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## Raising the Floor from the Back Door: Shareholder Proposals as a Mechanism for Raising Minimum Wage

Laura Carrier

Washington and Lee University School of Law, carrier.l24@law.wlu.edu

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# Raising the Floor from the Back Door: Shareholder Proposals as a Mechanism for Raising Minimum Wage

Laura Carrier\*

## *Abstract*

*When adjusted to reflect inflation, the federal minimum wage is almost 40 percent lower than it was in 1970. The Biden Administration tried and failed to legislatively raise the minimum wage, and political deadlock will continue to kill legislative change. The shareholder proposal, a nonbinding recommendation to management that shareholders can submit for a vote at a public corporation's annual meeting, presents a path for improving the wages of many workers in the absence of federal legislation. This Note analyzes the best approach to crafting a shareholder proposal on minimum wage that will prompt an effective increase in the minimum wages paid to workers. It evaluates the barriers to success and concludes that the right team of actors can overcome the barriers to raise the minimum wages paid to workers at large corporations through shareholder proposals.*

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\* J.D. Candidate, May 2024, Washington and Lee University School of Law; Bachelor of Science in Mathematics and Bachelor of Arts in History, Class of 2021, University of Alabama. Thank you to my advisor, Professor Sarah Haan, for your guidance and insight during the writing process. I'm also grateful for the dedicated work of the *W&L Law Review* upper board, especially Grace Moore for responding to my endless questions. Lastly, thank you to my family and friends—I could not have finished this Note without the love and support you showed me.

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INTRODUCTION

*Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial workers and to strengthen and stabilize the markets for the farmers' products. . . . Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. . . . All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, government must have some control over maximum hours, minimum wages, the evil of child labor and the exploitation of unorganized labor.*

Franklin D. Roosevelt<sup>1</sup>

*If unrest and conflict paralyze our political systems and prevent the compromises necessary for an inclusive public good, we will see underinvestment in the economy, continuing discrimination, and increased demands on a weakened government for social services that it does not have the resources to provide.*

The Investment Integration Project<sup>2</sup>

President Franklin D. Roosevelt implemented the first federal minimum wage in the Fair Labor Standards Act of 1938.<sup>3</sup> Roosevelt championed the minimum wage to address the effects of the Great Depression on wage workers and to stimulate the economy by increasing workers' purchasing power.<sup>4</sup> By enacting a minimum wage, Roosevelt ultimately

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1. Franklin D. Roosevelt, U.S. President, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937) (transcript available online by Gerhard Peters & John T. Woolley, The American Presidency Project, <https://perma.cc/H2SA-48LG>).

2. THE INV. INTEGRATION PROJECT, SYSTEMIC STEWARDSHIP: INVESTING TO ADDRESS INCOME INEQU. 18 (2021), <https://perma.cc/49G2-4GAP> (PDF).

3. 29 U.S.C. §§ 201–209; see Erin Blakemore, *How America Settled on a 5-Day Workweek*, NAT'L GEO. (Mar. 24, 2023), <https://perma.cc/A8B3-7FGX>.

4. Franklin D. Roosevelt, U.S. President, Statement on the National Industrial Recovery Act (June 16, 1933) (transcript available online by Franklin D. Roosevelt Pres. Libr. & Museum, <https://perma.cc/M2YR-UVNW>).

sought to establish “living wages” that allowed all workers to have a decent living.<sup>5</sup> Perhaps his word choice inspired the modern movement to measure the adequacy of wages against the average cost of a decent living.<sup>6</sup> MIT’s Living Wage Institute published a rationale for the living wage in 2023 that even mirrors Roosevelt’s sentiments.<sup>7</sup>

The federal minimum wage as it stands no longer achieves Roosevelt’s goals of providing a living wage.<sup>8</sup> Inflation has plummeted the purchasing power of the dollar, and as a result, the federal minimum wage is almost 40 percent lower than it was in 1970.<sup>9</sup> A couple with two children earning the minimum wage would need to work two full-time jobs, or ninety-six hours a week per adult, to make a living wage.<sup>10</sup> A single parent with two children earning the federal minimum wage would need to work almost six full-time jobs, or 252 hours per week, to make a

5. *Id.*

In my Inaugural I laid down the simple proposition that nobody is going to starve in this country. It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By “business” I mean the whole of commerce as well as the whole of industry; by workers I mean all workers, the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.

6. The living wage “is what one full-time worker must earn on an hourly basis to help cover the cost of their family’s minimum basic needs where they live while still being self-sufficient.” *Frequently Asked Questions (FAQs)*, LIVING WAGE CALCULATOR, <https://perma.cc/LPJ9-RKGG> (last updated Apr. 24, 2023). For a further discussion on MIT’s Living Wage Calculator, see *infra* note 66.

7. *Compare* Roosevelt, *supra* note 4 (“[T]he change from starvation wages and starvation employment to living wages and sustained employment can . . . restore our rich domestic market by raising its vast consuming capacity.”), with Amy K. Glasmeier, *NEW DATA POSTED: 2023 Living Wage Calculator*, LIVING WAGE CALCULATOR (Feb. 1, 2023), <https://perma.cc/4GES-Y3JM> (“Establishing a living wage and an approximate income needed to meet a family’s basic needs would enable the working poor to achieve financial independence while maintaining housing and food security.”).

8. See Greg Iacurci, *The \$7.25 Minimum Wage Can’t Pay All the Bills in Any State*, CNBC (Mar. 2, 2021, 10:54 AM), <https://perma.cc/ZR49-82HL>.

9. *Real and Nominal Value of the Federal Minimum Wage in the United States from 1938 to 2023*, STATISTA RSCH. DEPT (May 22, 2023), <https://perma.cc/9X4L-TRGJ>. The 40 percent statistic is adjusted for inflation.

10. Glasmeier, *supra* note 7.

living wage.<sup>11</sup> The federal minimum wage desperately needs an increase to accommodate inflation and cost of living.<sup>12</sup>

Due to bipartisan differences, legislative efforts to raise the federal minimum wage have repeatedly failed.<sup>13</sup> The shareholder proposal, a nonbinding recommendation to management that shareholders can submit for a vote at a public corporation's annual meeting, presents a path for improving the wages of many workers in the absence of federal legislation.<sup>14</sup> Large corporations employ over half of the U.S. workforce, so effecting change in public companies would impact many workers.<sup>15</sup>

This Note begins with an introduction to shareholder activism and the legalities behind the shareholder proposal.<sup>16</sup> The first Part also discusses the inadequacies of the minimum wage and the general public's attitude towards raising the minimum wage.<sup>17</sup> This Note then discusses what barriers would keep a proposal from achieving success by looking at how corporations could exclude the proposal prior to a vote and the factors that would cause shareholders to vote no, or fail to vote at all, on such a proposal.<sup>18</sup> Next, it will examine the major actors in shareholder activism and proxy voting and how those actors may best participate in a successful proposal.<sup>19</sup> This Note concludes with a proposed framework for crafting the proposal and achieving success.<sup>20</sup> This framework analyzes a recent proposal in the United Kingdom<sup>21</sup> and recommends wording that avoids exclusion under Rule 14a-8 of the Securities

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11. *Id.*

12. *See infra* Part I.B.

13. *See infra* Part I.B.

14. *See infra* Part I.C.

15. *See* ANTHONY CARUSO, U.S. CENSUS BUREAU, U.S. DEPT OF COM., G12-SUSB, STATISTICS OF U.S. BUSINESSES, EMPLOYMENT AND PAYROLL SUMMARY: 2012, at 1 (2015) <https://perma.cc/LQV3-J3YS> (PDF) (recording that large enterprises employed 51.6 percent of workers in 2015).

16. *See infra* Part I.

17. *See infra* Part I.B.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part IV.A.

Exchange Act of 1934.<sup>22</sup> It then posits that the proposals will need to be highly publicized for there to be a chance for success.<sup>23</sup> Lastly, it recommends that various actors work in concert; namely, a powerful nonprofit will need to work with socially minded institutional investors to make these proposals at various public companies.<sup>24</sup>

## I. THE RIGHT TOOLS AT THE RIGHT TIME

By looking at the history of shareholder activism, the minimum wage crisis, and the rules that govern shareholder proposals, this Part will explain why the current financial and political climate is ideal for shareholders to act on minimum wage.

### A. *Evolution of Shareholder Activism*

This subpart will analyze how shareholder activism has evolved and grown in popularity in recent years while considering the significance of Environmental Social Governance principles as a part of that growth.

Shareholder activism has become more popular because of increased institutional ownership of public stock, more diverse portfolios, and lower management fees.<sup>25</sup> Investors increasingly consider nonfinancial matters as a part of responsible investing (“RI”), “namely environmental risks, social issues, and governance reforms.”<sup>26</sup> These considerations have been named “ESG factors,” and some investors look at these factors to determine what companies to invest in.<sup>27</sup> Some common ESG factors include diversity and inclusion, employee welfare, supply chain issues, fair labor practices, and system risk

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22. 17 C.F.R. § 240.14a-8; *see infra* Part IV.B.

23. *See infra* Part IV.B.

24. *See infra* Part III.C.

25. *See* Michael Cappucci, *The Proxy War Against Proxy Advisors*, 16 N.Y.U. J.L. & BUS. 579, 582–86 (2020).

26. Alexander T. Kraik, *Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm*, 44 VT. L. REV. 493, 494 (2020).

27. *See* Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L.J. 129, 131 (2021) (describing how investors evaluate ESG considerations).

management.<sup>28</sup> At their core, ESG issues only gain traction when public, political, or legal scrutiny draws awareness to the problem.<sup>29</sup> The more “mainstream” an issue becomes, the more institutional investors will raise shareholder proposals to address it.<sup>30</sup> These investors are considering the big-picture optics and market wants of the general public and then deciding that the benefit of implementing ESG improvements outweighs the financial investment needed.<sup>31</sup>

While the concept of responsible investing originated as the use of capital to invest in those companies that have strong ESG ratings,<sup>32</sup> investors can also use their role within the company to make shareholder proposals that further ESG issues.<sup>33</sup> A shareholder can propose a policy or standard with an accompanying statement that explains why the corporation should adopt their policy.<sup>34</sup> If the proposal meets the regulations

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28. Mozaffar N. Khan et al., *Corporate Sustainability: First Evidence on Materiality* 34 (Harv. Bus. Sch., Working Paper No. 15-073, 2015), <https://perma.cc/9Z3W-KPZ5> (PDF).

29. See, e.g., Wang, *supra* note 27, at 171 (explaining how investors only focused on climate change when there was public and political pressure).

30. *Id.* at 137.

31. See Jordan Wolmann & Debra Kahn, *Shareholder Activists Making Inroads*, POLITICO (July 28, 2022), <https://perma.cc/Z4TE-EWEK> (“My thesis is that more proposals are occurring largely because of political dysfunction coupled with sustained investor concern . . . This reflects capital market priorities: The market is demanding answers that politicians are not providing.”).

32. See *supra* note 9 and accompanying text; Clark Barr et al., *Morningstar Sustainability Rating Methodology*, MORNINGSTAR (Nov. 8, 2021), <https://perma.cc/G37E-PQKB> (PDF) (“The Morningstar Sustainability Rating is designed to support investors in evaluating the relative environmental, social, and governance risks within portfolios.”).

33. See Robert C. Bird & Stephen Kim Park, *Organic Corporate Governance*, 59 B.C. L. REV. 21, 39–40 (2018)

The shareholder proposal mechanism is the most widely recognized and formal method for shareholders to exercise their voice in corporate decision-making. This mechanism is the primary procedural vehicle with which shareholders can shape corporate governance practices *ex ante*, rather than relying on their right to vote, sue, or sell their shares. (footnote omitted).

34. See Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 274–75 (2016) (“A typical shareholder proposal contains two parts: a resolution, commonly written in

promulgated by the Securities and Exchange Commission (“SEC” or “the Commission”), management must include it in its proxy materials, and then the proposal will be voted on at the corporation’s annual meeting.<sup>35</sup> However, shareholder proposals are precatory, meaning that they are not binding on the corporation, even if they receive a majority vote.<sup>36</sup> Despite their inability to force corporate action, shareholder proposals are still extremely influential over corporate decision-making because boards of directors need to appease the shareholders who vote to elect them.<sup>37</sup> The increased popularity of shareholder proposals evidences their effectiveness, especially when it comes to the push for ESG improvements in the corporate world.

2022 was a record-breaking year for shareholder proposals, with a surge in proposals concerning ESG.<sup>38</sup> Shareholders submitted a total of 941 proposals, exceeding those submitted in 2021 by 104.<sup>39</sup> Some proponents withdrew their proposals while the SEC omitted others, so a total of 562 proposals went to a vote in 2022.<sup>40</sup> Ultimately, 86 out of the 562 total proposals received a majority vote.<sup>41</sup> While this passage rate may seem low, it is notable because the rate has increased significantly

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the form of a policy or standard, which shareholders are asked to approve, and an explanatory statement in support of the resolution.”).

35. See *infra* Part I.C.

36. See Bird & Park, *supra* note 33, at 40 (“A shareholder proposal that receives a majority vote of the shareholders is only advisory—unless it concerns an action reserved for the board under the corporation’s charter.”). However, successful shareholder proposals consistently result in board action even though they aren’t binding. See Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 588 (2021) (observing an “increasing number of proposals that received majority shareholder support” since the early 2000s and explaining how “this support translated into directors implementing more of the actions called for by shareholders”).

37. Cf. Bird & Park, *supra* note 33, at 40 (“Nonetheless, through the shareholder proposal mechanism, shareholders can seek to influence corporate decision-making by advocating for specific causes. . . . Even though most proposals are precatory, the mere possibility of strong shareholder support may pressure the board to respond or to negotiate an accommodation.”).

38. See Brigid Rosati et al., *A Look Back at the 2022 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 23, 2022), <https://perma.cc/Z3RD-HJYX>.

39. *Id.*

40. *Id.*

41. *Id.*

over the past few years.<sup>42</sup> Only 6.2 percent of shareholder proposals voted on by S&P 500 corporations passed in 2018, compared to 10.5 percent in 2022.<sup>43</sup>

### B. *Minimum Wage Crisis*

This subpart will propose that raising minimum wage is an ESG initiative that most would consider timely due to the current financial and political climate in the United States. Pertinently, it will examine how inflation and political deadlock have exacerbated the inadequacy of the federal minimum wage.

With inflation rising at record-breaking speeds, there has been heightened scrutiny on the federal minimum wage and its inadequacy.<sup>44</sup> Given the inability of Congress to agree to increase minimum wage and the increased emphasis on ESG initiatives, shareholders may hold the power to initiate an increase in the minimum wage for public companies in the absence of legislation.<sup>45</sup>

Inflation has a huge impact on the everyday life of Americans. From January 2022 to January 2023 alone, inflation rose 6.4 percent in the United States.<sup>46</sup> *The Wall Street Journal*

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42. See Matteo Tonello, *Shareholder Voting Trends (2018–2022)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 5, 2022), <https://perma.cc/FX7E-EJ53> (recording the passage rates of shareholder proposals from 2018 to 2022).

43. *Id.* It should be noted that passage rates peaked in 2021 at 16.4 percent, but that “the overall number of submissions increased so much [in 2022] that it affected the average voting results and pass rate of all shareholder resolutions across subject areas.” *Id.*

44. See Nicolas Vega, *After Inflation, People Making U.S. Minimum Wage Are Earning Less Now Than 60 Years Ago*, CNBC (July 20, 2022, 9:00 AM), <https://perma.cc/ZYH5-C2BQ>; Ashfaq Khan & Rose Khattar, *It’s Long Past Time to Increase the Federal Minimum Wage*, CTR. FOR AM. PROGRESS (July 7, 2022), <https://perma.cc/JY87-UTE6>; Noam Scheiber, *Biden Orders \$15 Minimum Wage for Federal Contractors*, N.Y. TIMES (Apr. 27, 2021), <https://perma.cc/E9XZ-2GFN>.

45. See Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV’T L. REP. 10155, 10187 (2019) (“Private-sector actors, which exercise increasing power over global affairs and the enjoyment of human rights, may be best positioned to push for positive change.”).

46. BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., USDL-23-0277, CONSUMER PRICE INDEX—JANUARY 2023, at 1 (2023), <https://perma.cc/F3WW-AKJF>

reported that the average American household was spending an additional \$276 a month because of inflation.<sup>47</sup> When adjusted to reflect inflation, the U.S. minimum wage is almost forty percent lower than it was in 1970.<sup>48</sup> To bring the harshness of the current minimum wage into perspective, a person working full-time for \$7.25 an hour makes \$15,000 a year before taxes.<sup>49</sup> The median cost of a one-bedroom apartment in the United States is therefore almost 200 times the federal minimum wage, which means that a worker would have to work full-time for five weeks to make enough money to pay four weeks of rent.<sup>50</sup> An individual making the federal minimum wage cannot afford housing on their own.<sup>51</sup> Even workers in states that have raised the minimum wage above the federal level do not make enough money to meet their basic needs.<sup>52</sup>

Math aside, the inadequacy of minimum wage is best conveyed through the dissatisfaction of American citizens. A 2021 survey conducted by the Pew Research Center revealed that most Americans support raising the federal minimum wage

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(PDF). The percentage increase was even higher from 2021 to 2022, at 7.5 percent. See Gywnn Guilford, *Higher Inflation Is Probably Costing You \$276 a Month*, WALL ST. J., <https://perma.cc/EJN2-UFN5> (last updated Feb. 10, 2022, 2:42 PM).

47. Guilford, *supra* note 46.

48. See *Real and Nominal Value of the Federal Minimum Wage in the United States from 1938 to 2023*, *supra* note 9

When adjusted for inflation, the 2023 federal minimum wage in the United States is around 40 percent lower than the minimum wage in 1970. Although the real dollar minimum wage in 1970 was only 1.60 U.S. dollars, when expressed in nominal 2023 dollars this increases to 12.04 U.S. dollars. This is a significant difference from the federal minimum wage in 2023 of 7.25 U.S. dollars.

49. Iacurci, *supra* note 8.

50. Philip Bump, *Where the Gap Between Rent and the Minimum Wage is the Widest*, WASH. POST (Aug. 19, 2022, 3:14 PM), <https://perma.cc/PZY3-5CTS>

In other words, the median cost of a one-bedroom in the United States at that point was precisely 200 times the federal minimum wage. So if you want to rent a median-priced apartment while earning minimum wage, you simply have to work five full-time weeks a month. Oh, and spend no money on anything else at all.

51. *Id.*

52. See Gili Malinsky, *Minimum Wages Are Going Up, But Typical Workers Still Don't Make Enough to Get by in Any U.S. State*, CNBC: MAKE IT (Feb. 16, 2023, 2:51 PM), <https://perma.cc/EE5T-BHCM> (“[N]o state offers a minimum wage that is in line with the living wage.”).

to fifteen dollars.<sup>53</sup> Specifically, 62 percent of Americans support an increase to fifteen dollars while 71 percent of the dissenters still support a more modest increase.<sup>54</sup> Put differently, only 10 percent of Americans indicated that they wanted to maintain the current minimum wage of \$7.25.<sup>55</sup> The survey acknowledges the “sharp partisan differences” in poll results.<sup>56</sup> These differences foretell Congress’s inability to legislatively raise the minimum wage.<sup>57</sup> Currently, Democrats possess only a “tiebreaking majority” in the Senate, not the sixty votes required to pass legislation that all Republicans oppose.<sup>58</sup> The party’s inability to advance the minimum wage was demonstrated in the spring of 2022, when President Biden sought to include an increase in the minimum wage as part of the year’s coronavirus stimulus package.<sup>59</sup> Republicans and Democrats failed to find common ground over “the size of the wage increase or the categories of workers who could benefit from it.”<sup>60</sup>

Some scholars propose relying on states and local municipalities to raise the minimum wage where Congress

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53. Amina Dunn, *Most Americans Support a \$15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), <https://perma.cc/7YCA-QUFR>.

54. *See id.* (“Among those who oppose raising the minimum wage to \$15 an hour, a substantial majority (71%) say the federal minimum wage should be increased, but that the standard should be less than \$15 an hour; those who hold this view account for 27% of the overall public.”).

55. *Id.*

56. *See id.* (“While Democrats are largely united in their support for increasing the federal minimum wage to \$15 an hour, Republicans’ views differ by household income.”).

57. *Cf.* Drew DeSilver, *When It Comes to Raising the Minimum Wage, Most of the Action Is in Cities and States, Not Congress*, PEW RSCH. CTR. (Mar. 12, 2021), <https://perma.cc/K5LZ-W6TB> (“Prospects for raising the federal minimum wage, which has stood at \$7.25 an hour since 2009, appear to have stalled out yet again, despite broad public support for the idea.”).

58. Tony Romm, *Democrats Hit Major Political Wall in Efforts to Close Gender Pay Gap, Raise Minimum Wage*, WASH. POST (June 9, 2021, 10:47 AM), <https://perma.cc/HB6N-VNWW>.

59. *See id.* (explaining that while “Biden initially sought to raise the hourly rate to \$15 as part of a \$1.9 trillion coronavirus stimulus package,” the plan floundered in the Senate).

60. *Id.*

cannot.<sup>61</sup> While many states have locally raised the minimum wage to surpass the federal minimum wage, twenty-one states have not.<sup>62</sup> According to a study by the Pew Research Center, roughly 40 percent of all U.S. wage and salary workers live and work in these states.<sup>63</sup> Twenty out of the twenty-one states that use the federal minimum wage prohibit municipalities from raising the minimum wage by local ordinance.<sup>64</sup> Even some states that have raised their minimum wage preempt cities and counties from setting their own wages.<sup>65</sup> Further, these state and local wage increases do not meet economic standards like MIT's Living Wage Calculator.<sup>66</sup> The need for the increase in pay is obvious,<sup>67</sup> but Congress, states, and local government either cannot or will not do enough to ensure that all workers receive livable wages. Concerned activists must look for creative mechanisms to advantage the lowest-paid workers, like shareholder proposals made to public corporations. Large

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61. See, e.g., DeSilver, *supra* note 57.

62. See *id.* (“The \$7.25 federal minimum wage is actually used in just 21 states . . . . In the 29 other states and the District of Columbia, minimum wages are higher—ranging from \$8.65 in Florida to \$15 in D.C.”).

63. See *id.* (reporting that this accounts for “roughly 56.5 million people”).

64. *Id.*

65. See *id.* (“Seven states that have adopted minimum wages beyond the federal standard also have laws that prevent cities and counties from setting their own local minimums.”).

66. See Glasmeier, *supra* note 7. MIT's Living Wage Calculator uses geographically specific data to estimate the costs associated with eight basic needs—food, childcare, health care, housing, transportation, civic engagement, broadband, and other necessities—to calculate the minimum, livable wage for twelve different family types. *Methodology*, LIVING WAGE CALCULATOR, <https://perma.cc/Y6B8-ANLR> (last updated Apr. 24, 2023); see also *Frequently Asked Questions (FAQs)*, *supra* note 6.

67. The need for change is further highlighted by the number of workers who could benefit from higher hourly wages. Over half of U.S. workers are paid hourly wages as opposed to set salaries. See BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., REP. 1098, CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2021, at 1 (2022), <https://perma.cc/MP6S-98TV> (PDF) (“In 2021, 76.1 million workers . . . in the United States were paid at hourly rates, representing 55.8 percent of all wage and salary workers.”). This creates a pool of seventy-six million workers who could be affected by an increase in the federal or state minimum wage. *Id.* More than one million workers earn at or below the federal minimum wage, but this total does not include workers earning higher—but still inadequate—state or local minimum wages. *Id.*

corporations employ over half of the U.S. workforce, so effecting change at public companies would impact many workers.<sup>68</sup>

C. *The Mechanics of a Shareholder Proposal*

This subpart will discuss how shareholder proposals are made and voted on and what rules govern them.

Each year, all shareholders of a particular corporation can attend an annual meeting where they can vote on matters of corporate governance.<sup>69</sup> Shareholders can also submit proposals<sup>70</sup> that are admitted to the ballot and voted on by all shareholders,<sup>71</sup> but these proposals are limited by regulations promulgated by the SEC.<sup>72</sup> A company's investors typically receive one vote per share of stock in the company, and a shareholder proposal passes when more than 50 percent of votes are cast in favor of the proposal.<sup>73</sup> Company management typically opposes shareholder proposals, especially proposals on ESG issues,<sup>74</sup> but proposals can still pass if shareholders are united on an issue and there is public pressure to make a change.<sup>75</sup>

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68. See CARUSO, *supra* note 15, at 1 (recording that large enterprises employed 51.6 percent of workers in 2012). Statistics concerning how many U.S. workers are employed by public corporations were hard to find, as most large corporations' total employment statistics reflect their global workforce. See, e.g., Frank Holmes, *Top 10 Largest Fortune 500 Employers in the U.S.*, U.S. GLOB. INVS. (Oct. 26, 2022), <https://perma.cc/9AV4-FAC3> (discussing the "most profitable U.S. companies" but calculating employment statistics from global totals).

69. *Frequently Asked Questions*, PROXY MONITOR (2023) [hereinafter *Proxy Monitor FAQ*], <https://perma.cc/75A4-R6V3>.

70. See 17 C.F.R. § 240.14a-8(a) (2023) ("A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders.").

71. *Proxy Monitor FAQ*, *supra* note 69.

72. See 17 C.F.R. § 240.14a-8(i) (describing the reasons for which a company may exclude a shareholder proposal).

73. *Proxy Monitor FAQ*, *supra* note 69.

74. E.g., John G. Matsusaka, *Why Do Managers Fight Shareholder Proposals? Evidence from No-Action Letter Decisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 20, 2017), <https://perma.cc/35JZ-WVZS>.

75. See Wang, *supra* note 27, at 138 ("As institutional investor support increases past a tipping point, shareholder proposals will begin to pass. As

The rules governing shareholder proposals can be found in 17 C.F.R. § 240.14a-8. In order to be eligible to submit a proposal, a shareholder must have held at least \$2,000 of a company's securities for three years, \$15,000 for two years, or \$25,000 for one year.<sup>76</sup> The proposal must clearly and succinctly state the "course of action that you believe the company should follow."<sup>77</sup> The proposal can be substantiated by a supporting statement, but the proposal and the statement combined may not exceed 500 words.<sup>78</sup> Management may also submit a statement explaining why it opposes the proposal.<sup>79</sup> Either the proposing shareholder, or an appointed representative who is qualified under state law to present the proposal, must attend the meeting to present it.<sup>80</sup>

There are multiple grounds under which the company can move to exclude a shareholder proposal. First, the proposal must not violate state law.<sup>81</sup> State law commonly prohibits proposals that command action from the Board of Directors.<sup>82</sup> The SEC advises proponents to word their proposal as a recommendation or request because proposals not phrased as a suggestion are subject to further scrutiny to ensure compliance with state law.<sup>83</sup> Further, any proposal that would require a company to violate state, federal, or governing foreign law if implemented is excludable.<sup>84</sup> Proposals that are designed to redress a personal grievance or confer a personal benefit that conflicts with a current company proposal or action, that the company would not

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more shareholder proposals pass, a new norm of institutional investors supporting ESG issues will develop, and institutional investors may feel more pressure to continue to conform to the new norm.").

76. 17 C.F.R. § 240.14a-8(b)(1)(i).

77. *Id.* § 240.14a-8(a). Additionally, the SEC publishes Staff Legal Bulletins (SLBs) which provide further guidance on acceptable content of proposals. *See infra* Part II.B.

78. *Id.* § 240.14a-8(d).

79. *See id.* § 240.14a-8(m)(1) ("The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal.").

80. *Id.* § 240.14a-8(h).

81. *Id.* § 240.14a-8(i)(1). However, different states of incorporation have different laws regarding what constitutes proper shareholder action. *Id.*

82. *Id.* § 240.14a-8(i)(1) note.

83. *Id.*

84. *Id.* § 240.14a-8(i)(2).

have the power to implement, and that are not sufficiently relevant to the company's business, are all excludable.<sup>85</sup> Proposals also cannot be duplicated or resubmitted under most circumstances.<sup>86</sup> There is one further exclusion that is most likely to affect a proposal on minimum wage. Known as the ordinary business exception and the micromanagement principle, 17 C.F.R. § 240.14a-8(i)(7) authorizes companies to exclude proposals that deal with matters relating to the company's ordinary business practices.<sup>87</sup> If a company believes a proposal is excludable under one of these grounds, the company has the burden of so proving to the SEC.<sup>88</sup> The company must file a letter with the Commission that includes a copy of the proposal, an explanation of why the company believes the proposal is excludable, and occasionally the supporting opinion of an attorney if the reason for exclusion is that the proposal conflicts with state or foreign law.<sup>89</sup> A shareholder may submit a statement explaining why he or she believes the proposal is not excludable, but this is not required.<sup>90</sup> Because the company has the burden of proof, they will usually go through the no-action letter process, whereby the company submits a no-action request to the SEC's Division of Corporate Finance ("the Division").<sup>91</sup> The Division then responds publicly by stating whether it concurs with the company's arguments for excluding the proposal.<sup>92</sup>

## II. BARRIERS TO SUCCESS

This Part will look at the legislative, logistical, and philosophical barriers that would impede the success of a

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85. *Id.* § 240.14a-8(i)(3)–(6), (8)–(10).

86. *Id.* § 240.14a-8(i)(11)–(12).

87. *See infra* Part II.A.

88. 17 C.F.R. § 240.14a-8(g).

89. *Id.* § 240.14a-8(j).

90. *Id.* § 240.14a-8(k).

91. Christina M. Thomas et al., *Responding to Rule Changes When the Rule Has Not Actually Changed: How Companies Should Approach Shareholder Proposals This Proxy Season*, KIRKLAND & ELLIS (Nov. 17, 2022), <https://perma.cc/6UM2-4K35>.

92. *Id.*

shareholder proposal on minimum wage. These barriers include what keeps proposals off the proxy ballot, the unpredictability of partisanship, and how shareholders decide to utilize their power to vote.

#### A. *The Ordinary Business Exception*

This subpart will discuss what power management has to exclude a proposal on minimum wage. Further, it will explore the limits of these exclusionary powers so that there is a clear route to writing a successful proposal.

Glass Lewis recently advised shareholders of a U.K. supermarket chain not to vote for a shareholder proposal that would control what a company pays its employees.<sup>93</sup> The proxy advisory firm<sup>94</sup> based its recommendation on the ordinary business exception, which permits a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.”<sup>95</sup>

The SEC has stated that the policy underlying the ordinary business exception rests on two central considerations.<sup>96</sup> The first relates to the proposal’s subject matter while the second

93. See James Davey, *Glass Lewis, ISS Back UK’s Sainsbury’s on Workers Pay Vote*, REUTERS (June 23, 2022, 9:54 AM), <https://perma.cc/M4UC-5JPY> (“Glass Lewis said adoption of the proposal from the responsible investment group ShareAction ‘could border on micromanagement by shareholders.’”). For a more detailed description of this shareholder proposal and Glass Lewis’s analysis of the issue, see *infra* Part IV.A.

94. For an extended discussion of the role of proxy advisory firms in shareholder proposals, see *infra* Part III.B.

95. 17 C.F.R. § 240.14a-8(i)(7); see Davey, *supra* note 93; *Staff Legal Bulletin No. 14I(CF)*, U.S. SEC. & EXCH. COMM’N (Nov. 1, 2017) [hereinafter *SLB 14I*], <https://perma.cc/R8KT-JE2R> (“[T]he ‘ordinary business’ exception . . . permits a company to exclude a proposal that ‘deals with a matter relating to the company’s ordinary business operations.’”); see also Ester Ballabio, *Debates over Worker Pay and ESG Stewardship Leave Sainsbury Investors with Their Hands Full*, GLASS LEWIS (July 15, 2022), <https://perma.cc/T2FF-X8TJ> (“In aggregate, since it did not appear that Sainsbury’s had mismanaged its wages, we were concerned that allowing a third party to determine the wages paid to employees and contractors could have bordered on micromanagement . . .”).

96. *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM’N (Nov. 3, 2021) [hereinafter *SLB 14L*], <https://perma.cc/5MES-M8UH>.

relates to the degree to which the proposal “micromanages” the company:

[1] [P]roposals that raise matters that 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” relate to a company’s “ordinary” business operations. . . . [2] [A] proposal may be excludable under the “ordinary business” exception if it “micromanages” the company.<sup>97</sup>

The first prong restricts the content of a proposal by allowing management to exclude proposals that touch on a corporation’s ordinary business operations.<sup>98</sup> The SEC has given guidance on what constitutes ordinary business, providing examples including “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.”<sup>99</sup> Thus, this prong would likely exclude a topic like workers’ wages—were it not for the significant policy exception.

The significant policy exception allows proposals that encroach on “ordinary business operations” to avoid exclusion if they focus on a policy issue that is so significant it “transcends the day-to-day business matters.”<sup>100</sup> Previous SEC guidance dictated that the determination of a policy issue’s significance rests “in the context of the particular company and encouraged companies to provide a board analysis assessing whether the particular policy issue raised by the proposal was sufficiently

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97. See *Shareholder Proposals: Staff Legal Bulletin No. 14K (CF)*, U.S. SEC. & EXCH. COMM’N (Oct. 16, 2019) [hereinafter *SLB 14K*], <https://perma.cc/Q29U-K7TU>.

98. See *id.* (“The purpose of the exception is to ‘confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.’”).

99. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240).

100. Thomas et al., *supra* note 91; see *id.* (“Several other proposals related to companies’ workforce management were deemed not excludable pursuant to Rule 14a-8(i)(7) because they raised ‘human capital management issues with a broad societal impact.’”).

significant to the company.”<sup>101</sup> Staff Legal Bulletin (“SLB”) 14L, issued in November 2021, rejects that approach; instead, the Division now focuses on “whether the proposal raises issues with broad societal impacts.”<sup>102</sup> As an example, SLB 14L provides that “proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.”<sup>103</sup> Because of this recent broadening of the significant policy exception, there is limited evidence of what social policy matters the Commission considers significant enough to transcend day-to-day business matters.<sup>104</sup> Looking at the responses to no-action letters in 2022 and 2023, it appears that the Commission prohibits exclusion when a proposal primarily focuses on a social policy matter, but it allows exclusion where the proposal “merely touches upon a significant social policy issue.”<sup>105</sup>

The second prong of the Rule 14a-8(i)(7) analysis “rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself.”<sup>106</sup> Under the ordinary business exception, companies may exclude a proposal that “micromanages” the company “by probing too deeply into matters of a complex nature,” which may occur if the proposal involves “intricate detail, or seeks to impose specific [timeframes] or methods for

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101. Brian V. Breheny et al., *SEC Staff Issues New Shareholder Proposal Guidance*, SKADDEN (Nov. 5, 2021), <https://perma.cc/7F9R-B69P>.

102. *SLB 14L*, *supra* note 96.

103. *Id.*; see Breheny et al., *supra* note 101.

104. See *SLB 14L*, *supra* note 96 (instituting changes to the rule that were not in effect until 2022).

105. Compare CVS Health Corp., SEC Staff No-Action Letter, 2022 WL 110305, at \*7 (Mar. 18, 2022) (concluding that the proposal was not excludable because of its public health implications, mainly that the policy in the proposal could have a “crucial contribut[ion] to public health” and could contribute to “lowering disease and overall absence rates”), with Dollar Tree Inc., SEC Staff No-Action Letter, 2022 WL 392224 (May 2, 2022) (concluding that the proposal was excludable because it requested a report on management’s business strategy to address recent labor market pressure, but it only referenced employee safety and pandemic-related in passing).

106. *SLB 14K*, *supra* note 97.

implementing complex policies.”<sup>107</sup> SLB 14L specifically notes that “proposals seeking detail or seeking to promote [timeframes] or methods do not per se constitute micromanagement” and that the Division will focus on “the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management.”<sup>108</sup> In addition, SLB 14L explains that in order to assess whether a proposal probes matters “too complex” for shareholder consideration, the Division may consider “the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic,” as well as “references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and timeframes.”<sup>109</sup> Under the Biden Administration, the Commission has usually denied exclusion where the proposals merely asked for disclosure or consideration.<sup>110</sup> However, the Commission will allow exclusion where the requests seek “disclosure of intricate details” about a corporation’s policies and practices of a complex nature.<sup>111</sup>

*B. Presidential Affiliation and the Division of Corporate Finance*

This subpart will examine the politicized treatment of shareholder proposals. The changing of guidance in line with the

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107. *SLB 14L*, *supra* note 96 (quoting Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 63 Fed. Reg. 29106 (proposed May 28, 1998)).

108. *Id.* (quoting Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 63 Fed. Reg. 29106 (proposed May 28, 1998)).

109. *Id.*

110. *See, e.g.*, The Walt Disney Co., SEC Staff No-Action Letter, 2022 WL 16834605, at \*1 (Jan. 12, 2023) (denying the exclusion of a proposal requesting that the “Board of Directors consider listing on the Company website any recipient of \$10,000 or more of contributions, excluding employee matching gifts”).

111. *See, e.g.*, Verizon Communications, Inc., SEC Staff No-Action Letter, 2022 WL 110304, at \*1 (Mar. 17, 2022) (allowing the exclusion of a proposal that probed “too deeply into matters of a complex nature by seeking disclosure of intricate details regarding the company’s employment and training practices”).

political beliefs of the current President may affect the treatment of a shareholder proposal on minimum wage.

With the current influence of the Democratic Party, the Division is putting forth guidance that favors shareholder proposals on ESG issues.<sup>112</sup> However, SEC interpretation and guidance has become dependent on political affiliation, making the proposal process unpredictable.<sup>113</sup> A well-crafted and successful proposal in 2023 may be a legally excludable proposal in 2025 because the SLBs that advise on the excludability of shareholder proposals are heavily influenced by the political affiliation of the sitting President.<sup>114</sup> During the Trump Administration, the Division published three SLBs (Nos. 14I, 14J, and 14K) that have since been rescinded under the Biden Administration.<sup>115</sup> These SLBs promulgated guidance that favored corporations' boards and limited shareholder power. Pertinently, rescinded SLB Nos. 14J and 14K announced that the micromanagement prong of the ordinary business exception calls for the exclusion of any proposal that "seeks intricate detail or imposes a specific strategy, method, action, outcome or

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112. See Thomas et al., *supra* note 91 ("SEC Staff responses to shareholder proposal no-action requests last season . . . disrupted the balance of shareholder access versus potential for abuse, increasing costs for companies (and their shareholders), diverting management's attention away from running the company, and increasing the number of proposals included in proxy statements.").

113. See *id.* ("[T]he staff significantly narrowed the scope of several bases for exclusion under Rule 14a-8 . . . Suddenly, years of staff guidance and no-action precedent could no longer be relied upon, which resulted in increased costs for companies to evaluate and prepare no-action requests, only to have them denied.").

114. See, e.g., *SEC Staff Legal Bulletin Makes Exclusion of Certain Shareholder Proposals More Challenging*, COOLEY (Nov. 17, 2021), <https://perma.cc/4XJY-GTB9> ("The rescission of SLBs 14I, 14J and 14K and issuance of SLB 14L may well be part of a larger trend at the SEC under [SEC Chairman Gary] Gensler to reverse course on some of the work done under the previous administration and [former Chairman Jay] Clayton."). Compare *SLB 14I*, *supra* note 95 (favoring a company's ability to exclude shareholder proposals during the Trump Administration), with *SLB 14L*, *supra* note 96 (rescinding the SLBs released during the Trump Administration and curtailing a board's ability to exclude proposals during the Biden Administration).

115. See *SLB 14L*, *supra* note 96 ("The Division is rescinding Staff Legal Bulletin Nos. 14I, 14J and 14K . . . In addition, to the extent the views expressed in any other prior Division staff legal bulletin could be viewed as contrary to those expressed herein, this staff legal bulletin controls.").

timeline for addressing an issue, thereby supplanting the judgment of management and the board.”<sup>116</sup> Conversely, SLB No. 14L minimizes the micromanagement concept to expand the power of shareholders by rescinding the Trump Administration’s SLBs and redefining micromanagement.<sup>117</sup>

Further, there is inconsistency season-to-season in how the SEC applies its updated guidance.<sup>118</sup> A Kirkland & Ellis legal alert highlights this unpredictability by noting that, while some proposals related to companies’ workforce management were deemed not excludable because they raised “human capital management issues with a broad societal impact,” other companies “were able to exclude proposals seeking publication of their employee-training materials . . . on the grounds that the proposals sought to micromanage the companies.”<sup>119</sup> Similarly, “several proposals requesting reports related to . . . a company’s equal employment opportunity policy, workforce turnover rates or employment standards were deemed excludable . . . as relating to, but not transcending, ordinary business matters.”<sup>120</sup> It will be hard to craft a successful shareholder proposal on minimum wage without knowing which political party’s views will control the exclusion of proposals in future seasons. Given the favorability of the Biden Administration towards shareholder proposals and raising the minimum wage, the likelihood of successful shareholder proposals on minimum wage may be greater now than in future years.

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116. *SLB 14K*, *supra* note 97; see *Shareholder Proposals: Staff Legal Bulletin No. 14J (CF)*, U.S. SEC. & EXCH. COMM’N SEC (Oct. 23, 2018), <https://perma.cc/369R-P8L8> (“[A] proposal may probe too deeply into matters of a complex nature if it ‘involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.’” (quoting Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 63 Fed. Reg. 29106 (proposed May 28, 1998))).

117. *SLB 14L*, *supra* note 96 (“[T]he staff will take a measured approach to evaluating companies’ micromanagement arguments—recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement.”).

118. See, e.g., Thomas et al., *supra* note 91 (“Earlier seasons may no longer provide reliable precedent. Given the shift in approach, . . . at least five of the 13 substantive bases for exclusion are likely to be significantly less available to companies this season.”).

119. *Id.*

120. *Id.*

### C. *The Collective Action Problem*

This subpart will discuss the motivational barriers that would keep shareholders from voting for a proposal on minimum wage. Primarily, it will discuss how the cost and the effort required deters individual shareholders from voting. It will then examine the struggle of introducing proposals at corporations nationwide. Shareholders of one corporation are not usually shareholders of another, so even if one corporation analyzes its minimum wage following a shareholder proposal, there is no natural mechanism for that change to occur at any other corporation. Lastly, this subpart will examine the reasons shareholders would have to vote affirmatively on a minimum wage proposal.

#### 1. Galvanizing Enough Shareholders of a Single Corporation to Vote

Many scholars postulate that individual shareholders do not have adequate incentive to vote.<sup>121</sup> Their theories are continually affirmed in statistics, proxy season to proxy season.<sup>122</sup> Individual shareholders, typically referred to as retail investors, are “nonprofessional investors who use their own money to buy and sell securities.”<sup>123</sup> During the 2022 proxy

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121. See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. ECON. 395, 402 (1983) (“When many are entitled to vote, none of the voters expects his votes to decide the contest. Consequently, none of the voters has the appropriate incentive at the margin to study the firm’s affairs and vote intelligently.”); Paul H. Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1379 (2014) (“There is a serious collective action problem in shareholder voting: the benefits of a successful vote accrue to all shareholders but the costs of voting . . . are borne by each voter separately so that shareholders may have inadequate incentives to vote.”).

122. See, e.g., BROADRIDGE INV. COMM’N SOLS. & PRICewaterhouseCOOPERS LLP, 2020 PROXY SEASON REVIEW 5 (2020) [hereinafter 2020 PROXY SEASON REVIEW], <https://perma.cc/L6VV-QD7H> (PDF) (recording that retail investors voted only 28 percent of their shares in 2020); BROADRIDGE FIN. SOLS., 2023 PROXY SEASON PREVIEW AND 2022 PROXY SEASON HIGHLIGHTS 4 (2022) [hereinafter 2022 PROXY SEASON HIGHLIGHTS], <https://perma.cc/96SK-2K4G> (PDF) (recording that retail investors voted only 29 percent of their shares in 2022).

123. Krishan Arora, *The Rise of the Retail Investor*, FORBES (Nov. 4, 2022, 7:30 AM), <https://perma.cc/B5GL-983K>.

season, retail investors owned 31 percent of existing shares in the U.S. market, and they owned 14 percent of the S&P 500.<sup>124</sup> This percentage is significant enough to impact the success of a shareholder proposal; however, retail investors consistently do not vote their shares.<sup>125</sup> In 2022, retail investors voted only 29 percent of their shares.<sup>126</sup>

Institutional investors<sup>127</sup> are more motivated to vote the shares that they manage, so they turn out to vote at higher percentages.<sup>128</sup> They possess a codified fiduciary duty to their clients that motivates them to vote their shares, though there is admittedly little enforcement.<sup>129</sup> The retail investor has none of the legal incentives of an institutional investor; rather, the system deters them from participating and casting their

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124. 2022 PROXY SEASON HIGHLIGHTS, *supra* note 122, at 4; see Geoff Serednesky, *Close to the Madding Crowd*, BRUNSWICK REV. (July 22, 2022), <https://perma.cc/XSP7-RH48> (“Retail investors now own roughly 14 percent of the S&P 500—up from 11% two years ago.”).

125. See Chuck Callan & Paul DeNicola, *2019 Proxy Season Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 28, 2019), <https://perma.cc/A9F4-UZ4R> (detailing that retail shareholders’ voting participation remains relatively low); 2020 PROXY SEASON REVIEW, *supra* note 122, at 5 (recording that the percentage of retail investors’ shares voted has remained between 28–29 percent since 2016); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1409 (2008) (“In the modern public corporation, as a practical matter, retail shareholders—by which I mean living, breathing, individual shareholders—generally hand over their money and then check out.”).

126. 2022 PROXY SEASON HIGHLIGHTS, *supra* note 122, at 4.

127. Institutional investors are entities that make investment decisions on behalf of individual members or shareholders. *What’s the Difference Between Retail and Institutional Investors?*, YIELDSTREET (Oct. 9, 2022), <https://perma.cc/V3F2-7Q3E>.

128. Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585, 6586 (Feb. 7, 2003) (to be codified at 17 C.F.R. pt. 275)

[An investment] adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client’s behalf, including proxy voting. . . . To satisfy its duty of loyalty, the adviser must cast the proxy votes in a manner consistent with the best interest of its client and must not subrogate client interests to its own.

129. See Bernard S. Sharfman, *The Risks and Rewards of Shareholder Voting*, 73 SMU L. REV. 849, 874 (2020) (describing the duties that the SEC outlined for investment advisors but noting that “the SEC has done little to enforce these fiduciary duties”).

votes.<sup>130</sup> When retail investors do vote, they are likely to do so passively by blindly following the recommendations of management.<sup>131</sup> Further, institutional investors who are fiducially bound to vote may also be voting blindly, following the recommendation of proxy advisory services.<sup>132</sup> The proper route to a successful proposal on minimum wage will have to involve the support of proxy advisory services to ensure shareholders who do vote will vote affirmatively.

## 2. Organizing Proposals Across Corporate America

A single shareholder proposal can only affect a single corporation.<sup>133</sup> It would take immense funding to organize the shareholders of various corporations to make proposals, and then the organizer would have to make additional expenditures

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130. See Bruner, *supra* note 125, at 1409

But as a day-to-day matter, shareholders generally do not monitor corporate boards and management in any meaningful sense due to rational apathy, limitations on their ability to initiate corporate actions, and restrictive voting procedures . . . [W]e should observe the degree to which these very factors reinforce the disengagement of shareholders from the consequences of their own investment decisions; shareholders generally neither see, identify, nor communicate with, those affected by the corporate production they finance.

see also Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 616–19 (2006) (describing the direct and indirect limits on shareholder control that disenfranchise shareholders and reinforce the collective action problem).

131. See BROADRIDGE FIN. SOLS., ENGAGE AND MOBILIZE YOUR RETAIL SHAREHOLDER BASE 2 (2022), <https://perma.cc/5TEY-JLWC> (PDF) (“Retail shareholders are more likely to vote with management but, as we know, many of them fail to vote at all.”).

132. See *infra* Part III.A; see also Sharfman, *supra* note 129, at 855  
[I]nstitutional investors [are] required to cast ballots by proxy on tens, if not hundreds, of thousands of votes per year. However, because of the collective action problem, the amount of resources they are willing to spend on acquiring information, internally or externally, in order to be adequately informed on each and every vote is minimal. This requires them to seek the services of a low-cost proxy advisor for voting recommendations such as Institutional Shareholder Services (ISS) or Glass Lewis. (footnote omitted).

133. See *supra* Part I.C.

to promote the proposals prior to the vote.<sup>134</sup> Institutional investors, who are best positioned to empower this kind of action,<sup>135</sup> lack “sufficient economic incentives” to initiate shareholder proposals.<sup>136</sup>

Nonprofits and educational entities can drive large-scale submission of shareholder proposals on selected topics to defeat this issue.<sup>137</sup> However, they reserve these efforts for the most essential and most assured of initiatives.<sup>138</sup> The Harvard Law School Program on Institutional Investors started one such initiative that proved to be extremely successful, called the Shareholder Rights Project (“SRP”).<sup>139</sup> The SRP operated a clinic that assisted institutional investors in moving S&P 500 companies toward annual board elections.<sup>140</sup> After three years, 121 corporations agreed to move toward annual elections and 102 declassified<sup>141</sup> their boards.<sup>142</sup> The SRP organized for the submission of 196 shareholder proposals to 129 different

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134. See Bird & Park, *supra* note 33, at 41 (“Coordination mechanisms are too expensive and cumbersome to enable shareholders to exercise control over the firm.”).

135. See *infra* Part III.A.

136. Bird & Park, *supra* note 33, at 41.

137. See *infra* Part III.C.

138. See Kastiel & Nili, *supra* note 36, at 595–96 (explaining how repeat proponents of shareholder proposals focus on key governance issues, such as “shareholder rights and takeover defenses,” to ensure success follows their efforts); see also, *Corporate Affairs*, UNITED BHD. OF CARPENTERS & JOINERS OF AM., <https://perma.cc/XX9L-3DLZ> (describing the corporate activism that the United Brotherhood of Carpenters’ pension program undertakes, with an emphasis on issues that would greatly affect its constituents).

139. See *Shareholder Rights Project*, S’HOLDER RTS. PROJECT, <https://perma.cc/RRS9-PED5>.

140. See *id.* (“The Shareholder Rights Project (SRP) was established by the Harvard Law School Program on Institutional Investors to contribute to education, discourse, and research related to efforts by institutional investors to improve corporate governance arrangements at publicly traded firms.”).

141. Declassification is a corporate governance term used for when a corporation’s board of directors goes from staggered elections to annual elections: a classified board has different classes of directors who are elected for multi-year terms on a staggered election cycle while a declassified board holds elections for every director annually. See *121 Companies Agreed to Move Towards Annual Elections*, S’HOLDER RTS. PROJECT, <https://perma.cc/AF2F-P668>.

142. See *Shareholder Rights Project*, *supra* note 139.

corporations during the 2012, 2013, and 2014 proxy seasons.<sup>143</sup> They organized various proponents to submit these proposals at corporations in which they owned enough shares.<sup>144</sup>

Similarly, the nonprofit Center for Political Accountability (“CPA”) pushed for shareholders to make proposals demanding semi-annual reports on the corporation’s political donations.<sup>145</sup> Instead of directly engaging a small pool of proponents to make multiple proposals like the SRP, the CPA created a template for any interested shareholder to adapt and submit to a corporation.<sup>146</sup> The CPA also identified corporate targets and compatible investors to increase the number of involved corporations.<sup>147</sup> The template proved to be a well-used resource: forty-nine of the fifty-two shareholder proposals concerning campaign spending in 2014 followed the CPA template.<sup>148</sup> As a result of the CPA’s continuing efforts, three-fifths of S&P 500 corporations are now disclosing some or all of their political spending with corporate money.<sup>149</sup> These organizational entities prove that the collective action problem can be overcome, but they highlight the extreme cost and commitment required to achieve success.<sup>150</sup>

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143. See *121 Companies Agreed to Move Towards Annual Elections*, *supra* note 141.

144. See James McRitchie, *Harvard’s Shareholder Rights Project*, CORP. GOVERNANCE (Apr. 10, 2013), <https://perma.cc/MU9B-7XLL> (“The SRP has submitted a large number of board declassification proposals on behalf of eight SRP-represented institutional investors (seven public pension funds and one foundation).”).

145. See Haan, *supra* note 34, at 275 (“The CPA has taken a leading role in coordinating shareholder activism on campaign finance disclosure, identifying corporate targets, promoting its proposal template directly to institutional investors, and providing information and advice to shareholder proponents to advance shareholder activism on corporate political spending.”).

146. See *id.*

147. See *id.* at 275–76.

148. *Id.* at 275 n.46.

149. *Our Impact: Making Disclosure the Norm A Distinguished Record of Effectiveness*, CTR. FOR POL. ACCOUNTABILITY, <https://perma.cc/3KNU-RH6C>.

150. Both the SRP and the CPA found more success outside of official shareholder votes through the “settlement agreement” or “negotiated agreement” process. See MARTIJN CREMERS & SIMONE SEPE, BOARD DECLASSIFICATION ACTIVISM: THE FINANCIAL VALUE OF THE SHAREHOLDER RIGHTS PROJECT 8 (June 2017), <https://perma.cc/89HL-FADD> (“For 121 out of the 129 targeted companies, the SRP reports a negotiated agreement, under which the board of the targeted company agreed to bring the SRP’s

A 2020 SEC rule change accounts for another reason activist investors carefully select which topics to push. The SEC amended 17 C.F.R. § 240.14a-8(c) to

apply[] the one-proposal rule to “each person” rather than “each shareholder” who submits a proposal, such that a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder’s behalf for consideration at the same meeting. Likewise, a representative will not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders.<sup>151</sup>

This change went into effect starting with the 2022 proxy season,<sup>152</sup> but it has already affected activists’ proposals. Serial proponents, like corporate gadflies,<sup>153</sup> coordinated with nonprofits, mutual funds, and other shareholders to be able to advance the proposals they had planned.<sup>154</sup> This collaboration could have bifurcated effects as increased coordination helps defeat the collective action problem but heightens expenditures.

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management declassification proposals to a shareholder vote or, where declassification was established in bylaws that the board may amend, by declassifying.”); Haan, *supra* note 34, at 275 n.46 (describing how the CPA provided templates for shareholder proposals that sparked negotiations and sometimes even participated in settlement negotiations itself). These agreements carry their own increased costs that will also be a barrier. *See infra* Part III.E.

151. Press Release, U.S. Securities & Exchange Commission, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020), <https://perma.cc/8DWF-SL9Q>.

152. *See id.* (“[T]he final amendments will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022.”).

153. *See infra* Part III.D.

154. *See* Rosati et al., *supra* note 38

However, we believe coordination among proponents may have increased, perhaps—at least in part—in response to changes to Rule 14a-8 finalized in 2021 that now prohibit proponents from filing more than one shareholder proposal at a given company. In particular, we observed increasing coordination among Chevedden group members, who historically focused on governance matters, with proponents and advocacy groups across the ESG spectrum, including The Shareholder Commons, As You Sow and various Interfaith Center for Corporate Responsibility members.

### 3. Assuming Short-Term Loss to Achieve Long-Term Gain

Hidden behind the collective action issue is a more complicated question: Will shareholders want to vote in favor of a proposal that would potentially result in lower profit margins for the corporation? The foundation of U.S. corporate law is the shareholder-primacy model, meaning that all agents of a corporation have a duty to the corporation's shareholders.<sup>155</sup> Most scholars, judges, and corporate managers interpret this duty to compel corporate managers to maximize shareholder wealth.<sup>156</sup> While the outdated view of wealth maximization resulted in shortsighted financial decisions,<sup>157</sup> the modern trend allows for short-term profit loss in pursuit of long-term value.<sup>158</sup> Many corporate law scholars justify ESG initiatives and activism at large as increasing the long-term value of a corporation.<sup>159</sup> However, any investor or corporation that takes socially conscious steps risks profit loss because long-term benefits cannot be guaranteed.<sup>160</sup>

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155. Wang, *supra* note 27, at 142.

156. See Robert Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1954 (2018) (“[C]ourts have pervasively embraced the concept that corporate managers should maximize shareholder wealth.”).

157. See Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554, 1558 (2015) (describing how corporate managers prioritize the interest of short-term shareholders by “taking steps that boost the short-term stock price but reduce the economic value created by the firm over the long term”); see also Roger L. Martin, *Yes, Short-Termism Really Is a Problem*, HARV. BUS. REV. (Oct. 9, 2015), <https://perma.cc/7LPX-YV8P> (documenting the issues with “short-termism”).

158. See Kraik, *supra* note 26, at 527 (“[C]orporate law’s principal purpose is to increase long-term shareholder value. This principal goal is without challenge, having been widely accepted by the judiciary, government agencies, academics, and practitioners.”).

159. See, e.g., Khan, *supra* note 28, at 1 (documenting the results of extensive research and finding “that firms with good performance on *material* sustainability issues significantly outperform firms with poor performance on these issues, suggesting that investments in sustainability issues are shareholder-value enhancing”); Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAIN. FIN. & INV. 210, 226 (2015) (analyzing the results of more than 2,200 studies that concluded that there is a positive correlation between ESG factors and overall company performance).

160. See Kraik, *supra* note 26, at 548 (“When social factors are added to the mix for long-term strategy, a company’s risks, cash flows, and projections become harder to value. While long-term value is still defined monetarily, the

The decision to push for moral changes via corporate governance will always face opposition because of the accompanying risk, but activists have successfully instigated moral change through shareholder proposals on ESG.<sup>161</sup> This success is especially evident in the environmental arena: shareholders vote to pass environmental proposals more consistently than proposals on social or governance topics,<sup>162</sup> even though it can be costly for corporations to lower their environmental impact.<sup>163</sup>

Shareholders have been increasingly successful in advancing environmental proposals because of the publicity and science that accompanies climate change as a topic.<sup>164</sup> Similar media pressure could motivate shareholders to vote affirmatively on proposals on minimum wage by highlighting the long-term benefits of increased wages.<sup>165</sup> While increasing wages for employees would hamper profit margins in the short term, there are documented positive outcomes from paying

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inputs now consist of a greater number of both soft and hard assumptions.”). *But see* Khan, *supra* note 28, at 5 (“Stakeholder theory emphasizes that effective management of stakeholder relationships may mitigate the likelihood of negative regulatory, legislative or fiscal action, while protecting and enhancing corporate reputation.” (citations omitted)).

161. *See, e.g.*, Rosati et al., *supra* note 38 (documenting successful shareholder proposals related to reductions in emissions resulting from business activities and processes by other entities involved in a corporation’s value chain).

162. *See id.* (recording that 25 percent of shareholder proposals advancing environmental causes passed, compared to 10 percent for social issues and 18 percent for governance).

163. *See* MARK LEE ET AL., COSTS AND BENEFITS OF CLIMATE-RELATED DISCLOSURE ACTIVITIES BY CORPORATE ISSUERS AND INSTITUTIONAL INVESTORS, THE SUSTAINABILITY INST. BY ERM (May 16, 2022), <https://perma.cc/6RSF-RYUB> (detailing that corporations who have received climate-related proposals report an “average annual spend of \$80,000” in costs related to their proxy responses).

164. *See* Wang, *supra* note 27, at 179 (“Climate change has become a major focus of institutional investors, but this was not always the case. It took a century of scientific research and decades of advocacy for the largest institutional investors to put their weight behind the issue.”).

165. *See infra* Part IV.B.

employees well.<sup>166</sup> For example, Costco retained more employees during the COVID-19 pandemic than its competitors, likely because of the premium wages they paid to employees pre-pandemic.<sup>167</sup> Additionally, increasing wages boosts the economy in general by increasing individuals' purchasing power.<sup>168</sup> If the benefits are highlighted and the American public is in support, shareholders can be motivated to vote affirmatively on proposals concerning minimum wage.<sup>169</sup>

### III. THE KEY PLAYERS

This Part will focus on outlining who must be involved for a proposal to succeed. It will examine the entities that have the power to influence the success of a shareholder vote, from shareholders to firm management. Further, it will predict how these players can help and hurt shareholders' causes.

#### A. Institutional Investors

This subpart will examine the increasing power of institutional investors, especially the dominance of the "Big Three." Additionally, it will explore the different types of institutional investors to determine what institution could best promote a proposal on minimum wage.

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166. See Wang, *supra* note 27, at 145 ("Increasing employee wages may be costly in the short term but may increase employee retention during a pandemic or other crisis.").

167. See John D. Stoll, *How's the CEO 'Stakeholder Pledge' Working Out? Depends Who You Ask*, WALL ST. J. (Aug. 28, 2020, 12:37 PM), <https://perma.cc/CBE4-FMMJ> ("The warehouse club was paying employees premium wages before its competitors were forced to raise their hourly wage to attract and keep workers during the pandemic. Costco's pay policies fuel high worker-retention rates, which undergird the warehouse-club's resilient business model.").

168. See Josh Bivens, *Inflation, Minimum Wages, and Profits: Protecting Low-Wage Workers from Inflation Means Raising the Minimum Wage*, ECON. POL'Y INST. (Sept. 22, 2022, 2:22 PM), <https://perma.cc/5HK5-F7ZN> ("Every year lawmakers don't raise the minimum wage is a year that they have effectively cut the purchasing power and living standards of this country's lowest wage workers.").

169. See generally Wang, *supra* note 27 (exploring how media communication about an issue leads to public awareness of the issue and subsequent support for change, which in turn forces institutional investors and corporations to support change).

“[M]ost shares of public companies are now owned or controlled by professional investment managers and large asset owners like pensions and endowments, which are collectively known as institutional investors.”<sup>170</sup> Today, institutional investors control approximately 70 percent of the market value on U.S. exchanges.<sup>171</sup> This means that these institutions not only control large percentages of stock at individual corporations, but they also own stocks in a large number of corporations across the United States and internationally.<sup>172</sup> The largest institutional investors maintain an alarming amount of control over major U.S. corporations.<sup>173</sup> The “Big Three” institutional investors are Blackrock, Vanguard, and State Street Global Advisors.<sup>174</sup> They used to hold the top three places for the most assets under management in the world, but Fidelity Investments recently surpassed State Street.<sup>175</sup> In 2022, BlackRock held \$10.01 trillion assets under management (“AUM”), Vanguard held \$8.47 trillion, Fidelity Investments held \$4.23 trillion, and State Street held \$4.14 trillion.<sup>176</sup>

The backing of institutional investors, while dependent on the recommendation of proxy advisory firms,<sup>177</sup> is extremely significant in the success of any shareholder proposal. Institutional investors are more likely to vote their shares.<sup>178</sup> Because many individual shareholders do not vote their

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170. Cappucci, *supra* note 25, at 582; *see* Wang, *supra* note 27, at 132 (“Institutional investors are organizations that invest money, including asset managers.”).

171. Callan & DeNicola, *supra* note 125.

172. *See* Cappucci, *supra* note 25, at 582 (“First, institutional investors not only tend to own larger percentages of each company, but they own a broader swath of the market as well. As a result, stock ownership is concentrated among fewer large stockholders.”).

173. *See id.* (“Just three giant index fund managers, BlackRock, Vanguard, and State Street Global Advisors, (. . . collectively, the ‘Big Three’), together hold on average more than 20% of S&P 500 companies.”).

174. *Id.*

175. *See Top 500 Asset Managers Reach New US\$131 Trillion Record*, THINKING AHEAD INST. (Oct. 17, 2022), <https://perma.cc/G8R5-BPP5> (ranking assets under management).

176. *See id.*

177. *See infra* notes 192–195 and accompanying text.

178. Cappucci, *supra* note 25, at 582–83.

shares,<sup>179</sup> institutional investors' stock ownership grants them power and influence over many corporations.<sup>180</sup> However, an institutional investor may believe it is legally barred from voting on a proposal on minimum wage because institutional investors have a fiduciary duty to act in the best interests of their clients and beneficiaries.<sup>181</sup> Recent scholarship supports the integration of ESG with investment decisions,<sup>182</sup> but practical considerations might interfere with institutional investors' support of a minimum wage proposal.<sup>183</sup>

Further, while institutional investors have become more responsible in their voting, they largely follow the advice of proxy advisers.<sup>184</sup> This practice, called "robovoting,"<sup>185</sup> increases

179. See *supra* notes 125–126 and accompanying text.

180. See Cappucci, *supra* note 25, at 582 ("[B]ecause not all other shareholders vote their shares, the Big Three collectively control about 25% of the votes of the average S&P 500 company."); Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1557 (2022)

[T]he voting power of the Big Three is actually substantially greater than the number of shares that they hold. This is because the Big Three consistently vote the shares they hold, whereas a substantial proportion of other investors do not vote their shares. . . . [T]he Big Three collectively held a median of 27.6% of votes cast at annual meetings.

181. See Commission Interpretation Regarding Standard of Conduct for Investment Advisors, 84 Fed. Reg. 33669, 33672 (July 12, 2019) (to be codified at 17 C.F.R. pt. 276) [hereinafter SEC Fiduciary Interpretation]

The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

182. See Kraik, *supra* note 26, at 533–34 (concluding that "integration of ESG furthers fiduciary duties" based on long-term wealth maximization and guidance from entities like the U.N. Global Compact).

183. See *id.* at 537 ("Institutional investors suffer from regulatory and structural barriers, which hinder efficacy and bring about complications such as collective action problems, conflicts of interest, and weak personal incentives for fund managers.").

184. See Cappucci, *supra* note 25, at 596 ("Although many institutional investors use the tools provided by ISS and Glass Lewis to inform their own research, a significant number of clients take the recommendations of proxy advisers into account in some manner, and some portion automatically vote with the recommendations (derisively referred to as 'robo-voting').").

185. Paul Rose, *Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting*, HARV. L. SCH. F. ON CORP. GOVERNANCE

the influence of proxy advisors.<sup>186</sup> Activists who acquire the support of a “select few, large institutional investors” make successful proposals.<sup>187</sup> However, the influence of proxy advisors also needs to be utilized to support a proposal on minimum wage or mitigated for institutional investors to serve a key role in minimum wage advocacy.

### B. *Proxy Advisory Firms*

This subpart will look at the role proxy advisory firms play in successful shareholder proposals. It will also consider the risks that accompany their influence over the vast majority of shareholders, and how that influence could be harnessed.

The two main proxy advisory firms in the United States are ISS and Glass Lewis.<sup>188</sup> ISS is the oldest and largest firm, with over 2,000 clients and an estimated market share of 63 percent.<sup>189</sup> Glass Lewis has grown to be the second-largest firm, with over 1,300 clients and an estimated market share of 28 percent.<sup>190</sup> These companies have powerful influence, as they provide recommendations about shareholder proposals that

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(May 27, 2021), <https://perma.cc/2X6Y-KEBA> (defining robovoting as “institutional investors mechanically follow[ing] a proxy advisor’s voting guidance without any independent review”). This effectually means that the institutional investor “transfers its fiduciary voting authority to a third party.” *Id.*

186. *See id.* (“Robovoting is a principal mechanism through which proxy advisory firms have assumed substantial influence over corporate shareholder voting outcomes . . . 114 institutional investors voted in lockstep alignment with either ISS or Glass Lewis in 2020.”).

187. Kraik, *supra* note 26, at 543; *see id.* at 542–43 (“Trends reveal that activist successes are founded upon the support of allied institutions. Moreover, with a certain amount of consolidation among asset managers’ [assets under management], activists are able to acquire the requisite support with only a select few, large institutional investors in tow.”).

188. Cappucci, *supra* note 25, at 590–91; *see* CHONG SHU, THE PROXY ADVISORY INDUSTRY: INFLUENCING AND BEING INFLUENCED 2 (June 8, 2023), <https://perma.cc/9PHS-K35D> (PDF) (describing the proxy advisory industry as a “duopoly” dominated by just two firms).

189. Cappucci, *supra* note 25, at 590; SHU, *supra* note 188, at 2.

190. Cappucci, *supra* note 25, at 591; SHU, *supra* note 188, at 2.

institutional investors widely follow.<sup>191</sup> Glass Lewis described the role of a proxy advisor as follows:

Proxy advisory firms provide institutional investors with research and data, as well as recommendations on management and shareholder proxy proposals that are voted on at an organization's annual and special meetings. Operating as independent research firms, they digest and evaluate lengthy and complex filings on common corporate endeavors, including mergers & acquisitions, CEO salary, and more. By bringing their expert knowledge to bear on these issues, proxy advisors enable key shareholders to protect their interests by helping them make an informed voting decision. Proxy advisory firms provide these voting recommendations to institutional investors for the companies that they own shares in.<sup>192</sup>

Because of this influence, the publications of proxy advisory firms make or break shareholder proposals.<sup>193</sup> One study reveals the empirical effect that a negative recommendation can have on a vote:

For example, when ISS recommends voting against a director's election, its customers are 21 percent more likely than other investors who do not subscribe to ISS to vote against this director. Similarly, when Glass Lewis recommends voting against a director, its customers are 29 percent more likely than other investors to vote against the director.<sup>194</sup>

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191. See *supra* note 185 and accompanying text; see also Cappucci, *supra* note 25, at 596 (“[I]nstitutional investors control approximately 70% of the outstanding shares of U.S. corporations and that together, ISS and Glass Lewis control about 97% of the market to provide proxy advisory services to such institutional investors.”).

192. Cassidy Alexander, *The Role of Proxy Advisory Firms*, GLASS LEWIS (Jan. 14, 2022), <https://perma.cc/5YLS-H9Z4>.

193. See SHU, *supra* note 188, at 2 (citing research that shows the substantial impact of ISS and Glass Lewis recommendations); see also David F. Larcker et al., *And Then a Miracle Happens!: How Do Proxy Advisory Firms Develop Their Voting Recommendations?*, in STANFORD CLOSER LOOK SERIES 1 (2013), <https://perma.cc/NUV3-5WSY> (PDF) (describing the dominant influence of ISS and Glass Lewis).

194. SHU, *supra* note 188, at 2. The study also includes research on votes on ESG proposals and concludes that the same statistical patterns appear for ESG proposals as those described above for director voting. *Id.*

The same researcher also postulates that there is an empirical connection between the proxy advisory firm's influence and what vote execution service the client uses. Both ISS and Glass Lewis also sell vote execution services, and clients that pay for both the voting service and the recommendations have a statistically significant increase in reliance on the firm's recommendation.<sup>195</sup> Because of the proxy advisors' influence, they will be key to the success of any shareholder proposal, especially one positing that corporations should raise minimum wage.

### C. *Nonprofits*

This subpart will discuss the importance of organizing nonprofits to combat the collective action problem that shareholders face.

Nonprofit organizations, called nongovernmental organizations ("NGOs") on the global stage,<sup>196</sup> are typically corporations organized to achieve a philanthropic purpose rather than to return a profit.<sup>197</sup> Nonprofits who are involved in responsible investing are most often affiliate groups, such as religious advocacy groups<sup>198</sup> and labor unions,<sup>199</sup> but

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195. *See id.* at 3

However, my analysis reveals that among the investors that subscribe to both proxy advisors for voting advice, if they use ISS's voting system, they will be 13 percent more likely to vote with ISS's recommendations when the two proxy advisors disagree. Similarly, investors using Glass Lewis's voting platform are 18 percent more likely to follow its advice in such instances.

196. *See* Terrence Guay et al., *Non-Governmental Organizations, Shareholder Activism, and Socially Responsible Investments: Ethical, Strategic, and Governance Implications*, 52 J. BUS. ETHICS 125, 134 (2004) ("The UN currently describes an NGO as: 'any non-profit, voluntary citizens' group which is organized on a local, national or international level.'").

197. Will Kenton, *Nonprofit Organization (NPO): Definition and Example*, INVESTOPEdia, <https://perma.cc/W2BZ-GKH2> (last updated Mar. 4, 2023).

198. *See, e.g.,* *Mercy Investment Services: Socially Responsible Investing*, SISTERS OF MERCY, <https://perma.cc/55LQ-EBYW> (an international community of Roman Catholic women who operate a socially responsible investment fund).

199. *See, e.g.,* *Corporate Affairs*, *supra* note 138 (an American union that advocates for responsible corporate behavior and operates its pension fund as shareholder activists).

environmental organizations<sup>200</sup> and other policy-focused charities also serve as shareholder activists.<sup>201</sup> More recently, investment-savvy and socially-conscious individuals are organizing nonprofits, coined “socially responsible investment funds,” to influence corporate governance and advocate for social and environmental causes by purchasing stock.<sup>202</sup>

Nonprofits are particularly effective shareholder activists because they combat one of the major barriers to shareholder proposals as a mechanism for widespread change: the collective action problem.<sup>203</sup> Nonprofits have a central mission that guides their business decisions, and they can amass the funds to buy stock in many corporations.<sup>204</sup> In the 2022 proxy season, ten out of the top sixteen proponents were nonprofits: As You Sow Foundation, Mercy Investment Services, National Legal and Policy Center, National Center for Public Policy Research, SEIU Master Trust, Common Spirit Health, The International Brotherhood of Teamsters General Fund, Adrian Dominican Sisters, Unitarian Universalist Association, and The Shareholder Commons.<sup>205</sup> Together, these nonprofits proposed 305 out of the 941 total proposal submissions in the 2022 season.<sup>206</sup> Nonprofits are also extremely active as advocates and advisors, advocating for certain environmental and social

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200. See, e.g., *About Us*, MAJORITY ACTION, <https://perma.cc/8U3M-56DH> (“Majority Action is a non-profit, non-partisan organization that empowers shareholders to hold corporations accountable . . . and engag[es] investors on the critical role of corporate governance in addressing climate change”).

201. See Maria Goranova & Lori Versteegen Ryan, *Shareholder Activism: A Multidisciplinary Review*, 40 J. MGMT. 1230, 1233 (2013).

202. *Id.*

203. See *supra* Section III.C.

204. See Guay et al., *supra* note 196, at 131 (detailing the unique positions that nonprofits hold as both agents of stakeholders and as shareholders themselves).

205. Rosati et al., *supra* note 38.

206. *Id.* The final total of 305 was calculated by adding up the number of proposals submitted by each of the organizations listed in *A Look Back at the 2022 Proxy Season*, a review of the 2022 proxy season for the Harvard Law School Forum on Corporate Governance. See *id.* This figure is an estimate because proposals can be co-filed, so a proposal may be counted twice if any of the listed organizations filed jointly with one another.

movements and advising on the passage of related shareholder votes.<sup>207</sup>

As You Sow was the most prolific proponent in the 2022 proxy season,<sup>208</sup> and its efforts reveal the versatility of nonprofits as corporate activists.<sup>209</sup> It has even developed its own proxy voting service, As You Vote.<sup>210</sup> As You Sow achieved widespread success in 2022,<sup>211</sup> but this success has been mounting since the nonprofit's start in 1992—it has repeatedly effected change at major corporations since its inception.<sup>212</sup> Other nonprofits effect change as the advocates and organizers standing behind proponents. For example, the Shareholder Rights Project and the Center for Political Accountability

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207. See Guay et al., *supra* note 196, at 133 (“NGO influencing strategies may simply take the form of advocacy efforts designed to press other shareholders, particularly institutional investors, to urge changes in managerial behavior or management officers. . . . NGOs, as stakeholders, influence corporate management through advocacy directed toward institutional and individual shareholders.”).

208. See Rosati et al., *supra* note 38.

209. See *2022 Shareholder Impact Review: Changing Corporations for Good*, AS YOU SOW (2022), <https://perma.cc/M37V-9J5F>

In total, the *As You Sow* team led 196 engagements with 156 companies across 11 program areas. In proxy year 2022, a total of 99 of these engagements were escalated and shareholder resolutions were filed on behalf of 79 shareholders. We successfully withdrew 56 resolutions in instances where companies agreed to take requested actions; 32 proposals went to a vote, with ten majority votes and median support of 41.4%. A total of \$2.18 trillion of share value was voted in support of our resolutions. Companies challenged 15 resolutions at the SEC; we won 14 of those challenges or the proposal was withdrawn during the SEC evaluation period, with only one proposal being omitted.

210. *As You Vote: Shareholder Power Redefined*, AS YOU SOW, <https://perma.cc/T8DK-SYQJ>.

211. *2022 Shareholder Impact Review: Changing Corporations for Good*, *supra* note 209.

212. See *About Us*, AS YOU SOW (2022), <https://perma.cc/DA7Q-WZXG>. Impressive accomplishments from As You Sow have resulted in changes such as: Revlon committing to removing toxic chemicals from its nail polish in 1993; Hershey agreeing to stop using sugar from GMO beets in 2000; K-Mart agreeing to end the sale of toys containing PVC toxin in 2006; McDonald's agreeing not to use nanomaterials in its food in 2011; Unilever agreeing to make all of its packaging recyclable in 2017; and, as the result of a 91 percent shareholder vote, Boeing committing to climate targets in line with the Paris Agreement's 1.5°C goal in 2022. *Id.*

created proposal templates for shareholders to adapt and submit.<sup>213</sup> Another of the top ten proponents, The Shareholder Commons self-identifies as an advocacy organization.<sup>214</sup> It operates in a variety of capacities with the central purpose of addressing “the divergence that often emerges between a company’s interest in maximizing its cash flows over the long term and its shareholders’ interests in optimizing overall market returns.”<sup>215</sup> The Shareholder Commons files proposals,<sup>216</sup> researches business theories to support and lobby for their system stewardship theory,<sup>217</sup> collaborates with other prolific proponents,<sup>218</sup> and advises proxy advisors and institutional investors.<sup>219</sup> The involvement of a nonprofit with a wholistic and collaborative approach to corporate social responsibility, like The Shareholder Commons, will be critical to a successful proposal on minimum wage.<sup>220</sup>

#### D. *Corporate Gadflies*

This subpart will look at the emergence of “corporate gadflies” and the influence they have over public corporations via shareholder proposals. Further, it will reflect on the power of corporate gadflies in the 2022 Proxy Season, focusing on their

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213. See *supra* notes 138–148 and accompanying text.

214. *Mission and Vision*, SHAREHOLDER COMMONS, <https://perma.cc/WT76-NGN9>.

215. *Id.*; see *id.* (“Individual company behavior that harms the economy threatens diversified investors, even when that conduct might increase the company’s own long-term value.”).

216. See Rosati et al., *supra* note 38.

217. See *Get Involved*, SHAREHOLDER COMMONS, <https://perma.cc/XZ9L-E2MT> (“As part of our policy initiatives, we provide input to regulators and legislators, file amicus briefs in relevant litigation proceedings, and support impact litigation.”).

218. See *id.* (“TSC collaborates with advocacy organizations that address risks to critical social, environmental, and economic systems.”).

219. See *Stewardship Practices*, SHAREHOLDER COMMONS, <https://perma.cc/6BBG-87KS> (“Adoption of proxy voting guidelines along the lines set forth in this model will give staff and advisors the direction they need to act on systemic issues and ensure that trustees have accounted for the full effect of their stewardship choices.”).

220. For a further discussion of the critical importance of a holistic approach by shareholder activists, see *infra* Part IV.D.

prominence as proponents.<sup>221</sup> This subpart will conclude with how that prominence can be enlisted for the minimum wage crisis.

The term “gadfly” has interesting origins that emphasize the function of corporate gadflies: Socrates was the original gadfly.<sup>222</sup> He compared his own habit of “irritating people so as to make them think, and to reconsider their arguments and perhaps alter their convictions or prejudices,” to that of gadflies, which are “small insects that bite and annoy livestock.”<sup>223</sup> The term is now being used to describe—and perhaps villainize—a new category of questioners:

These days, the term “corporate gadflies” is used to describe small, “pesky” individual shareholders who are engaged in the submission of massive numbers of shareholder proposals.

Today’s gadflies are part of a lineage of dedicated and often eccentric activists who have taken to the floor of annual meetings . . . . Forty-eight percent of all the shareholder proposals submitted between 1944 and 1951 came from the Gilbert brothers . . . .

Following in their wake came a second generation of activists, including Gerald Armstrong and Evelyn Davis, whose approach to questioning chief executives was, respectively, “to harangue and to flirt outrageously.” Of all the 2,042 shareholder proposals submitted between 1987 and 1994, 22% were submitted by the Gilbert brothers and 15% by Evelyn Davis.<sup>224</sup>

Like the Gilbert brothers and Evelyn Davis, only a handful of individuals submit the greater portion of all shareholder proposals in the United States.<sup>225</sup> John Chevedden of the

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221. See Rosati et al., *supra* note 38 (depicting in a chart the top shareholder proposals of 2022).

222. Kastiel & Nili, *supra* note 36, at 589. People have also used the term to refer to annoying and aggressive politicians. *Id.*

223. *Id.*

224. *Id.* at 589–90 (footnotes omitted).

225. See *id.* at 591 (collecting data showing that corporate gadflies submitted “27.3% of all 6,827 shareholder proposals submitted among the S&P 1500 between 2005 and 2018”). The next largest category of proponents is “religious groups and other stakeholders,” at 15 percent. *Id.* The percentage submitted by individual gadflies has only increased. *Compare id.* (calculating that 41 percent of the proposals from 2018 were submitted by gadflies), *with*

Chevedden Group and a married couple, James McRitchie and Myra Young, were listed as two of the top five proponents in the 2022 proxy season.<sup>226</sup> Chevedden, Young, and McRitchie, along with Gerald Armstrong, Evelyn Davis, the Rossi family, and the Steiners, are the modern iteration of the “corporate gadfly.”<sup>227</sup>

In addition to filing large numbers of proposals, gadflies have also achieved higher rates of success than most other proponents.<sup>228</sup> On average, 26 percent of proposals submitted by gadflies have passed with a majority vote.<sup>229</sup> Further, gadflies’ proposals account for 53 percent of the proposals that passed during the 2018 proxy season.<sup>230</sup>

This level of success would not necessarily be replicated should gadflies tackle minimum wage. One reason so many of their proposals pass is that gadflies submit proposals that address key governance issues that universally affect stakeholders.<sup>231</sup> Further, those who have enough money to

Rosati et al., *supra* note 38 (documenting that two corporate gadflies submitted 282 out of the 562 proposals during the 2022 proxy season, accounting for 50.2 percent of all submissions).

226. See Rosati et al., *supra* note 38 (recording that the Chevedden group submitted 237 proposals and McRitchie submitted 45).

227. See Kastiel & Nili, *supra* note 36, at 590–91

Today, a third generation of gadflies has taken up the baton, including William and Kenneth Steiner, John Chevedden, the Rossi family, and the husband-and-wife team of James [Mc]Ritchie and Myra Young . . . . The data we provide regarding “gadflies” refer to the following six individuals or families: Gerald R. Armstrong, the Chevedden family, Evelyn Davis, Myra Young and James McRitchie, the Rossi family, and the Steiner family.

228. See *id.* at 593 n.106

[G]adflies outperform many other shareholder proponents, including labor unions (19.1%), religious group and other stakeholders (4.2%), hedge funds and active investment advisors (6.3%), and other individuals (6.8%). Only pension funds have a higher success rate, with 30.9% of the proposals receiving majority support, though pension funds submitted significantly less proposals during the examined period (1,041 proposals compared to 1,864 proposals submitted by gadflies).

229. *Id.* at 593.

230. *Id.* at 594.

231. See *id.* at 595 (“Gadflies’ proposals do not focus on esoteric corporate policies, pet peeves gadflies may have with specific companies, or even larger societal issues. . . . [G]adflies have focused on key governance issues, such as shareholder rights and takeover defenses . . .”).

submit shareholder proposals are unlikely to be directly affected by the minimum wage.<sup>232</sup> Gadflies, acting alone, may not be able to advance minimum wage proposals successfully.<sup>233</sup>

E. *Boards of Directors*

This subpart will consider what role a corporation's board of directors must play in a successful proposal. First, it will look at the historical opposition to social causes by corporate boards, then at the ways a board could positively interact with shareholders to advance minimum wage. Namely, it will examine the viability of the "shareholder settlement agreement" as a means to raise a company's minimum wage.

A discussion of the key players in any corporate law topic needs to mention firm management. While shareholders are the owners of the corporations, the board of directors and a corporation's officers oversee the firm on their behalf.<sup>234</sup> Shareholders elect board members, and in turn management must respect the fiduciary duties they owe to shareholders.<sup>235</sup> Even so, management has room to act self-servingly or against

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232. Federal regulations require shareholders to hold at least \$2,000 in stocks for three years, \$15,000 for two years, or \$25,000 for one year to be able to submit a shareholder proposal. 17 C.F.R. § 240.14a-8(b)(i)(A)–(C); *see also* Wang, *supra* note 27, at 155 ("Some people believe that investments should only be used for financial gain and ESG issues should be pursued elsewhere, such as through regulation. They might see little value in pursuing ESG issues, or prize economic return above all else, perhaps to sustain their retirements or to spur the economy."). As previously discussed, the distance of the shareholders from the issues faced by those making minimum wage raises the question of whether shareholders would be motivated to take money away from themselves to help others. *See supra* Part II.C.3.

233. *See infra* Part IV.D.

234. *E.g.*, 8 DEL. CODE ANN. § 141(a) (West 2023); *see* Joseph W. Yockey, *On the Role and Regulation of Private Negotiations in Governance*, 61 S.C. L. REV. 171, 176–77 (2009)

[T]he separation of ownership and control that characterizes the modern public corporation contemplates a governance arrangement whereby shareholders exercise virtually no control over the operations and objectives of the firms in which they have invested. Instead, control is vested in the board of directors and those executives and managers selected by the board to oversee day-to-day operations.

235. Yockey, *supra* note 234, at 177.

the general wishes of shareholders.<sup>236</sup> While management should honor shareholders' wishes to maintain their positions year-to-year,<sup>237</sup> they can act freely with few binding repercussions from shareholders.<sup>238</sup>

Shareholder proposals have only recently become a tool that activists can use to push management.<sup>239</sup> Firm management usually recommends against shareholder proposals, especially those relating to ESG,<sup>240</sup> and many shareholders vote with management.<sup>241</sup> Shareholders have become more willing to vote against management in recent years,<sup>242</sup> which is in line with the

236. *See id.*

[D]irectors and officers selected by directors might shirk, steal, or otherwise act in ways contrary to the interests of shareholders. They might also act to satisfy their own self-interest at shareholder expense by doing things like creating provisions that will protect them from takeover risk, directing corporate business to friends or family, or stacking boards with directors who give deference to the whims of management.

237. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 681–82 (2007) (“[S]hareholders dissatisfied with the board’s decisions with respect to such issues have the power to replace incumbent directors with a new team that would make different decisions.”). Bebchuk further explains the limitations of this power to replace the directors, showing its failure as a mechanism for control. *See id.*

238. *See* Yockey, *supra* note 234, at 177 (listing shareholders’ “limited set of tools for checking potential abuses by management” and concluding that these “monitoring devices . . . render individual investors relatively powerless to enact meaningful changes in managerial behavior”).

239. *See supra* Part I.A.

240. *See Proxy Monitor FAQ*, *supra* note 69 (“Management typically opposes such proposals, and the sponsoring shareholder and management each summarize their opinion on corporate proxy statements.”).

241. *See* Kobi Kastiel & Yaron Nili, *Competing for Votes*, 10 HARV. BUS. L. REV. 287, 312–13 (2020) [hereinafter *Competing for Votes*] (examining “support for shareholder proposals with management recommendation of no” and finding it “increased slightly between 2015, when it rested at 25.95%, and 2018, when it reached 27.68%,” but “decrease[d] from its peak of 33.92% in 2009”).

242. *See id.* at 313

[S]upport for shareholder environmental and social proposals experienced a large increase between 2005 and 2017. In 2005, average support as a percentage of votes cast sat just below 9%, and none of the proposals passed. This number has climbed steadily to 20.67% support as a percentage of votes cast and 2.26% of proposals passing in 2017.

rise of shareholder activism.<sup>243</sup> This increased resistance gives shareholders leverage to negotiate with management and effect change through boards and officers.<sup>244</sup>

The main way that a corporation's management could play a key role in the advancement of wages is through shareholder proposal settlements. The settlement of shareholder proposals through negotiated agreements between the proponents and the target corporation has quietly become a surreptitious path for shareholder activism.<sup>245</sup> Sarah Haan explains the typical process for negotiations and subsequent agreements:

Settlement negotiations take place during the window of time before the proxy statement is published, typically over several months, through correspondence and phone conferences in which the shareholder proponent and the target firm haggle over details of a firm policy change. Participation is generally limited to representatives of the investor and representatives of the firm . . . . If the parties reach an agreement to settle the proposal, it is memorialized in writing, and may be as formal as a contract signed by both parties or as informal as an exchange of emails.<sup>246</sup>

Settlement agreements may not be an ideal tool for raising a company's minimum wage because proponents need leverage to gain access to the firm for negotiations.<sup>247</sup> Many settlement agreements originate with activists who acquire substantial

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243. See *supra* Part I.A.

244. See *Competing for Votes*, *supra* note 241, at 330 (“[T]he mere existence of such a vote creates the concern from receiving a significant percentage of negative votes and causes insiders to be more attentive to shareholder demands, to disclose more information, to engage with major shareholders before the proxy season, and to conduct negotiation behind the scenes.”).

245. See Haan, *supra* note 34, at 277 (“Withdrawn proposals are not filed with the SEC. There is no registry or collection of proposals that have been settled, no list of companies that have settled proposals, and no central repository of settlement agreements.”); Lucian A. Bebchuk et al., *Dancing with Activists 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 26171, 2019) (“While such settlements used to be rare, they now occur with significant frequency, and they have been attracting a great deal of media and practitioner attention.”).

246. Haan, *supra* note 34, at 280.

247. *C.f. id.* at 293–97 (examining managers’ incentives to settle).

control in the corporation to use as bargaining power.<sup>248</sup> This approach drains the activist's capital with little reward, as many of these agreements result in board turnover rather than accomplishment of the activist's cause.<sup>249</sup> More recently, firm management appears to negotiate with non-controlling shareholder proponents as a form of risk management because it fears a proposal's success or negative publicity.<sup>250</sup>

For a settlement to work in this context, there needs to be a documented path for success and a concerted social awareness for shareholder proposals on minimum wage.<sup>251</sup> Otherwise, proponents will not have the leverage needed to negotiate favorable terms from management.

#### IV. CRAFTING AN EFFECTIVE PROPOSAL ON MINIMUM WAGE

This Part will make a recommendation for the best path towards a successful shareholder proposal on minimum wage. It will explore how to carefully word the proposal to avoid exclusion under Rule 14a-8(i)(7). Further, it will recommend marketing to make sure that the proposal has the attention of both the public and retail investors. Lastly, it will suggest the involvement of a nonprofit to coordinate proposals across public companies and recruit corporate gadflies and socially responsible investment funds to file the proposals.

##### A. *The Prototype*

This subpart will discuss the Sainsbury's proposal on minimum wage in the United Kingdom, and how it has opened the door for the success of future proposals in the United States.

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248. See Bebchuk et al., *supra* note 245, at 2–3 (presenting and analyzing data that suggests “settlements are more likely in cases in which the activist has good chances to win board seats should a contested vote take place”).

249. *Id.*

250. See Haan, *supra* note 34, at 294–96 (discussing how management will settle when there are risks that the board wants to avoid, like the inability to implement a successful proposal, board turnover, media backlash, and even litigation risks).

251. *C.f.* Kraik, *supra* note 26, at 497 (“Since both activists and institutions are repeat players in the market for corporate control, reputation and previous experience greatly influence the success of a campaign.”).

An investor coalition that owned shares in the Sainsbury's grocery store chain in the United Kingdom recently filed a shareholder proposal that addressed the minimum wage crisis.<sup>252</sup> This proposal served as a test run for the idea that shareholders can affect minimum wage. The coalition's filing proposed that Sainsbury's raise its pay to reflect the Living Wage Index, which publicizes the appropriate minimum wage in different cities in the United Kingdom based on cost of living.<sup>253</sup> After receiving criticism from major investors and Glass Lewis, the proposal did not attain a minimum number of votes.<sup>254</sup>

The criticisms against the proposal were quite convincing. Glass Lewis's advice highlighted the futility of the proposal made to a company like Sainsbury's. Glass Lewis concluded that "Sainsbury's existing approach to wages did not represent a material risk, and the company does not have a history of underpaying its employees."<sup>255</sup> Further, Glass Lewis expressed concern that a third party organization would control wage-setting.<sup>256</sup> Taking this power out of the company's hands bordered on micromanagement, which would allow a United

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252. *See Shareholders File Living Wage Resolution at Sainsbury's*, SHAREACTION (Mar. 28, 2022), <https://perma.cc/6FC5-7Y8W> (listing the co-filers, including ShareAction, Legal and General Investment Management, Actiam, Fidelity International, Nest, Brunel Pension Partnership, Islington Pension Fund, Joseph Rowntree Foundation, Guy's and St. Thomas' Foundation, Friends Provident Foundation, and HSBC Asset Management).

253. *What Is the Real Living Wage?*, LIVING WAGE FOUND. (2022), <https://perma.cc/83QY-A3YC>. The Foundation calculates its Living Wage using a holistic approach to calculate cost of living, looking at housing, transportation, groceries, clothing, childcare, and other needs. *Id.* It then weighs the expenses by incidence (i.e., how many people incur that expense), and calculates the average minimum wage needed to get by. *Id.*

254. Ballabio, *supra* note 95.

255. *Id.*

256. *See id.*

In aggregate, since it did not appear that Sainsbury's had mismanaged its wages, we were concerned that allowing a third party to determine the wages paid to employees and contractors could have bordered on micromanagement—particularly since this was a binding proposal, thus not allowing any flexibility in its implementation.

States corporation to exclude the proposal.<sup>257</sup> Schroders, an asset management company that is a top-five investor in Sainsbury's, also released a statement explaining why it would not support the proposal.<sup>258</sup> Schroders faced much criticism for voting against the proposal because the company is Living Wage-accredited<sup>259</sup> and a member of the Good Work Coalition.<sup>260</sup>

Despite these substantive flaws, the proposal still received 17 percent of the total votes in favor of approval.<sup>261</sup> While this may seem insubstantial, 17 percent is a strong showing in the face of management and proxy advisor dissent, especially in the U.K. where shareholder proposals usually receive well below 20 percent.<sup>262</sup> Indeed, despite most votes going against the resolution, Rachel Hargreaves, campaign manager at ShareAction, claimed that the vote "sent a powerful message from shareholders that Sainsbury's should make a Living Wage commitment to all of its workers."<sup>263</sup>

Given this support, the proposal obviously got a few things right. Most significantly, the proposal was made by a nonprofit with the backing of ten institutional investors.<sup>264</sup> The path towards a successful proposal on minimum wage will involve the work of targeted nonprofits and the support of powerful

257. 17 C.F.R. § 240.14a-8(i)(7); *see supra* Part II.A.

258. *See* Kimberly Lewis, *Why Sainsbury's' AGM Is a Pivotal Moment for ESG*, SCHRODERS (June 27, 2022), <https://perma.cc/5TM6-RAMK>.

259. Accredited Living Wage employers have been certified by the Living Wage Foundation. *See What Is the Living Wage?*, *supra* note 253. These employers agree to institute a higher minimum wage according to a standard set by the Living Wage Foundation, a U.K. nonprofit that publishes the Living Wage Index. *Id.* "The real Living Wage rates are higher because they are independently-calculated based on what people need to get by." *Id.*

260. The Good Work Coalition was created by ShareAction, the nonprofit that submitted this proposal. *See* Lewis, *supra* note 258. ShareAction revoked Schroders' membership in The Good Work Coalition following its publication of the rationale for voting against the Coalition's proposal. *See id.*

261. *Shareholders File Living Wage Resolution at Sainsbury's*, *supra* note 252.

262. Ballabio, *supra* note 95.

263. *Sainsbury's Living Wage Resolution Achieves Significant Shareholder Support*, SHAREACTION (July 7, 2022), <https://perma.cc/FH9H-8KTG>.

264. *See* Ballabio, *supra* note 95.

institutional investors.<sup>265</sup> Additionally, extensive publicity aided the proposal.<sup>266</sup>

The underperformance of the Sainsbury's proposal does not foreclose the potential for future successful minimum wage proposals. Instead, the publicity and support the proposal received should encourage other nonprofits and interested shareholders to use it as a case study and ask what they can do differently to successfully capitalize on the public support. The following excerpt from Glass Lewis explains the door that the Sainsbury's proposal opened:

While the proposal was not approved, the first UK shareholder resolution on Living Wage nonetheless shows that human capital management practices can have wide-ranging impacts on companies and their investors and highlights the nuance and complexity of ESG integration. Given the emphasis placed on this resolution, the emerging shareholder divide on how to best execute an ESG strategy, and the rapidly growing number of environmental and social proposals submitted to companies on a global basis, the Sainsbury's resolution is unlikely to be the last dealing with these matters, or the final word on how to approach active ownership.<sup>267</sup>

The Sainsbury's proposal shed light on a potential path for success: cooperative efforts from key players, a savvy media campaign, and the potential for success without a vote.

#### B. *Wording a Non-Excludable Proposal*

This subpart will examine what language should be used in the proposal so that the proposal is non-excludable under Rule 14a-8(i)(7). The proposal is designed to be as beneficial as possible without triggering the micromanagement exclusion. Further, this subpart will contemplate what language to include in the proposal's supporting statement to ensure the SEC finds

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265. See *supra* Parts III.A, III.C.

266. See *Shareholders File Living Wage Resolution at Sainsbury's*, *supra* note 252 (explaining that many people were watching this proposal as Sainsbury's is such a big company and there was great public support for fair wages).

267. Ballabio, *supra* note 95.

that the subject-matter “transcends day-to-day business matters.”<sup>268</sup>

1. Avoiding Exclusion Based on Micromanagement with Careful Wording

Shareholders may not bind management to action with proposals.<sup>269</sup> The proposals themselves, when passed, are only precatory.<sup>270</sup> Beyond showing a path forward for proposals on the minimum wage, the Sainsbury’s proposal and its critics highlighted language to avoid when submitting a proposal. The proposal cannot take decision-making power away from the board.<sup>271</sup> Consequently, the proposal cannot require the management to raise the minimum wage.<sup>272</sup> Studying proposals that survived no-action requests can demonstrate how to word the proposal to avoid exclusion based on micromanagement. The proponent should draft a proposal that asks for consideration or disclosure (or both) rather than immediate action.

One approach that has escaped exclusion is asking management to audit a specific business practice to assess their impact on a significant policy issue. The National Center for Public Policy Research submitted a proposal requesting that The Walt Disney Company assess its non-discrimination practices and their effects.<sup>273</sup> The proposal stated:

RESOLVED: Shareholders of The Walt Disney Company (“Disney” or “Company”) request that the Board of Directors commission a workplace nondiscrimination audit analyzing Disney’s impacts, including the impacts arising from Disney-sponsored or -promoted employee training, on civil

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268. 17 C.F.R. § 240.14a-8(i)(7).

269. 17 C.F.R. § 240.14a-8(i)(1); *see supra* notes 81–83 and accompanying text.

270. *See supra* notes 36–37 and accompanying text.

271. *See supra* notes 107–108 and accompanying text.

272. As previously discussed, shareholders proposals are likely to violate state law if they mandate a specific board action. *See supra* notes 107–108 and accompanying text. Further, a proposal that specifically details the manner or method of implementing a suggested policy is excludable under 17 C.F.R. § 240.14a-8(i)(7) because it limits the board’s discretion. *See supra* Part II.A.

273. *See* The Walt Disney Co., SEC Staff No-Action Letter, 2021 WL 5052838, at \*1 (Jan. 19, 2021).

rights and nondiscrimination in the workplace, and the impacts of those issues on Disney's business. A report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on Disney's website.<sup>274</sup>

Disney filed a non-action request, arguing that the proposal should be excluded under Rule 14a-8(i)(7) because "the subject matter of the Proposal directly concern[ed] the Company's ordinary business operations"<sup>275</sup> and "[sought] to micromanage the Company."<sup>276</sup> The National Center for Public Policy Research rebutted by arguing that the "Proposal [did] not seek to manage the company in any way. It simply ask[ed] the company for a report about what it is already doing, and the potential risks and effects associated with that behavior."<sup>277</sup> The SEC concurred with the latter rationale and concluded that the proposal did not seek to micromanage Disney.<sup>278</sup>

Another approach that has escaped exclusion is asking the company to prepare a neutral report analyzing the feasibility of more socially responsible action in order to advance some significant social policy. Oxfam America submitted a proposal requesting that Moderna commission and deliver a report to shareholders on the feasibility of facilitating the production of the COVID-19 vaccine in poor countries.<sup>279</sup> The proposal stated:

RESOLVED that shareholders of Moderna Inc. ("Moderna") ask the Board of Directors to commission a third-party report to shareholders, at reasonable expense and omitting confidential and proprietary information, analyzing the feasibility of promptly transferring intellectual property and technical knowledge ("know-how") to facilitate the production of COVID-19 vaccine doses by additional

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274. *Id.* at \*2.

275. *Id.* at \*38.

276. *Id.* at \*39.

277. *Id.* at \*36.

278. *Id.* at\*1.

279. See Moderna, Inc., SEC Staff No-Action Letter, 2021 WL 6063317, at \*1 (Feb. 8, 2022).

qualified manufacturers located in low and middle-income countries, as defined by the World Bank.<sup>280</sup>

Moderna filed a no-action request, arguing that the proposal could be excluded under Rule 14a-8(i)(7) because “it [sought] to micromanage the Company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”<sup>281</sup> Oxfam America argued that the proposal did not micromanage because “the Proposal operate[d] at a high level, asking for an analysis of the feasibility of sharing IP, rather than specifying the steps Moderna should take, and shareholders would be in a position to understand the disclosure it would elicit.”<sup>282</sup> The SEC concluded that the proposal did not micromanage Moderna, concurring in Oxfam America’s rationale.<sup>283</sup>

Incorporating the SEC-approved wording of the two aforementioned proposals, a proponent seeking to highlight the need for a company to increase its minimum wage should request a third-party report on the feasibility of raising the minimum wage. Additionally, the proposal should request that such a report be publicly disclosed to pressure management to follow up the proposal with action.<sup>284</sup> The proposal could state:

RESOLVED: Shareholders of \_\_\_\_\_ request that the Board of Directors commission a third-party report analyzing the feasibility of raising the minimum wages that the Company pays to its employees to reflect inflation and cost-of-living increases and to facilitate its employees’ ability to meet minimum standards of living, as defined by the MIT Living Wage Calculator. The report, prepared at reasonable expense and omitting confidential or proprietary information, should be publicly disclosed on the Company’s website.

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280. *Id.* at \*2.

281. *Id.* at \*10.

282. *Id.* at \*24.

283. *Id.*

284. *See infra* Part IV.C.

2. Transcending Day-to-Day Business Operations in  
Supporting Statements

Compensation qualifies as an ordinary business operation, so matters of compensation alone are not appropriate topics for shareholder proposals.<sup>285</sup> However, the SEC allows proposals on ordinary business matters so long as the proposal focuses on a social policy matter significant enough to “transcend day-to-day business operations.”<sup>286</sup> The proponent will need to highlight that the proposal raises a policy reason with a “broad societal impact.”<sup>287</sup> Further, the proposal must focus on the social policy rather than merely touch on it.<sup>288</sup>

The proponent may include a 500-word supporting statement when he or she submits a shareholder proposal, and this space can be utilized to highlight the public policy rationale for raising minimum wage.<sup>289</sup> While the recent guidance on Rule 14a-8(i)(7) no longer requires this significant policy matter to be significant to the company specifically,<sup>290</sup> proposals that tie their subject matter to a policy matter significant to both society at large and the company are more likely to be non-excludable.<sup>291</sup>

To describe the broad societal impact of minimum wages that do not allow employees to meet minimum standards of living, proponents should reference inflation rates,<sup>292</sup> the high cost of housing and rent,<sup>293</sup> and public opinion on the need for

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285. See *supra* Part II.A.

286. *SLB 14L*, *supra* note 96.

287. *Id.*

288. See *supra* notes 102–105 and accompanying text.

289. See, e.g., Moderna, Inc., SEC Staff No-Action Letter, 2021 WL 6063317, at \*2–3 (Feb. 8, 2022) (including the proponent’s supporting statement, which highlighted the vaccine inequity between high and low-income countries and how Moderna’s inaction could damage its own reputation, public health, and the global economy).

290. See *supra* notes 101–102 and accompanying text.

291. See, e.g., Amazon.com, Inc., SEC Staff No-Action Letter, 2022 WL 225963, at \*1 (Apr. 6, 2022) (concluding that the proposal was non-excludable where the proponent focused on the significance of employee safety for society and for Amazon specifically).

292. See *supra* notes 46–48 and accompanying text.

293. See *supra* notes 49–52 and accompanying text.

higher wages.<sup>294</sup> To address the issue's significance to the company, the proponent should utilize statistics concerning current company compensation in relation to living wages. A recent proposal illustrates the success of such tactics. The Shareholder Commons, on behalf of James McRitchie, filed a shareholder proposal with the Tractor Supply Company (TSC) requesting a report on whether TSC "participates in compensation and workforce practices that prioritize Company financial performance over the economic and social costs and risks created by inequality and racial and gender disparities."<sup>295</sup> In its supporting statement, the proponents asserted that

[t]he Company's starting wage is \$11.25 per hour and its median employee was paid \$24,437, or 0.15% of the CEO's compensation. By comparison, the living wage was \$16.54 per hour, or \$34,404 per for a family of four (two working adults, two children) in 2019.<sup>296</sup>

These statistics highlighted TSC's specific compensation practices to affirm that the proposal raised a policy issue specific to the company.<sup>297</sup> The proponents further described the broad societal impact at play in response to the no-action request:

The Proposal is unambiguous about the underlying policy issue: the Company may be engaging in workforce practices that raise the Company's profits but harm society (and ultimately the diversified portfolios of most of its shareholders) . . . This "trade" of company wealth for social harm has broad societal impact and has been the subject of legislation, regulation, and public debate.<sup>298</sup>

Following these justifications, the SEC concluded that this proposal was not excludable under Rule 14a-8(i)(7) because "the Proposal transcend[ed] ordinary business matters because it raise[d] human capital management issues with a broad societal impact."<sup>299</sup> This same societal impact described in the TSC

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294. See *supra* notes 53–57 and accompanying text.

295. See Tractor Supply Co., SEC Staff No-Action Letter, 2022 WL 110300, at \*1 (Mar. 9, 2022).

296. *Id.* at \*10. The proponents drew statistics on living wage from the MIT Living Wage Calculator. *Id.* at \*10 n.1.

297. *Id.* at \*10.

298. *Id.* at \*13.

299. *Id.*

no-action letter should be used to support proposals on minimum wage since the rationale has been proven to withstand SEC scrutiny.

C. *Public Relations Pressure*

This subpart will propose that publicity must play a crucial role in a successful proposal.

Boards of directors will likely direct shareholders to vote against a proposal to raise the minimum wage.<sup>300</sup> The board can publish a statement in opposition to the proposal, and it will make a recommendation against the proposal at the meeting prior to voting.<sup>301</sup> Because of robovoting and passive investors, the proposal will not receive a majority vote in the face of management dissent unless investors have notice and motivation to vote a certain way.<sup>302</sup>

ESG proposals that overcome management dissent often rely on public relations to apply public pressure on the company and to motivate shareholders to vote.<sup>303</sup> Even properly publicized proposals that do not attain a majority of the votes are powerful because the publicization of the corporation's inaction heightens societal awareness of certain issues.<sup>304</sup> A well-performing corporation with a good reputation for ESG does not make a good target for a proposal.<sup>305</sup> To best capitalize on social awareness, the initial proposals should be made to corporations that have recently been under fire for labor wrongs,

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300. See *supra* Part III.E.

301. See *supra* note 79 and accompanying text.

302. See *supra* Part II.C.

303. See Yaron Nili, *Missing the Forest for the Trees: A New Approach to Shareholder Activism*, 4 HARV. BUS. L. REV. 157, 176–77 (2014) (“In particular, one might point to nongovernmental organizations (NGOs), which use media and public relations alongside corporate governance mechanisms when campaigning to sway corporations’ socially impactful decisions.”).

304. See Bird & Park, *supra* note 33, at 40 (“In particular, the shareholder proposal mechanism is increasingly attractive to activist shareholders seeking to compel greater attention to social and environmental issues.”).

305. See Kraik, *supra* note 26, at 547 (“To balance the structural need for shorter-term profits against preaching long-term value, activists will need to find targets that are underperforming, or could change, in both the short and long-term. ESG alone may not provide enough of a nexus.”).

like Starbucks or Amazon.<sup>306</sup> If the right media coverage were to accompany a down-voted proposal in support of minimum wage, change could follow due to market pressure.<sup>307</sup> Employees have more power than ever before in today's economic market because of labor shortages.<sup>308</sup> Peaceful protesting and even labor strikes could follow a publicized proposal. Because of the public attention on the inadequacy of the federal minimum wage<sup>309</sup> and the recent uptick in labor strikes,<sup>310</sup> proponents of proposals on minimum wage should coordinate a media campaign to motivate other shareholders to vote and prompt company management into action.

#### D. *A Coordinated Assault*

This subpart will describe how key players can work in concert to craft, market, and support a successful proposal on minimum wage. The formation of a coalition of advocates to

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306. See, e.g., Paul Blest, *Lateness, Cursing, a Broken Sink: Starbucks Keeps Firing Pro-Union Employees*, VICE (Apr. 19, 2022, 10:11 AM), <https://perma.cc/B6GG-99N3>; Annie Palmer, *Amazon Cited by Labor Department for Exposing Warehouse Workers to Safety Hazards*, CNBC (Jan. 18, 2023, 11:55 AM), <https://perma.cc/2MDS-SH5E>.

307. 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, 372–73 (2006)

It is now often argued that a company's corporate social responsibility record has an impact on the bottom line through its effect on the company's "reputational capital," and that there is an empirical connection between reputation-goodwill and firm market value . . . .

. . . [S]tudies analyzing the effects of ethical business activity on share prices have indicated that a corporation's social performance and its share value have a positive correlation.

308. See Jason Lalljee & Juliana Kaplan, *Workers Are Getting Bolder. The Number of Strikes Tripled from Last Year as Americans See Their Wages Shrink and Bosses Profit*, BUS. INSIDER (Sep. 17, 2022, 7:15 AM), <https://perma.cc/7HBR-X9BP> ("Inflation woes and increased bargaining power have created a perfect storm of conditions for workers, who have joined picket lines in increasing numbers since the pandemic began.")

309. See *supra* Part I.B.

310. See Margaret Poydock et al., *Major Strike Activity Increased Nearly 50% in 2022*, ECON. POL'Y INST. (Feb. 22, 2023), <https://perma.cc/H4S7-KA7U> ("Data from the Bureau of Labor Statistics (BLS) show the number of workers involved in major work stoppages (strikes and similar activities) increased by nearly 50 percent compared with 2021.")

promote a social policy is not unprecedented.<sup>311</sup> A combined effort from shareholders, nonprofits, and investors allows for increased funding, higher visibility, and widespread impact.<sup>312</sup> Part of the Sainsbury's proposal's media success grew from the institutional investors who backed it.<sup>313</sup> Multiple high-AUM institutions co-filed the proposal, which lent validity to it.<sup>314</sup>

To recruit the support of institutional investors, a respectable and recognizable nonprofit should coordinate co-filers, supporters, and proxy advisor endorsements. Ideally, the targeted nonprofit ("TNP") should have experience with corporate advocacy in the human and employee rights space as well as a resume of success in shareholder activism. The Shareholders Commons should be consulted because it has researched and opposed wealth inequality,<sup>315</sup> and it has demonstrated its capacity to make proposals concerning compensation in a collaborative and legal manner.<sup>316</sup>

The TNP should coordinate with potential filers and co-filers, like James McRitchie and other corporate gadflies<sup>317</sup> or Mercy Investment Services and other socially responsible investment funds.<sup>318</sup> These potential filers should own stock in multiple major corporations to meet the shareholder stock ownership requirements for filing.<sup>319</sup> The TNP should also

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311. See Dhir, *supra* note 307, at 384–85 ("With respect to [human rights/social policy]-related proposals, . . . the proponents tend to be religious investors, socially responsible investment funds, and social justice organizations. Often, these groups form coalitions in order to co-endorse particular proposals.").

312. See *supra* notes 145–150 and accompanying text.

313. See Ballabio, *supra* note 95 ("Though it ultimately failed to secure majority shareholder support, the high-profile nature of the proposal and the considerable AUM of its backers further emphasi[z]ed the growing importance of ESG issues, and specifically those related to human capital management.").

314. See *id.* (claiming that the attention given to the proposal "sent a powerful message from shareholders that Sainsbury's should make a Living Wage commitment to all of its workers").

315. See generally *Legal Foundation*, S'HOLDER COMMONS (2023), <https://perma.cc/RYG6N-3MW5>.

316. See *supra* notes 295–299 and accompanying text.

317. See *supra* Part III.D.

318. See *supra* Part III.C.

319. See *supra* notes 76–80 and accompanying text.

consider drafting and distributing a proposal template as that step has been successful for other advocacy groups.<sup>320</sup>

Beyond organizing the filings of proposals, the TNP will need to advocate for the proposal among the press, companies, and proxy advisors. When there is evidence of public support for an idea, corporate management is often willing to negotiate settlements with shareholders or advocacy groups to effect change away from the public eye.<sup>321</sup> The TNP can lay the groundwork for these compromises by opening lines of communications with management prior to and during the proxy season in which the proposal will be submitted. Further, the TNP can engage with proxy advisors to advocate for a favorable recommendation. ISS, the leading proxy advisory service, takes engagement requests prior to the proxy season, and a representative can decide to meet with proponents to discuss the proposal before ISS decides how to make the recommendation.<sup>322</sup> These engagements should be sought proactively to better the chances of proxy advisor approval. Lastly, the TNP will need to advocate for the proposal and raise attention via publicity.<sup>323</sup>

#### CONCLUSION

This Note has demonstrated that the social and legal landscapes surrounding minimum wage would support shareholder proposals aimed at raising the minimum wage. Additionally, this Note has evaluated barriers to proposal success and concluded that the right team of actors can overcome the barriers to using shareholder proposals to raise the minimum wages paid to workers at large corporations.

Recipients of the federal minimum wage do not make enough money to maintain minimum standards of living for themselves, let alone for family members they may be supporting. With Congress unable to come to a consensus to raise the minimum wage, activists need to take non-legislative action to improve compensation for hourly workers. Given the

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320. See *supra* notes 145–149 and accompanying text.

321. See *supra* Part III.E.

322. See *FAQs Regarding ISS Proxy Research*, ISS (2023), <https://perma.cc/DBD9-G6X9>.

323. See *supra* Part IV.C.

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rise of shareholder activism and the favorable guidelines for shareholder proposals under the Biden Administration, now is the time for socially-conscious shareholders to submit proposals to corporations that press corporate managers to evaluate compensation practices and their effects on workers.