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A Few Quick Viewpoints on Viewpoint Diversity Shareholder Proposals

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A FEW QUICK VIEWPOINTS ON VIEWPOINT DIVERSITY SHAREHOLDER PROPOSALS

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This commentary essay represents a brief response to a thoughtful Article: Professor Stefan Padfield's contribution to the 2020 Business Law Prof Blog symposium, "Connecting the Threads." His Article, *An Introduction to Viewpoint Diversity Shareholder Proposals*,[1] reminds me of how much I enjoy reading his work. He so often writes in an inspired—and sometimes fearless—way. I appreciate this important contribution to our symposium and the literature on shareholder proposals (and proxy regulation more generally). I stand with him in his effort to extend and intensify academic and practical conversations about the way that U.S. securities regulation intersects with social justice through shareholder activism.

I. PRELIMINARY REMARKS

It should be recognized that Professor Padfield substantially wrote and edited his Article in the latter half of 2020, during the course of a controversial and politically charged presidential election season. His topic—viewpoint diversity shareholder proposals—and its presentation at the symposium had great meaning in that context and takes on even more significance in light of the November 2020 election results, the breach of the U.S. Capitol on January 6, 2021, the ultimate change in leadership of the federal executive branch later that month after two months of disputation, and the current existence of an evenly divided U.S. Senate. It also seems apt to note that these larger, recent events have occurred during a period of great social and economic stress. The COVID-19 pandemic, economic insecurity, and a period of public racial unrest—referred to by some as the "triple pandemic"—have intersected with and contributed to

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[1] Stefan J. Padfield, *An introduction to Viewpoint Diversity Shareholder Proposals*, 22 TRANSACTIONS: TENN. J. BUS. L. 271 (2021).

the political environment.[2] This contentious political context underscores the importance of the information Professor Padfield conveys in his Article. We were and (at the time of this writing) are in an era of factionalism and upheaval that touches our political, social, and economic lives in salient ways. Professor Padfield's Article describes this era in various aspects that are significant to capture as a matter of history—both generally (in political, social, and economic terms) and as a matter of academic scholarship in business law.

At the outset, it is essential to note that, in selecting viewpoint diversity as a focal point for analysis and commentary, Professor Padfield implicitly undertakes a tough task: defining the concept of viewpoint diversity. He accomplishes this mission indirectly in two ways in the Article. First, he illustrates the need for a more balanced viewpoint environment by providing evidence of actual and perceived viewpoint bias and discrimination.[3] Second, he offers content to the definition through his presentation of specific examples of viewpoint diversity shareholder proposals.[4]

It is genuinely difficult to get one's arms wrapped around the notion of viewpoint diversity (sometimes referred to as ideological diversity, although that may be a different matter for some). I work with a number of organizations, including bar associations, that place a value on viewpoint diversity in their programming. In this setting, issues often arise as to how to assess the inclusion or exclusion of particular viewpoints in a particular program proposal. That conversation often involves an uncomfortable labeling of distinct viewpoints and the identification of people who actually have—or are likely to have—those viewpoints. Through these conversations, I have learned that, while the representation of a divergent viewpoint or the full and fair inclusion of divergent viewpoints sometimes may be obvious, at other times viewpoint diversity may be harder to isolate and evaluate.

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[2] *See, e.g.*, Erik Spanberg, *How the Urban League is Addressing a 'Triple Pandemic' of Covid, Economic Malaise and Racial Disparity*, CHARLOTTE BUS. J., Feb. 23, 2021, https://www.bizjournals.com/charlotte/news/2021/02/23/economic-empowerment-fuels-local-urban-league-ceo.html; Trust for America's Health, Congressional Briefing: Ending the Triple Pandemic: Advancing Racial Equity by Promoting Health, Economic Opportunity and Criminal Justice Reform, July 30, 2020, https://www.tfah.org/story/ending-the-triple-pandemic-congressional-briefing/ (recorded briefing).

[3] Padfield, *supra* note 1, at 272-75.

[4] *Id.* at 280-92.

There are organizations that benchmark viewpoint or ideology in different contexts, typically along a political scale. Given his focus on shareholder proposals, Professor Padfield uses as his touchstone the Free Enterprise Project of the National Center for Public Policy Research[5] (noting its acknowledged conservative viewpoint) and also offers As You Sow[6] as an alternative and opposing resource for shareholder proposal viewpoint analysis.[7] I would also note that media bias organizations offer feedback on the viewpoints of various websites.[8] In fact, I used the media bias websites in my own work a few years ago in identifying and assessing third-party views of the Trump administration's deregulatory efforts affecting business.[9] And (apropos of that thought) academic and policy researchers study viewpoint difference from a variety of perspectives and contexts.[10] Yet, in spite of all this attention, viewpoint diversity eludes clear definition. What some consider an alternative viewpoint, others may reasonably perceive as oppression or discrimination.

Regardless, the elusiveness of viewpoint diversity does not—and should not—take away from the value of Professor Padfield's enterprise. The main objective of his Article is to highlight and describe viewpoint diversity shareholder proposals as a possible path to counterbalancing inefficiencies and other harms that may result from corporate cancel culture and speech suppression. The Article accomplishes this objective.

I am especially interested in two aspects of Professor Padfield's Article on which I comment briefly in turn. First and foremost, I focus in on

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[5] For more information about the Free Enterprise Project, see *Free Enterprise Project*, NAT'L CTR. FOR PUB. POL'Y RSCH., https://nationalcenter.org/programs/free-enterprise-project/ (last visited Mar. 9, 2021).

[6] For more information about As You Sow, see AS YOU SOW, https://www.asyousow.org/ (last visited Mar. 9, 2021).

[7] *See* Padfield, *supra* note 1 at 275.

[8] Notable in this regard are AllSides, and Media Bias/Fact Check. *See* ALLSIDES, https://www.allsides.com/media-bias/media-bias-ratings (last visited Mar. 9, 2021); MEDIA BIAS/FACT CHECK, https://mediabiasfactcheck.com/ (last visited Mar. 9, 2021).

[9] *See* Joan MacLeod Heminway, *Mr. Toad's Wild Ride: Business Deregulation in the Trump Era*, 70 MERCER L. REV. 587, 595–607 (2019).

[10] *See, e.g.*, Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, CATO INST. (July 22, 2020), https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share#introduction; Kent Greenfield, *Trademarks, Hate Speech, and Solving a Puzzle of Viewpoint Bias*, 4 S. CT. REV. 183 (2019); Hans J. G. Hassell, John B. Holbein & Matthew R. Miles, *There is No Liberal Media Bias in Which News Stories Political Journalists Choose to Cover*, 6 SCI. ADVANCES, no. 14, e9344 (Apr. 1, 2020), https://advances.sciencemag.org/content/6/14/eaay9344.full.

relevant aspects of an academic and popular literature that Professor Padfield touches on in his Article. This literature addresses an area that intersects with my own research: the diversity and independence of corporate management (in particular, as to boards of directors, but also as to high level executive officers, those constituting the so-called "C-suite") and its effects on corporate decision-making.[11] Second, I offer a few succinct thoughts on the suitability of the shareholder proposal process as a means of promoting viewpoint diversity in publicly held firms.

II. MANAGEMENT DIVERSITY AND EFFICACIOUS DECISION-MAKING

The vast body of literature on management diversity and decision-making is instructive to the thesis of Professor Padfield's Article. However, for purposes of this commentary, I will simply highlight a well-researched popular press book written by journalist (and long-time *New Yorker* columnist) James Surowiecki entitled *The Wisdom of Crowds*.[12] In this book, Surowiecki draws from significant amounts of research, which he uses to descriptive advantage (citing to the primary source material in his endnotes). The literature he canvasses comes from a variety of research traditions. Surowiecki's endnotes can easily be mined for research purposes.

In *The Wisdom of Crowds*, Surowiecki identifies three factors that contribute to the wisdom of a crowd—the capacity of human decisionmakers, acting together, to engage in optimal decision-making. Two of the three factors relate specifically to Professor Padfield's analysis in *An Introduction to Vienpoint Diversity Shareholder Proposals*. The three factors Surowiecki identifies are: diversity, independence, and coordinated, decentralized communication structures that allow for information aggregation.[13] In earlier work, I asserted that a corporate board of

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[11] *See, e.g.*, Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079 (2019); Joan MacLeod Heminway, *Women in the Crowd of Corporate Directors: Following, Walking Alone, and Meaningfully Contributing*, 21 WM. & MARY J. WOMEN & L. 59 (2014) [hereinafter *Women in the Crowd*]; Joan MacLeod Heminway, *The Last Male Bastion: In Search of a Trojan Horse*, 37 U. DAYTON L. REV. 77 (2011); Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L.J. 173 (2007); Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249 (2009) (reviewing DOUGLAS M. BRANSON, NO SEAT AT THE TABLE (2007)). These works cite to many others by various authors in and outside legal scholarship.

[12] JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005).

[13] *Id.* at xviii.

directors could be seen as a crowd under Surowiecki's framework and that of crowd theorists more generally.[14] That insight is important to the connection of Surowiecki's book to Professor Padfield's Article.

Professor Padfield's Article implicates directly both independence and diversity, the first two factors identified by Surowiecki as crucial to crowd wisdom. As Professor Padfield notes, corporate law doctrine, as exemplified in Delaware corporate law, takes independence (and disinterestedness) into account in crediting board decision-making under the business judgment rule.[15] However, it does not credit diversity in any way. Having said that, the California and Washington State legislatures have recently struck out to provide a direct legal link to diversity through their enactment of statutes providing for specified gender (and, in the case of California, racial or ethnic) compositions for certain public company boards of directors,[16] and there is some activity around broadening these legislative efforts.[17] However, most U.S. law (both state and federal) does

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[14] *See Women in the Crowd*, *supra* note 11, at 72–73 ("If a board of directors can be described as a group of people who can 'act collectively to make decisions and solve problems,' then it can be seen as a crowd under the broad definitions used by crowd theorists.").

[15] *See* Padfield, *supra* note 1, at 293. *See generally*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (explaining that the protections of the business judgment rule can only be claimed by disinterested, independent directors); In re Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013) (noting the business judgment rule's applicability to decisions made by board members who are "disinterested and independent").

[16] *See* CAL. CORP. CODE § 301.3 (Deering 2021); Assemb. 979, 2019-20 Leg., Reg. Sess. (Cal. 2020). Almost ten years ago, the California legislature also enacted a law providing that '[t]he Secretary of State shall develop and maintain a registry of distinguished women and minorities who are available to serve on corporate boards of directors." CAL. CORP. CODE § 318 (2012); WASH. REV. CODE § 23B.08.120 (2020) (instituting a "comply or disclose" rule for board diversity applicable to defined public companies). Other state legislatures have passed disclosure rules or precatory legislative resolutions. *See generally* Stewart M. Landefeld et al., *Accelerating Gender Diversity on Boards: Reviewing Legislative Action*, CORP. GOV. ADVISOR, July/August 2020, at 1-7, https://www.perkinscoie.com/images/content/2/3/v3/234657/Accelerating-Gender-Diversity-on-Boards.pdf (detailing legislative board diversity initiatives).

[17] *See, e.g.*, Dylan Bruce & Peter Rasmussen, *ANALYSIS: Mandated Board Diversity Takes Center Stage in 2021*, BLOOMBERG L. (Nov. 16, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-mandated-board-diversity-takes-center-stage-in-2021; Jaclyn Jaeger, *Emerging State Board Diversity Laws Encourage Proactive Approach*, COMPLIANCE WEEK (Nov. 3, 2020), https://www.complianceweek.com/boards-and-shareholders/emerging-state-board-diversity-laws-encourage-proactive-approach/29681.article.

not directly address diversity in corporate management, whether as to gender, race, ethnicity, viewpoint or anything else. U.S. Securities and Exchange Commission ("SEC") member (and, at this writing, Acting Chari) Allison Lee recently noted the paucity of comprehensive regulation relating to management diversity and the need to move forward with broader initiatives for change.[18] Securities exchanges are already moving in this direction. The SEC is in possession of a rulemaking request from the Nasdaq Stock Market generally mandating that each Nasdaq-listed firm (subject to certain exceptions) either include two diverse directors (one female and one from a specified racial, ethnic, sexual orientation, or sexual identity group) or explain why it does not have a board of directors with membership conforming to those requirements.[19]

By spotlighting viewpoint diversity shareholder proposals and viewpoint diverse boards of directors, Professor Padfield broadens and deepens the corporate management diversity discussion in meaningful ways that relate directly to attributes of efficacious decision-making by boards of directors and senior management evidenced in, and in the research underlying, *The Wisdom of Crowds*. When added to existing procedural incentives for independent decision-making and related fiduciary duty principles, viewpoint diversity may enable more efficient and effective corporate management. The addition of appropriately tailored decentralized communication structures to the mix (as suggested by Surowiecki's work) may further support effectual corporate managerial decision-making.

Viewpoint diversity may well have more widespread corporate workplace benefits as well, although they may be difficult to achieve, at

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[18] Allison Herren Lee, U.S. Sec's & Exch. Comm'n, *Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference* (Sept. 22, 2020) (transcript available at https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922#_ftn27).

[19] Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, SEC Release No. 34-90574, 85 Fed. Reg. 80472 (Dec. 4, 2020); Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendments No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes, as Modified by Amendments No. 1, To Adopt Listing Rules Related to Board Diversity and To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution To Help Advance Diversity on Company Boards, SEC Release No. 34-91286, 86 Fed. Reg. 14484 (Mar. 10, 2021) (replacing and superseding SEC Release No. 34-90574).

least in the short term. For example, "tone at the top" theories (which generally postulate that chief executives and other key corporate leaders have the power to instill corporate culture, including an ethical culture of compliance)[20] would indicate that senior management's operationalized commitment to viewpoint diversity has the potential to filter down into mid-level management, employees, and even the firm's relationships with its independent contractors. The institutionalization of viewpoint diversity within a corporation has the capacity to create a safer and happier workplace in which all understand they are welcomed. However, integrating viewpoint diversity into corporate culture is by no means easy.[21] Defining the corporate space for communication of diverse viewpoints will be key to resolving tensions between the educative value of free expression and the re-traumatization of those who suffer the harmful effects of long-term institutionalized discrimination and oppression.

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[20] *See, e.g.*, Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 542 (2008) ("The creation of the organization's ethical culture is generated both by the company's directors and officers—who set the 'tone at the top,' by its lawyers and accountants, and by the multitude of mid-level managers who interact with rank-and-file employees."); Alfredo Contreras, Aiyesha Dey & Claire Hill, *"Tone at the Top" and the Communication of Corporate Values: Lost in Translation?*, 43 SEATTLE U. L. REV. 497, 509–13 (2020) (describing generally "Evidence on Tone at the Top"); Lisa Hope Nicholson, *Culture Is the Key to Employee Adherence to Corporate Codes of Ethics*, 3 J. BUS. & TECH. L. 449, 453 (2008) (offering that "the 'tone at the top' should permeate throughout the corporate culture to modify the behaviors and attitudes of all corporate agents about what is expected."); *see also* Grant Freeland, *Culture Change: It Starts At The Top,* FORBES (July 16, 2018), https://www.forbes.com/sites/grantfreeland/2018/07/16/culture-change-it-starts-at-the-top/ ("Culture change comes from concrete and noticeable changes in leadership behavior: what they do; who they hire; who they ask to move on; who they listen to and emulate; where they spend their time; what they talk about in meetings; what they measure; how they invest the firm's money."); Freeland, *supra* ("Sticky notes and posters won't change a company's culture. What's needed is a leadership team that's committed to change, points the company in the right direction, sets the tone, establishes expectations, and leads by example.").

[21] *See* Michelle M. Harner, *Barriers to Effective Risk Management*, 40 SETON HALL L. REV. 1323, 1357 (2010) (noting that, when it comes to corporate culture, "change is hard and slow."); Michelle Yun, Comment: *The Next Phase in Supporting Women at Work: Balancing Fiduciary Duties and Corporate Legitimacy*, 27 WIS. J.L. GENDER & SOC'Y 65, 68 (2012) ("As with any culture, changes in corporate culture require long-term strategies, policies, messaging, and practices.").

III. THE SHAREHOLDER PROPOSAL AS CHANGE CATALYST

An Introduction to Viewpoint Diversity Shareholder Proposals connects the value of viewpoint diversity to the shareholder proposal process, a significant component of proxy regulation embodied in Rule 14a-8,[22] promulgated by the SEC under Section 14(a) of the Securities Exchange Act of 1934, as amended.[23] Assuming viewpoint diversity can be defined (and is determined to be desirable and workable as so defined), Professor Padfield's Article avers that the shareholder proposal process represents a promising way for shareholders concerned about viewpoint diversity to catch management's attention and have their voices heard. Shareholder proposals are public company vehicles for corporate governance. As such, they are situated substantively at the intersection of federal securities law and state corporate law. That intersection can sometimes be doctrinally challenging.

Rule 14a-8 is located in U.S. federal securities doctrine. As such, it exists to serve the policies underlying that body of law. I tell my students (and relate in my scholarship) that there are three principal overarching policies underlying federal securities law: encouraging capital formation (which, from my vantage point, is foundational), protecting investors, and ensuring the integrity of the securities markets.[24]

I also note in my teaching and scholarship that U.S. securities law uses three principal tools of regulation: disclosure regulation through mandatory disclosure rules, fraud and other liability prevention through enforcement provisions (some of which relate to disclosure), and substantive regulation—rules relating to who can do what and when and how they can do it.[25] Proxy regulation incorporates all three tools, but the

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[22] 17 C.F.R. § 240.14a-8 (2020).

[23] 15 U.S.C. § 78(n)(a) (2018).

[24] *See, e.g.*, Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 640 (2017) ("[S]ecurities regulation protects investors, markets, and capital raising generally."); Joan MacLeod Heminway, *What is a Security in the Crowdfunding Era?*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 335, 337 (2012) ("[T]he key policies underlying U.S. securities regulation are the protection of investors and the maintenance of the integrity of the national securities markets, with the overall objective of enhancing prospects for capital formation to sustain business activity and growth.").

[25] *See, e.g.*, Joan MacLeod Heminway, *How Congress Killed Investment Crowdfunding: A Tale of Political Pressure, Hasty Decisions, and Inexpert Judgments That Begs for a Happy Ending*, 102 KY. L.J. 865, 869 (2014) ("Congress employed traditional tools of securities

provisions of Rule 14a-8 most centrally represent substantive regulation. They address who can get access to a public company's proxy materials for purposes of raising a proposal at a shareholder meeting and when and how that can be done.

Two aspects of viewpoint diversity shareholder proposals present regulatory questions under Rule 14a-8 as a means of effectuating the policies underlying federal securities regulation. They are embodied in two express regulatory justifications for a public company's exclusion of a shareholder proposal from its proxy statement under Rule 14a-8.[26] Each rationale for exclusion reflects a judgment by the SEC that a shareholder proposal interferes too significantly with state-law corporate structures, governance, or processes.

The first ground for exclusion that may be implicated by viewpoint diversity shareholder proposals is that for a proposal dealing "with a matter relating to the company's ordinary business operations."[27] Viewpoint diversity shareholder proposals relating to employee protection,[28] as well as those relating to viewpoint discriminatory policymaking,[29] may present challenges under this ground for exclusion. A 2019 SEC Division of Corporation Finance Staff Legal Bulletin addresses this ground for exclusion and includes significant related guidance.[30]

The second ground for exclusion that may be implicated by these shareholder proposals is that for a proposal that would relate in specified ways to the election of directors.[31] The board selection proposals

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regulation in composing the CROWDFUND Act (i.e., mandatory disclosure rules, antifraud and other liability provisions, and substantive regulation of participants and conduct)"); Joan MacLeod Heminway, *What Is A Security in the Crowdfunding Era?*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 335, 345 (2012) ("The U.S. securities regulation regime uses three principal kinds of rules to achieve its policy objectives. These rules—the tools in our securities regulation toolbox—are mandatory disclosure, fraud prevention and substantive regulation.").

[26] Professor Padfield mentions regulatory exclusions in a footnote in his Article and notes that they are beyond the scope of coverage of his Article. Padfield, *supra* note 1, at 277 n.26 ("[T]he impact of the ability of corporations to exclude proposals under the relevant rules is beyond the scope of this Article.").

[27] *See* 17 C.F.R. § 240.14a-8(i)(7).

[28] *See* Padfield, *supra* note 1, at 281-88.

[29] *Id.* at 291-92.

[30] *See* SEC Staff Legal Bulletin No. 14K (CF) (Oct. 16, 2019), https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals.

[31] *See* 17 C.F.R. § 240.14a-8(i)(8).

described in Professor Padfield's Article[32] present possible questions under this ground for exclusion. The grounds for exclusion of director election proposals have a rich history and were narrowed by amendments to Rule 14a-8 adopted a bit more a decade ago in the wake of the global financial crisis—modifications that were designed to provide shareholders with greater access to communication through public company proxy materials.[33]

Ultimately, the inclusion or exclusion of any viewpoint diversity shareholder proposal in or from a firm's proxy statement should support the policies underlying the federal securities laws—the encouragement of capital formation, the protection of investors, and the maintenance of securities market integrity. Connections between specific viewpoint diversity shareholder proposals and Rule 14a-8's fulfillment of these policy goals are unclear. Yet, those connections would seem to be important to the promise these shareholder proposals offer for meaningful corporate change through the exercise of the shareholder franchise. Proponents of viewpoint diversity shareholder proposals should bear this in mind.

Having said that, the exclusions contained in (and policy underpinnings of) Rule 14a-8 may be less relevant or of less significance if the viewpoint diversity shareholder proposal venture is more about bringing shareholders and management together to talk than it is to actually obtain proxy access and a shareholder vote favoring the proposal. If that is the ultimate end-goal of viewpoint diversity shareholder proposals, then they may have a less complicated (and greater) utility.[34]

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[32] *See* Padfield, *supra* note 1, at 288-91.

[33] *See, e.g.*, Jena Martin Amerson, *The SEC and Shareholder Empowerment-Analyzing the New Proxy Regime and Its Impact on Corporate Governance*, BANKING & FIN. SERVICES POL'Y REP., Feb. 2011, at 8, 11 ("[T]he 2010 amendments to Rule 14a-8(i)(8) decisively narrow the election exclusion . . . ."); J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. L. REV. F. 151, 167–69 (2016) (summarizing the history of the election exclusion under Rule 14a-8(i)(8), including the 2010 amendments); Bernard S. Sharfman, *What Theory and the Empirical Evidence Tell Us About Proxy Access*, 13 J.L. ECON. & POL'Y 1, 6–7 (2017) ("[I]n 2011, a dramatic change occurred in the way in which the SEC approached proxy access. By using authority granted to it by Section 971 of the recently enacted Dodd-Frank Act, the SEC was able to modify Rule 14a-8(i)(8), the election exclusion rule, so that public companies could no longer exclude precatory or binding shareholder proposals on proxy access from their proxy solicitation materials.").

[34] *See generally* Gretchen Morgenson, *Want Change? Shareholders Have a Tool for That*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/business/proxy-

Encouraging conversations between shareholders and selected firms in specific contexts designed to improve management decision-making and workplace conditions would seem to be laudatory. In this way, viewpoint diversity shareholder proposals may be great conversation starters in establishing healthier board governance and workplace relationship-management policies and processes. Professor Padfield implies this when he suggests that viewpoint diversity shareholder proposals "may help restore some much needed balance to corporations and their workplaces"[35] and when he offers, in conclusion, the possibility that "viewpoint diversity can come to play an insulating role in corporate governance."[36]

IV. CONCLUSION

In *An Introduction to Viewpoint Diversity Shareholder Proposals*, Professor Padfield scopes out new territory within the proxy regulation sphere—providing a description of the viewpoint diversity shareholder proposal as a genre—that is ripe for further study. He does this at a propitious time: in the midst of an era of deep political, social, and economic division in our country. Although viewpoint diversity may be a vague or malleable term, the business environment and exemplar shareholder proposals featured in Professor Padfield's Article offer guidance as to the contextual meaning of that term. Based on his depiction and the literature on management diversity's role in efficacious decision-making, viewpoint diversity has the capacity to add value to the business management enterprise and enhance the existence and sustainability of a healthy, happy workforce. Moreover, his Article indicates, and this commentary affirms, that the shareholder proposal process may be a successful tool in raising viewpoint diversity issues with firm management. Even if the inclusion of specific shareholder proposals in public company proxy statements may be questionable under Rule 14a-8, the existence of viewpoint diversity

climate-change-executive-pay.html (summarizing ways in which even unsuccessful shareholder proposals may be used as shareholder advocacy tools to impact the subject corporations). This begs the question of whether the use of the shareholder proposal process for shareholder advocacy outside the shareholder voting sphere is theoretically sound or is cost-effective (or otherwise desirable) as a matter of public policy. That question (really a set of queries), like others left unresolved by Professor Padfield's Article and this commentary, represents an interesting avenue for future research.

[35] *See* Padfield, *supra* note 1, at 275.

[36] *Id.* at 293.

shareholder proposals may open the door to productive dialogues between shareholders and the subject companies. In sum, Professor Padfield's Article represents a thought-provoking inquiry into an innovative way in which securities regulation may contribute to forwarding corporate social justice in the public company realm.