposal, limited to 500 words. The proponent must hold this amount through the date of the annual meeting where she must present the proposal or send a representative to do so. This low eligibility threshold has made the corporate proxy accessible to a wide range of corporate stakeholders who are not professional investors.

A proposal must receive at least a 3% vote the first year, a 6% vote the second year, and a 10% vote in each subsequent year to be resubmitted. These thresholds, which have been revisited from time to time, have helped to ensure that social and environmental issues that may not have wide support among investors have an opportunity to remain on the proxy and build support over time.

Companies regularly submit "no-action requests" to the SEC, asking that the Commission "take no action" if the company omits the proposal from its proxy. The company bears the burden of proving that the proposal is improper based on a series of thirteen substantive grounds for exclusion set forth in the Rule.[13] These decisions are generally one sentence, without a rationale, informing the company whether SEC Staff agrees or disagrees with the company's argument. The decision and the accompanying correspondence (including briefs from both sides) become a matter of public record.

Generally, the board of directors will provide a "statement in opposition" to appear in the proxy statement. In many cases, this is the first time the company has made any substantive remarks about the subject matter of the proposal. In a sense, therefore, the mere filing of a proposal results in some form of report from the company, even if that report is generally less than satisfactory.

The proponent is normally given time at the annual meeting to make a brief speech in support of the proposal. Although most investors will have voted their proxies by the time of the annual meeting, this is a unique opportunity to address the board of directors and senior management in person. In the early days of social-issue shareholder activism several high profile corporate annual meetings were transformed into Town Hall style debates on the issue at hand**.**[14]

Shareholders have also brought affected stakeholders to the annual meeting either to present their proposal or to speak from their experience. In 1996, for example, the Benedictine Sisters brought a group of Mexican workers to Alcoa's annual meeting to describe their experiences working for Alcoa-Fujikura, the company's Mexican subsidiary. The proposal itself did not survive the SEC no-action process. According to Sister Susan Mika:

> It was an eye-opener. The CEO, Paul O'Neill, met with the workers afterwards and asked for six weeks to investigate. He went to the border himself. He raised wages (even though he told stockholders he would not), he fired the CEO of Alcoa-Fujikura … (the man supposed to keep him informed of what was happening in Mexico), he paid profit-sharing to the workers (even though workers had been told there was no profit—at the meeting, they learned that Alcoa had made $790 million). We have been meeting with the company officials every six to eight months since that time.[15]

Twelve years later, these meetings still continue.

The vast majority of shareholder proposals filed in the United States are non-binding, or advisory (sometimes referred to as "precatory"), meaning that the company is not required to take any action even if the proposal receives a majority vote.[16] Binding proposals seeking by-law changes (to establish a board committee, for example) may also be filed, but these are less common. For example, Harrington Investments has filed binding shareholder proposals asking companies to create a human rights committee of the board.[17]

Social-issue proposals rarely garner a majority vote and it is therefore often reported that they have been "defeated" or "failed," as expressed in the quote from SEC Commissioner Atkins that opened this essay. This is a misconception. These proposals are not analogous to elections. Rule 14a-8 is "informational," and affords shareholders an opportunity to "sound out management views and to communicate with other shareholders on matters of major import . . . ."[18] A vote on a non-binding proposal of 51% is of no more significance than a vote of 49%—the proposal is still advisory, and the board has no obligation to adopt it. Rather, the vote on a non-binding proposal can best be understood as a gauge of investor sentiment, and many corporations appear to view them in this light. The proposals that brought Reverend Leon Sullivan to the board of General Motors received less than 3% support.[19] Some companies have responded to large votes,[20] while others ignore majority votes. Sister Mika's experience with Alcoa clearly demonstrates that the vote, in some cases, may be irrelevant.

Ordinary Business and the Significant Social Policy Exception

Among the thirteen bases for exclusion, the most commonly applied to human rights proposals is Rule 14a-8(i)(7), the "ordinary business" exception. Through a combination of case law and SEC interpretation, a safe space has been carved out to permit certain social-issue proposals, including those pertaining to human rights, to appear on the corporate ballot even if they address what would ordinarily be considered an "ordinary business" matter that should not generally be subject to shareholder oversight.

In order for a proposal to be excludable pursuant to Rule 14a-8(i)(7)**,** the proposal must not only pertain to a matter of ordinary company business, it must also fail to raise a significant policy issue:

> 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.[21]

As of 1970, proposals which were "motivated by general political and moral concerns" were explicitly excludable under SEC rules.[22] In *Medical Committee for Human Rights v. SEC*, the U.S. Court of Appeals for the District of Columbia explained the basis for establishing a "significant social policy" exception to the ordinary business rule this way:

> In so far as the shareholder has contributed an asset of value to the corporate venture, in so far as he has handed over his goods and property and money for use and increase, he has not only the clear right, but more to the point, perhaps, he has the stringent duty to exercise control over that asset for which he must keep care, guard, guide, and in general be held seriously responsible. As much as one may surrender the immediate disposition of (his) goods, he can never shirk a

> supervisory and secondary duty (not just a right) to make sure these goods are used justly, morally and beneficially.[23]

Although arguably dicta, the court was echoing Brandeis' idea that investors have a key role to play in holding companies accountable. Just as Brandeis argued that investors should not be able to waive access to certain information because the general public benefits from the "continuous remedial measure" of disclosure, here investors are said to have a supervisory "duty"—not just a right—to ensure that their capital is used appropriately.

The Medical Committee court was considering a shareholder proposal at Dow Chemical seeking to end the company's production of napalm for the U.S. government. Dow executives had justified their continued production of napalm in political terms, rather than business terms—the company was working to support the war effort in Vietnam. The court noted:

> We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934.[24]

Although it is rare for corporate management to cite a political rationale for continuing a controversial line of business, the court's reasoning holds true for human rights issues generally. These issues rise above the day-to-day business of the corporation, and fall outside the authority of corporate executives.

It is worth noting that the court did not say that shareholders, as owners, are in *the best* position to make these decisions with broad political and moral implications. Rather, the court said that there is no rationale to support the view that management is in a *better* position than shareholders. After all, shareholders have no greater legitimacy than management when exercising power over innocent third parties. Is it the shareholder's role as "owner" (considering the often neglected obligations of ownership) that conveys the authority to make these decisions, or is it the widely dispersed nature of the company's shareholder base that adds a patina of "democracy" to the process? There are at least two lessons in this case. First, shareholders take on certain responsibilities to society when they become owners of a corporation, and second, corporate management is not given exclusive authority to make decisions that may affect the fundamental human rights of third parties. The court does not venture an opinion as to who would be *ideally* situated to make these decisions.

The SEC has not been consistent over the years in applying the significant social policy exception. In particular, there is a fairly complex history of how SEC Staff handled proposals relating to "employment matters" from the mid-1980s through the 1990s. Perhaps the most important was its decision to permit Cracker Barrel Old Country Stores[25] to omit a proposal seeking a non-discrimination policy protecting gay and lesbian employees. The New York City Comptroller's Office filed the proposal after Cracker Barrel publicly announced it would no longer be hiring homosexuals. After a series of court cases, an ICCR/Social Investment Forum campaign and pressure from members of Congress, the SEC famously reversed course, announcing that it would be returning to a "case by case" determination of proposals relating to employment matters and would no longer apply a *per se* exclusion to these proposals.[26]

In its reversal of Cracker Barrel, the SEC noted that its decisions on these matters would be somewhat subjective and in fact, the SEC has not disclosed any set of criteria used to determine whether a proposal raises a "significant social policy" issue. Proponents raising novel issues have generally sought to demonstrate that the issue is controversial and relevant to the company. Although the SEC is given broad discretion under Section 14(a) of the Exchange Act to regulate the proxy in the public interest, SEC staff expresses no view as to the merits of the proposal being offered, only whether the proposal comports with Rule 14a-8 and is a proper matter to be brought before shareholders.

Since the reversal of Cracker Barrel, SEC staff has generally been consistent in ruling that shareholder proposals relating to human rights issues raise such significant social policy considerations that the ordinary business exception is inapplicable to them.[27]

Staff's recent letter in *Certain Fidelity Funds*[28] regarding a proposal relating to the mutual fund manager's investments in corporations doing business in Sudan is a particularly strong affirmation of the "significant social policy" exception. That proposal requested that Fidelity "institute oversight procedures to screen out investments in companies that, in the judgment of the Board, substantially contribute to genocide, patterns of extraordinary and egregious violations of human rights, or crimes against humanity." If there is anything that constitutes 'ordinary business' for a mutual fund manager, it is the criteria used to select holdings for its funds. Nevertheless, Staff rejected Fidelity's arguments, and the proposal went on to receive between 21% and 29% of the vote at six funds.[29]

A Commitment to Dialogue

Proponents use a variety of criteria, often in combination, to select companies to "target" with a proposal, including the company's record on the issue at hand and its importance to the company's business model, the size and influence of the company (a company may be targeted, for example, if it is a leader in its industry and may set an example for others to follow), the degree of risk the company faces as a result of its performance on the issue, and the company's record with respect to its peers. Experienced proponents have learned that success will generally depend on their ability to make the "business case" to the company and its shareholder base.

These factors, including corporate culture, can also play an important role in how the company responds to a proposal.

The majority of human rights proposals have been filed over the past 36 years by members and affiliates of the Interfaith Center on Corporate Responsibility (ICCR).[30] Although proponents use a wide range of tactics to advance their goals, Domini and other asset managers affiliated with ICCR have largely adopted ICCR's methodology. The shareholder resolution is not viewed as an end in itself, but a tool to encourage management to enter into dialogue.

Many companies have been unwilling to engage in substantive dialogue until a proposal is filed. When these dialogues break down, or when management is no longer willing to move forward on the issue, Rule 14a-8 provides shareholders with a legal "foot in the door." The implicit (and occasionally explicit) threat of a resolution can be sufficient to keep these discussions on track.

Many proposals are withdrawn prior to the annual meeting because proponents have been able to reach agreement with management. In 2006, for example, roughly one third of the social-issue proposals filed were withdrawn.[31]

Productive dialogues are based on trust. Institutional shareholders are in a unique position to establish this level of trust for two primary reasons:

- Long-term shareholders' interests are aligned with the company, an alignment that can be difficult or impossible for other stakeholders to communicate; and
- A fiduciary would presumably be legally barred from taking action detrimental to the long-term value of the company.

What the Process Can Achieve

The use of shareholder proposals to address human rights issues came of age during the apartheid era. Two shareholder proposals at General Motors set a process in motion that brought the Reverend Leon Sullivan to the board. He later developed the Sullivan Principles, which became a critical framework for guiding companies doing business in South Africa. Shareholder proposals were successfully used to convince numerous companies to adopt the Sullivan Principles, to report on their activities and, ultimately, to pull out of South Africa. Shareholder pressure generally, through divestment and active engagement, has been credited as significantly contributing to bringing the system of apartheid to an end.

The flexibility of the shareholder proposal rule has permitted shareholders to file proposals on a broad range of human rights issues, and to address emerging issues. This section provides only a few highlights to provide a sense of the breadth of these efforts, and their efficacy. There are many other significant achievements to relate.

ILO Core Conventions

Shareholders have engaged in numerous dialogues to encourage companies to adopt codes that incorporate the core conventions of the International Labor Organization and to develop credible systems to implement these standards for their global operations and supply chains. As the ILO conventions were intended to apply to governments, these discussions can involve extensive debate, interpretation and drafting. As a result of these dialogues, companies are increasingly accepting the authority of the ILO to set labor standards, and building systems to enforce them at their suppliers.

Shareholder proposals have prompted companies that are now considered leaders in this area, such as Gap and Mattel, to take their first steps toward independent monitoring of working conditions in their supply chains. Many other companies have agreed to adopt or amend codes of conduct for their supply chains in exchange for the withdrawal of shareholder resolutions. For example, following a series of resolution filings, a shareholder coalition led by Christian Brothers Investment Services pursued a two-year collaborative dialogue with Sears to revise the company's supplier code of conduct and accompanying handbook. The process, which involved a line by line review of the company's code and manual against the ILO conventions, resulted in a revised manual that includes key requirements for each code provision, indicators of non-compliance and examples of best practice. [32]

Shareholder proposals preceded what is now a more than ten-year engagement with the Walt Disney Co. on global labor standards. This dialogue, which was eventually combined with a parallel dialogue with McDonald's, recently culminated in the completion of a multi-stakeholder pilot project to find more effective ways to sustain compliance with corporate codes of conduct. The project was tested at ten factories in Southern China.[33]

Public reporting on corporate human rights performance

In 2004, Gap Inc**.** released its first Social Responsibility Report, after two years of dialogue with shareholders. The company had initially resisted the idea of "quantifying" its performance in this area and a shareholder proposal served as an important negotiating tool.[34]

Gap's report, the first apparel company report to rate suppliers on their adherence to labor standards, drew praise from some of the company's toughest critics. The shareholder group[35] worked with Gap on its two subsequent reports, providing a statement in each. These reports tackled difficult challenges in enforcing global labor standards, including obstacles imposed by the company's own business model and purchasing practices.[36] Gap's initial report has also contributed to an informal standardization of reporting, with Nike and Hewlett Packard using the format of a key chart in their reports.[37]

Non-Discrimination in the Workplace

Shareholder proposals have been successfully used to address a range of discrimination issues, including the use of racist images in advertising, the addition of women and minorities to boards of directors, the disclosure of diversity data and religious discrimination in Northern Ireland.

The shareholder-driven campaign against sexual orientation discrimination has been particularly effective. In the absence of federal law, 430 Fortune 500 companies have adopted formal policies protecting their employees against discrimination based on sexual orientation.[38] This significant development is largely the result of years of shareholder proposals filed pursuant to Rule 14a-8.

These dialogues have generally included the following components:

- informing the company of the significance of the issue, and identifying it as a "human rights" issue;
- discussing the ramifications of adopting a more inclusive policy, and the risks of not doing so, including legal risks and implications for employee morale, retention and recruiting; and
- defining best practice in terms of policy implementation and communication.

Community Impact of Mining Operations

In 2007, Newmont Mining Corp. endorsed a human rights proposal filed by Christian Brothers Investment Services and a coalition of faith-based investors seeking a report addressing community-based opposition to its operations in the U.S. and around the world, resulting in a 92% vote. This was the first time a U.S. mining company had called on its shareholders to vote for a social resolution.[39] An external independent advisory panel has been established to provide advice to the company on strengthening its environmental and social policies and practices.

In April 2008, the Public Service Alliance of Canada Staff Pension Fund, the Ethical Funds Company, and the First and Fourth Swedish National Pension Funds announced that they had convinced Canadian mining firm Goldcorp Inc. to conduct an independent Human Rights Impact Assessment in Guatemala in exchange for the withdrawal of a shareholder proposal.[40]

Corporate Political Accountability

U.S. corporations are heavily engaged in the political process, contributing millions of dollars to support or oppose candidates, advance political agendas and even elect state judges that are perceived to be "business friendly." Most do so without sufficient oversight or disclosure.

Arguably, corporate political activity compromises a fundamental right enshrined in Article 21(3) of the UDHR: "the will of the people shall be the basis of the authority of government…" as well as other rights dependent upon universal suffrage. The International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD recently acknowledged the potential link between corporate political activities and complicity in human rights violations committed by states, recommending that companies "remain politically neutral to avoid risks of accusations of complicit behaviour."[41]

Since 2003, a shareholder campaign led by the Center for Political Accountability[42] has sought to bring greater accountability to corporate political spending through the adoption of codes of conduct, board oversight, and commitments to annual public disclosure of all political contributions, including payments to trade associations and other organizations. This campaign, although not described as a human rights campaign, is working to strengthen democratic systems in the United States that many believe have been undermined through extensive corporate political involvement. The campaign also seeks to address gaps in U.S. law and corporate governance that do not require full disclosure of corporate political activity. To date, this campaign has convinced at least 43 large public companies to disclose their political contributions, including 27% of the S&P 100.[43]

Conclusion

"A trustee is held to something stricter than the morals of the market place."

Chief Justice Benjamin Cardozo, New York Court of Appeals, 1928.[44]

During a series of recent roundtable discussions convened by the SEC to examine the proxy rules,[45] the elimination of non-binding proposals was considered. During these discussions, and in the SEC releases that followed, very little was said about a fiduciary duty to rise above the "morals of the market place" or to monitor corporate behavior to effect a broader public purpose. The SEC's mandate to regulate in the public interest was lost in a discussion of the Commission's duty to vindicate shareholder rights under state law, market efficiencies, and shareholder value.

The Business Roundtable, an influential organization of leading CEOs, took the opportunity to ask the SEC to eliminate the "significant social policy" exception to the ordinary business rule, arguing that these proposals have "little to do with the economics of the company," a particularly difficult statement to reconcile with the numerous no-action requests submitted each year arguing that these proposals concern ordinary business matters. Xerox went so far as to say that the significant social policy exception "has encouraged the submission of shareholder proposals that have no discernable relation to company operations and creating shareholder value."[46] A handful of other major corporations—but only a handful—made similar requests.[47] The Commission even suggested that perhaps companies should be permitted to 'opt out' of the shareholder proposal process altogether.

Fortunately, the morals of the marketplace themselves are changing. The SEC received an unprecedented number of public comments—more than 30,000—with the vast majority opposing changes to Rule 14a-8, and supporting the right of shareholders to have a greater say in how directors are elected. Supportive comments were submitted by fiduciaries from around the world, despite the fact that shareholder resolutions are rarely used in non-U.S. jurisdictions.[48] The SEC has tabled any changes to Rule 14a-8 for the time being.

It is beyond the scope of this essay to consider the history of the fiduciary "duty of loyalty" and the alleged tension between this duty and the pursuit of broader societal goals. It is clear that a fiduciary must vote proxies in the best interests of her clients or beneficiaries, and "best interest" is being defined more and more broadly, particularly for so-called "universal owners" that are invested in the entire market.[49]

As the link between social, environmental and financial performance becomes stronger, the scope of fiduciary duties are changing. The law firm of Freshfields Bruckhaus Deringer has made it clear that in every jurisdiction surveyed (United States, Europe, Japan, Canada and Australia), fiduciary duty arguably *requires* the consideration of environmental, social and governance factors when these factors may impact the long-term value of the portfolio.[50]

Rule 14a-8 and these legal duties work in tandem, forming an increasingly effective mechanism for holding U.S. corporations accountable to international human rights norms.

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[1] Unofficial Transcript of the Roundtable Discussion on Proposals for Shareholders, Friday, May 25, 2007 at 23, available at *www.sec.gov/news/openmeetings/2007/openmtg_trans052507.pdf*.

[2] A historical discussion of the evolution of Rule 14a-8 is beyond the scope of this essay, which focuses on the rule as currently formulated.

[3] Fried, Frank, Harris, Shriver & Jacobson LLP, "*Mandating Conduct by U.S. Corporations: A Pro Bono Submission to the United Nations Secretary General's Special Representative for Business and Human Rights*" (Oct. 29, 2007), Section III, paragraph 2, available at *www.business-humanrights.org/Documents/Fried-Frank-Memo-Dec-2007.pdf*.

[4] Human Rights Watch and Center for Human Rights and Global Justice, NYU School of Law, "*On the Margins of Profit: Rights at Risk in the Global Economy*", Volume 20, No. 3(G) (February 2008), available at *www.hrw.org/reports/2008/bhr0208/*

[5] Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (August M. Kelley, 1986. Originally published, 1914), at 92. The original article is available at *www.sechistorical.org/collection/papers/Pre1930/1913_12_20_What_Publicity_Ca.pdf*.

[6] *Id*. at 103-104.

[7] *Id*. at 104-105.

[8] On the public interest mandate of the SEC, and this particular insight, see Cynthia A. Williams, "*The Securities and Exchange Commission and Corporate Social Transparency*", 112 Harv.L.Rev. 1197 (1999).

[9] *SEC v. Transamerica Corp*., 163 F.2d 511, 513 (3d. Cir. 1947)

[10] *SEC and Corporate Social Transparency* at 1204.

[11] www.sec.gov/spotlight/proxyprocess.htm

[12] Rule 14a-8 is available at *www.law.uc.edu/CCL/34ActRls/rule14a-8.html* or *www.sec.gov/rules/final/34-40018.htm*. Additional guidance is available at *www.sec.gov/interps/legal/cfslb14.htm, www.sec.gov/interps/legal/cfslb14b.htm* and *www.sec.gov/interps/legal/cfslb14c.htm.*

[13] See Rule 14a-8(i)(1-13).

[14] See, generally, David Vogel, *Lobbying the Corporation: Citizen Challenges to Business Authority* (New York: Basic Books, 1978).

[15] Carolyn Mathiasen, *"Shareholder Proposal Success Stories, 1985-2000"*, IRRC Corporate Social Issues Reporter (November 2000) at 13.

[16] This is largely a reflection of state law. SEC Rule 14a-8(i)(1) allows companies to omit proposals that would be "improper under state law." In a note to this paragraph, the SEC explains "[d]epending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. 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." For a more complete discussion of the legal basis of shareholder proposals, see Paul M. Neuhauser's letter to the SEC dated October 2, 2007, submitted on behalf of the ICCR, at *www.sec.gov/comments/s7-16-07/s71607-476.pdf* (**"**Precatory proposals are not the creation of Rule 14a-8. Rather they have independent existence under state law and derive from the common law of corporations."). The legal foundation of the shareholder proposal rule, and the SEC's ability to modify and/or eliminate it, were subjects of significant recent debate.

[17] See Harrington Investments Press Release: "As Corporate Scandals Mount, Harrington Investments Advocates for Director Accountability in 2008" (March 22, 2008), available at *www.harringtoninvestments.com/press/031108.html*.

[18] *Amalgamated Clothing and Textile Workers Union* v. *Wal-Mart Stores*, 821 F. Supp. 877, 1993 U.S. Dist. LEXIS 5382, *12 (S.D.N.Y. 1993), quoting *Roosevelt* v. *E.I. Du Pont de Nemours & Co*., 958 F.2d 416, 421(D.C. Cir. 1992).

[19] *Lobbing the Corporation* at 85.

[20] In 2006, for example, Verizon agreed to annual political contributions disclosure after a proposal's support rose to 33%.

[21] SEC Release 34-40018 (May 21, 1998)

[22]James Peck purchased Greyhound shares in 1948 to raise the issue of integrating bus seating in the South at the annual meeting. This culminated in a 1951 federal court decision against Peck and in 1952 the SEC instituted new language prohibiting these types of proposals.

[23] *Medical Committee for Human Rights v. SEC*, 432 F. 2d. 659, 680-681 (1970), vacated and dismissed as moot, 404 U.S. 402 (1972).

[24] *Id.* at 681.

[25] *Cracker Barrel Old Country Stores, Inc*., 1992 SEC No-Act. LEXIS 984 (Oct. 13, 1992).
[26] See, generally, Romanek & Young's ShareholderProposals.com at **§** 20.01[A][1], **"**The Cracker Barrel Saga."

[27] There is at least one notable exception to this trend. Proposals that focus on wages being paid at supplier facilities (or elsewhere, with the exception of executive compensation) have continued to be excluded as "ordinary business." ICCR members seeking to address the question of sustainable living wages, for example, have been forced to recast their proposals to focus on other labor issues, despite the centrality of wages to the definition of "sweatshop." See *Nordstrom, Inc*., *2000 SEC No-Act. LEXIS 525, 526* (March 31, 2000) for Paul Neuhauser's argument exposing the inconsistencies in SEC Staff's reasoning.

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[28] 2008 SEC No-Act. LEXIS 31 (January 22, 2008)

[29] "Results of voting on genocide-free investing", available at *www.investorsagainstgenocide.net/page10011382532* (visited on May 9, 2008).

[30] ICCR is a member association of 275 faith- based institutional investors. ICCR also includes a broad range of "associate" members, including pension funds, foundations, hospital corporations, economic development funds, asset management companies, colleges, and unions. Each year ICCR- members and associates sponsor over 200 shareholder resolutions on social and environmental issues. Domini is an associate member of ICCR, and this author currently serves as co-chair of ICCR's contract-supplier working group. Each year, ICCR publishes the "The Proxy Resolutions Book", including the full text of each proposal filed by ICCR members and affiliates. For a status chart of current proposals, visit *www.iccr.org/shareholder/proxy_book07/07statuschart.php*.

[31] Carolyn Mathiasen and Heidi Welsh, "*Social Policy Shareholder Resolutions in 2006: Issues, Votes and Views of Institutional Investors*" (Published by the Social Issues Service, ISS, March 2007)

[32] For the investor press release, see*/www.cbisonline.com/page.asp?id=811* and to view the resulting code and manual, visit */www.searsholdings.com/govern/code_vendor.htm.*

[33] The Project Kaleidoscope Working Group included The Walt Disney Co., McDonald's, As You Sow Foundation, the Center for Reflection, Education and Action (CREA), Domini Social Investments, the Connecticut State Treasurer's Office, the General Board of Pension and Health Benefits of the United Methodist Church, ICCR, and the Missionary Oblates of Mary Immaculate. See *www.domini.com/common/pdf/ProjectKaleidoscope.pdf*.

[34] *The Gap, Inc.*, 2002 SEC No-Act. LEXIS 385, *40 (March 13, 2002). The proposal was withdrawn before SEC staff reached a decision.

[35] As You Sow Foundation, Calvert Group, CREA, Domini Social Investments and ICCR.

[36] *www.gapinc.com/public/SocialResponsibility/sr_report.shtml*

[37] Compare page 51 of Hewlett-Packard's 2005 Global Citizenship Report and page 36 of Nike's Fiscal Year 2004 Corporate Responsibility Report to the chart on page 14 of Gap's 2003 Social Responsibility Report.

[38] *www.hrc.org/Template.cfm?Section=Work_Life*

[39] Press release by Christian Brothers Investment Services, *"91.6 Percent of Newmont Shareholders Support Resolution for Mining Company to Report on its Impacts on Local Communiites"* (April 24, 2007), at *www.cbisonline.com/page.asp?id=873*.

[40] *www.share.ca/files/Joint_release_on_Goldcorp_final_080424.pdf.* The Canadian shareholder proposal rule is based on the U.S. rule. For a helpful comparative analysis, see, Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 Am. Bus. L.J. 365 (Summer, 2006).

[41] "Business and Human Rights: The Role of Business in Weak Governance Zones", Submission to John Ruggie, the UN Special Representative to the Secretary General on business and human rights by ICC and BIAC, December 2006, at paragraph 19, page 6, available at *www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf* .

[42] The campaign includes 26 institutional investors and allied groups. See *www.politicalaccountability.net.* The SEC has consistently held that lobbying activities constitute "ordinary business." This campaign, therefore, which uses the shareholder proposal as a primary tool, has avoided explicit requests for expenditures on lobbying activity.

[43] See "*Five New Companies Agree to Political Disclosure, Including Trade Association and c4 Payments*: *Number Hits 43 as 2008 Proxy Season Unfolds", www.politicalaccountability.net/files/CPA%20-%20press%20release%20-%2043%20-%202-28-08.pdf.*

[44] *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)

[45] *www.sec.gov/spotlight/proxyprocess.htm*

[46] Anne Mulcahy, the CEO of Xerox, is also Chair of the Business Roundtable Corporate Governance Taskforce, and the author of both letters, available at *www.sec.gov/comments/s7-16-07/s71607.shtml*.

[47] See, e.g., letters from Apache, Caterpillar, and Burlington Northern Santa Fe Corporation at *Id*.

[48] See, e.g., Letter to the SEC on behalf of 47 signatories from 10 countries, representing assets under management of approximately US$ 1.4 trillion, available at *www.sec.gov/comments/s7-16-07/s71607-409.pdf*.

[49] See James P. Hawley and Andrew T. Williams, *The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic* (Philadelphia: University of Pennsylvania Press, 2000).

[50] Freshfields Bruckhaus Deringer, "*A legal framework for the integration of environmental, social and governance issues into institutional investment*" (October 2005). For a cautionary view of the focus on "materiality", and the risk that it may lead to ignoring certain financially "immaterial" human rights issues, see, Christoph Butz and Jean Laville, *"Ethos Discussion Paper No. 2: Socially Responsible Investment: Avoiding the Financial Materiality Trap"* (June 2007), available at *www.ethosfund.ch/upload/publication/p180e_070702_No_Avoiding_the_Financial_Materiality_Trap_in_SRI.pdf.*