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Shareholder Resolutions and Access to Medications

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20.1 INTRODUCTION

The unaffordability of prescription medications remains an issue of moral and practical importance. To address this issue, scholars, politicians, and activists dominantly focus on "external" regulation – that is, the public law tools of legislative and regulatory reform, such as the Inflation Reduction Act's (IRA) Medicare provisions.[1] "Internal" governance dynamics of drug manufacturers and associated opportunities for private ordering, however, are underexamined aspects of access to medications (A2M) discussions.[2]

A standard narrative blames high drug prices on shareholders and corporate fiduciary obligations to "maximize profits."[3] Yet, *for nearly half a century*, shareholders of large drug manufacturers have put forward shareholder resolutions, or proposals, raising concerns about drug manufacturers' pricing practices. Resolutions are submitted in accordance with regulations under the Securities Exchange Act[4] and are a tool uniquely available to shareholders. Resolutions have demanded pricing

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[1] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

[2] Carly J. Goeman, The Price Isn't Right: Shareholder Proposals as Opportunities for Institutional Investors to Restore Firm Value and Reduce Pharmaceutical Prices, 2017 Colum. Bus. L. Rev. 748 (2017); Rebecca E. Wolitz, A Corporate Duty to Rescue: Biopharmaceutical Companies and Access to Medications, 94 Ind. L.J. 1163 (2019). Compare Yaniv Heled et al., Why Healthcare Companies Should Be(Come) Benefit Corporations, 60 B.C. L. Rev. 73, 78 (2019).

[3] Wolitz, supra note 2, at 1176.

[4] 17 C.F.R. § 240.14a–8 (2023).

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restraint, transparency and reporting about how drug prices are set, and justifications for a range of activities.

These shareholder efforts may not unseat the standard narrative but do add complexity. Not all shareholders accept the serious externalities imposed by drug manufacturers' pricing practices. Moreover, shareholder proposals raise existential questions about corporate purpose and faithful agency. Discordance may exist between what drug manufacturers say and what they do when it comes to being patient centric. Further, drug manufacturers often seek to exclude resolutions or issue statements in opposition.

This chapter asks: can shareholder efforts achieve public-spirited reform? What are shareholder resolutions' relative strengths and weaknesses as compared with public law efforts? Are shareholder proposals uniquely well-suited to certain aspects of A2M problems?

Ultimately, shareholder proposals can be an important part of a multi-prong approach that complements "external" legislative efforts. They may also have purchase for overlapping governance matters perhaps better suited to private ordering. Yet, as this chapter shows, shareholder resolutions confront several limitations, and the pursuit of A2M resolutions may be more an opportunity of necessity than choice.[5]

This essay proceeds as follows. Section 20.2 provides background on shareholder resolutions and applicable law. Section 20.3 turns to drug-pricing and A2M proposals, tracing their evolution and then focusing on three kinds of proposals: executive compensation, mission misalignment with political spending, and patenting practices. Section 20.4 reflects on and analyzes themes from these shareholder efforts to address the main questions identified above. Section 20.5 concludes.

20.2 SHAREHOLDER RESOLUTIONS IN A NUTSHELL

A corporation's board is endowed with the power to manage the corporation's business and affairs.[6] Historically, with the separation of ownership and control, shareholders though nominal owners have enjoyed limited control rights.[7] Shareholder voting is one important vehicle for participation in corporate governance. Under state law, shareholders typically have rights to vote on director elections and major transactions. They can also make "proposals on a variety of issues,

[5] See Chapter 1 in this volume.

[6] Del. Code Ann. tit. 8, § 141(a) (West 2020).

[7] Stephen M. Bainbridge, Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal, 85 Fordham L. Rev. 705, 707 (2016). But see Harwell Wells, A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century, 67 Fla. L. Rev. 1033, 1098 (2015) (shareholder power ebbs and flows).

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including general corporate governance and social interest matters."[8] Shareholder proposals have been analogized to state constitutional ballot initiatives.[9] Shareholder proposals, however, are typically advisory. They are opportunities for shareholders to communicate their preferences.[10]

For public companies, shareholder proposals are subject to federal securities law, which regulates their default inclusion on the corporation's proxy materials at the corporation's expense.[11] As one might imagine, however, not every shareholder proposal must be included. The U.S. Securities and Exchange Commission (SEC) makes case-by-case exclusion determinations,[12] and proposals must clear multiple hurdles. For instance, among other eligibility and procedural requirements, proposals have a word limit and only shareholders holding securities for specified continuous lengths of time and value can submit a proposal.[13]

Regulations further permit a company to exclude a proposal if it qualifies under one of the enumerated substantive exclusions. The ordinary business exclusion – exclusion based on a proposal "deal[ing] with a matter relating to the company's ordinary business operations"[14] – is among the most popular and contentious. This exclusion's rationale is to embed and be deferential to "the bedrock state corporate law principle" that a firm's ordinary business operations is the proper purview of directors and officers and not shareholders.[15]

Drug manufacturers are consistently resistant to drug-pricing proposals,[16] and the ordinary business exclusion is a commonly sought refuge.[17] That said, though some proposals have been ensnared by this exclusion, the SEC has determined that many drug-pricing and A2M proposals cannot be excluded from proxy materials on this basis because they transcend such matters.[18] This is an important exception to an otherwise excludable proposal: Even if a proposal *relates* to a company's ordinary business, the proposal *may not be excluded* if it focuses on "sufficiently significant

[8] Paul Rose, Shareholder Proposals in the Market for Corporate Influence, 66 Fla. L. Rev. 2179, 2186 (2014).
[9] Id. at 2185–86.
[10] Id. at 2186–87; 17 C.F.R. § 240.14a–8(a) (2023).
[11] 17 C.F.R. § 240.14a–8 (2023); see also Alan R. Palmiter, The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation, 45 Ala. L. Rev. 879, 893–95 (1993–94).
[12] See, e.g., Palmiter, supra note 11, at 905 n.112.
[13] 17 C.F.R. § 240.14a–8 (2023).
[14] 17 C.F.R. § 240.14a–8(i)(7) (2023).
[15] Bainbridge, supra note 7, at 720; see Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29107 (May 28, 1998) (amending 17 C.F.R. § 240.14a–8).
[16] See, e.g., Goeman, supra note 2, at 759.
[17] 17 C.F.R. § 240.14a–8(i)(7) (2023).
[18] See, e.g., Goeman, supra note 2, at 768; Jill E. Fisch, From Legitimacy to Logic: Reconstructing Proxy Regulation, 46 Vand. L. Rev. 1129, 1158 (1993).

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social policy issues."[19] Proposals that raise such issues "transcend the day-to-day business matters" and are "appropriate for a shareholder vote."[20]

The ordinary business exclusion is highly relevant to drug-pricing proposals, but it is one among many exclusions comprising an intricate system. Thus, there are two big-picture points to highlight among these preliminaries. First, as a practical matter, when it comes to A2M proposals, as with any proposal, proponents must navigate these regulations with skill and strategy. Misjudgment of support or missteps in one proxy season can impact not just an individual proposal but the inclusion of future proposals as well.[21]

Second, federal proxy rules have empowered shareholders to take a more active role in overseeing corporate conduct through "shareholder democracy."[22] Contested shareholder proposals involve different factions of the corporate ecosystem vying for power with a federal agency inserting itself as arbiter over whether a proposal is sufficiently meritorious to be put to a shareholder vote.[23] However, so long as an investor meets regulatory criteria, investors of all kinds – from the individual "gadfly" to large institutional investors – have the opportunity for their voices to be heard.[24]

20.3 DRUG-PRICING AND A2M PROPOSALS

Since at least the 1970s, shareholders have sought proxy access to raise concerns regarding drug-pricing and A2M. Over the years, shareholders have run the gamut from small retail investors to large institutional shareholders.[25] Proponents have included individuals,[26] health systems,[27] asset managers,[28] social justice

[19] Amendments to Rules on Shareholder Proposals, supra note 15, 29108.

[20] Id. Interpretation and application of this exception is fraught. See, e.g., Bainbridge, supra note 7.

[21] 17 C.F.R. § 240.14a–8(i)(12) (2023); see Goeman, supra note 2, at 770.

[22] See, e.g., Palmiter, supra note 11, at 879.

[23] See generally id. Submission of proposals can yield three outcomes: inclusion, withdrawal, or omission. Kobi Kastiel & Yaron Nili, The Giant Shadow of Corporate Gadflies, 94 S. Cal. L. Rev. 569, 580–81 (2021).

[24] Kastiel & Nili, supra note 23, at 572; Rose, supra note 8, at 2197.

[25] Proponents often are religiously affiliated.

[26] See, e.g., Gilead Sciences, Inc., 2014 Proxy Statement 34 (2014), https://www.sec.gov/Archives/edgar/data/882095/000119312514112507/d690615ddef14a.htm (proposal submitted by Mr. Michael Weinstein).

[27] See, e.g., Eli Lilly and Co., 2023 Proxy Statement 95–96, 101 (2023), https://www.sec.gov/Archives/edgar/data/59478/000005947823000120/lly-20230317.htm (proposals submitted by Trinity Health and CommonSpirit Health).

[28] See, e.g., AbbVie Inc., 2023 Proxy Statement 83 (2023), https://www.sec.gov/Archives/edgar/data/1551152/000155837023004204/abbv-20230505xdef14a.htm (proposal submitted by Friends Fiduciary Corporation); Johnson & Johnson, 2023 Proxy Statement 136 (2023), https://www.sec.gov/Archives/edgar/data/200406/000020040623000023/jnj-20230313.htm (proposal submitted by Mercy Investment Services, Inc.).

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organizations,[29] and pension plans.[30] During the 2023 proxy season, for example, lead filers have included Friends Fiduciary Corporation, Mercy Investment Services, Trinity Health, Oxfam, the Service Employees International Union, and the Boston Common ESG Impact US Equity Fund.[31]

A2M resolutions commonly express twin themes of concern. First, proposals register concern for how a drug manufacturer's pricing and related decisions impact shareholders' investments, given their invitation for regulatory response.[32] Second, they note concern for potential negative externalities imposed upon patients and society.[33]

Historically, resolutions have sought price-setting information and requested pricing "restraint."[34] A pre-Hatch-Waxman Act 1976 proposal, for instance, expressed concerns over disparities between US and foreign pricing and generics access. This proposal requested that shareholders receive "[a] breakdown of prices of and corporate profits from antibiotics sold in five representative countries . . ."[35] It also sought information about the corporation's anti-substitution law lobbying.[36]

Likewise, in the early 1990s, citing an environment with "little market pressure on manufacturers to set fair and reasonable prices," the imposition upon patients of "cruel choice[s]," and skepticism of management's claims that research costs were causing increasing prices, shareholders of Eli Lilly and Company requested that the Board "seek input on pricing policy from consumer groups, and adopt a policy of price restraint . . ."[37] According to shareholders, Eli Lilly's excessive pricing was "bringing us to the brink of federal action to control drug prices."[38] Other proposals sought price-setting transparency through a report on "overall pricing policy."[39]

[29] See, e.g., Merck & Co., Inc., 2023 Proxy Statement 91–92 (2023), https://www.sec.gov/Archives/edgar/data/310158/000119312523089525/d277607ddef14a.htm (proposal submitted by Oxfam America, Inc.).

[30] See, e.g., Eli Lilly and Co., supra note 27, at 91 (proposal submitted by SEIU); Vertex Pharmaceuticals Incorporated, 2015 BL 116062 (Feb. 25, 2015) (proposal submitted by UAW Retiree Medical Benefits Trust); Eli Lilly and Co., SEC No-Action Letter, 2007 BL (Jan. 5, 2007) (proposal submitted by Minnesota State Board of Investment).

[31] See, e.g., AbbVie Inc., supra note 28; Johnson & Johnson, supra note 28; Eli Lilly and Co., supra note 27; Merck & Co., supra note 29; Regeneron, 2023 Proxy Statement 106 (2023), https://www.sec.gov/Archives/edgar/data/872589/000130817923000728/lregn2023_def14a.htm (proposal submitted by Boston Common ESG Impact US Equity Fund).

[32] See, e.g., Ed Silverman, SEC Greenlights Shareholder Proposals for Several Big Drug Makers over Pricing, STAT (Mar. 26, 2018), https://www.statnews.com/6harmalot/2018/03/26/sec-shareholders-drug-prices.

[33] See, e.g., AbbVie Inc., supra note 28.

[34] Cf. Goeman, supra note 2, at 752.

[35] Schering-Plough Corp., SEC Staff No-Action Letter, 1976 BL [Sisters Sorrowful Mother-Mgmt Serv.], *1–2 (Mar. 4, 1976).

[36] Id.

[37] Eli Lilly and Co., SEC Staff No-Action Letter, 1993 BL [Wadsworth], *5–6 (Feb. 25, 1993).

[38] Id. at *6.

[39] Eli Lilly and Co., SEC Staff No-Action Letter, 1993 BL [United Senior Action], *4 (Dec. 23, 1992).

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Shareholders articulated that Eli Lilly should act with "the highest standards of responsibility and fairness to the consumers who rely on our products."[40] Given enduring opacity, proposals from the 2010s continued to seek transparency about numerous price-setting factors.[41] Recently, with COVID-19 vaccines, shareholders have inquired about the role of federal funding.[42]

Recent proxy seasons include a multitude of proposals pursuing new directions. Some raise questions about management's incentives. Others, arguably, raise existential questions about drug manufacturers' underlying corporate purpose and guiding norms. Three approaches are briefly discussed below. These proposals regard (1) the links between drug-pricing and executive compensation incentives; (2) the potential misalignment between corporate mission, values, and political spending; and (3) reporting on patenting procedures.

20.3.1 *Executive Compensation*

The size and setting of executive compensation is a contentious topic that has not escaped Congressional notice or the public's attention. Moderna, for instance, generated headlines when its CEO made US$398 million in 2022.[43]

Large salaries juxtaposed with A2M challenges generate a slew of questions, and generally, accross sectors, there has been "growing demand for executive compensation metrics linked to stakeholder welfare."[44] Linking executive compensation in this manner is thought to benefit various non-shareholder stakeholders (such as patients) and address the critique of stakeholderism that managers lack incentives to act in the interests of these non-shareholder groups.[45]

Recent drug-pricing proposals reflect these broader trends. Some proposals express concern about A2M and how these issues intersect with executive

[40] Id. at *3–4.

[41] See, e.g., Gilead Sciences, Inc., SEC No-Action Letter, 2015 BL 116210, *22 (Feb. 23, 2015).

[42] Pfizer, Moderna, Johnson & Johnson, Merck Shareholders Must Vote to End Unequal Access to COVID-19 Vaccines and Medicines, Oxfam (Apr. 27, 2023), https://www.oxfamamerica.org/press/press-releases/pfizer-moderna-johnson-johnson-merck-shareholders-must-vote-to-end-unequal-access-to-covid-19-vaccines-and-medicines/ [https://perma.cc/RDL5-L5U5]; Johnson & Johnson, supra note 28, at 130.

[43] Bob Herman & Damian Garde, Moderna CEO Made $398 Million in 2022, but Still Pledges to Give Most to Charity, STAT News (Mar. 17, 2023), https://www.statnews.com/2023/03/17/moderna-stephane-bancel-compensation/ [https://perma.cc/T2JG-DPD9]; Daniel Gilbert, Moderna's Billionaire CEO Reaped Nearly $400 Million Last Year. He Also Got a Raise, Wash. Post (Apr. 29, 2023, 6:00 AM), https://www.washingtonpost.com/business/2023/04/29/modernas-billionaire-ceo-reaped-nearly-400-million-last-year-he-also-got-raise/ [https://perma.cc/7TQ9-W36H].

[44] Lucian A. Bebchuk & Roberto Tallarita, The Perils and Questionable Promise of ESG-Based Compensation, 48 J. Corp. L. 37, 44 (2022).

[45] Id. at 42. "Stakeholderism" is a view of corporate purpose that holds directors should serve non-shareholder constituencies as well.

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compensation.[46] Consequently, proposals have sought greater information about how drug-pricing strategies (and associated risks) figure into the pay incentives for senior executives to be provided through a shareholder report. A proposal submitted to Pfizer, Inc., is illustrative:

> RESOLVED, that shareholders of Pfizer, Inc. ("Pfizer") urge the Compensation Committee … to report annually to shareholders on the extent to which risks related to public concern over drug pricing strategies are integrated into Pfizer's incentive compensation policies, plans and programs ("arrangements") for senior executives. The report should include, but need not be limited to, discussion of whether (i) incentive compensation arrangements reward, or not penalize, senior executives for adopting pricing strategies, or making and honoring commitments about pricing, that incorporate public concern regarding prescription drug prices; and (ii) such concern is considered when setting financial targets for incentive compensation arrangements.[47]

The supporting statement identified concerns about the association between drug-pricing practices such as chronic price increases (a "key risk") and short-term financial performance as undermining long-term value creation.[48] Shareholders noted that the Trump administration singled out Pfizer for these increases, writing "[i]n our view, excessive dependence on drug price increases is a risky and unsustainable strategy, especially when price hikes appear to drive large senior executive payouts."[49] The disclosures sought would permit shareholders to "better assess the extent to which compensation arrangements encourage senior executives to responsibly manage risks relating to drug-pricing and contribute to long-term value creation."[50]

Pfizer sought to omit this proposal from its proxy materials under the ordinary business exclusion but was unsuccessful.[51] According to the SEC, disclosure of how drug-pricing risks "are integrated into senior executive compensation decisions[] transcends ordinary business matters" as drug-pricing strategy is a significant issue,

[46] An earlier example is a 2014 proposal requesting that the Board "adopt a policy that incentive compensation for the Chief Executive Officer … should include non-financial measures based on patient access to the Company's medicines." Gilead Sciences, Inc., supra note 26, at 34.

[47] Pfizer Inc., 2019 Proxy Statement 115 (2019), https://www.sec.gov/Archives/edgar/data/78003/000093041319000953/c93082_def14a.htm. See also Abbvie Inc., SEC Staff No-Action Letter, 2019 BL 74951, *17 (2019); Johnson & Johnson, SEC Staff No-Action Letter, 2019 BL 74937, *19 (2019) (each with substantially similar proposals).

[48] Pfizer Inc., supra note 47, at 115.

[49] Id.

[50] Id.

[51] Pfizer Inc., SEC Staff No-Action Letter, 2019 BL 75180, *1–2.

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and the proposal further failed to micromanage the company.[52] Though this proposal garnered a significant response (40.2 percent approved), it did not pass.[53]

20.3.2 *Purpose and Politics*

Another area of recent focus is the congruency of political spending with purported corporate purpose. Drug manufacturers often have lofty, public-spirited, patient-centric mission statements.[54] AbbVie's website, for instance, says: "our life's work is to improve lives."[55] Likewise, Pfizer states: "[o]ur purpose ensures that patients remain at the center of all we do."[56]

However, in 2022, pharmaceutical and health products companies spent a record US$372 million on federal lobbying, with most aimed at undermining the IRA's efforts to lower drug prices.[57] After PhRMA (a trade association), which spent US$29.2 million, Pfizer was the second-largest individual spender at US$14.9 million.[58] Pfizer's spending exceeded previous years and occurred when the COVID-19 vaccine maker planned to quadruple the vaccine's price.[59]

Thus, reconciling what drug manufacturers say and how they act has been the subject of a series of proposals. A proposal filed with Gilead, for instance, provided:

> RESOLVED: Shareholders request that the Board of Directors commission and publish a third party review within the next year . . . of whether Gilead Sciences, Inc. lobbying activities (direct and through trade associations) align with its Vision statement, "To create a healthier world for all people" and in particular its Policy Position Statement that "the price of medicines should never be a barrier to access, and we work domestically and globally to ensure that patients who need our products are able to obtain them." The Board of Directors should report on how

[52] Id. at *2–3.

[53] See Pfizer Inc., Current Report (Form 8-K) (Apr. 29, 2019), https://www.sec.gov/Archives/edgar/data/78003/000007800319000018/a8_kxvoting2019.htm.

[54] See Elizabeth Pollman, The History and Revival of the Corporate Purpose Clause, 99 Tex. L. Rev. 1423 (2021) (observing contemporary charters stating "for any lawful purpose" have pushed mission statements elsewhere).

[55] Positions & Views, Abbvie, https://www.abbvie.com/who-we-are/our-principles/positions-views.html [https://perma.cc/SF22-AZHK] (last accessed Oct. 9, 2024).

[56] Our Purpose, Pfizer, https://www.pfizer.com/about/purpose [https://perma.cc/77MR-HDH5] (last accessed Aug. 3, 2023).

[57] Inci Sayki, Despite Record Federal Lobbying Spending, the Pharmaceutical and Health Product Industry Lost Their Biggest Legislative Bet in 2022, Open Secrets (Feb. 2, 2023, 1:58 PM), https://www.opensecrets.org/news/2023/02/despite-record-federal-lobbying-spending-the-pharmaceutical-and-health-product-industry-lost-their-biggest-legislative-bet-in-2022/ [https://perma.cc/Y9VD-DN5U]. Drug manufacturers are now litigating the IRA.

[58] Id.

[59] Id.

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it addresses the risks presented by any misaligned lobbying and the company's plans, if any, to mitigate these risks.[60]

The supporting statement noted Gilead's contributions to PhRMA, and that its CEO sat on PhRMA's board.[61] According to these shareholders, however, PhRMA has "systematically opposed" any attempt to improve A2M through drug-pricing reforms.[62] In a similar proposal filed with Eli Lilly,[63] shareholders observed that given the company's "extensive direct and indirect lobbying *against* measures that would make drugs more affordable, investors need to better understand the balance Lilly is striking between its commitments to innovation, on the one hand, and access and affordability, on the other."[64] The proposals at Gilead and Eli Lilly each failed to pass but received 49.8 percent and 22.4 percent of votes, respectively.[65]

20.3.3 *Patenting Practices*

A2M resolutions periodically raise questions about intellectual property policies. Recent proposals have focused on intellectual property and the related issue of anticompetitive conduct.[66] While proposals regarding tech transfer in the context of COVID-19 vaccines are noted later, this section highlights proposals focusing on secondary and tertiary patenting.

Secondary patents – those patents pertaining to a product other than its original active ingredient – and tertiary patents – those pertaining to drug delivery devices – have increasingly caught the attention of academics and policymakers.[67] Not only

[60] Gilead Sciences, Inc., 2022 Proxy Statement 90 (2022), https://www.sec.gov/Archives/edgar/data/882095/000120677422000832/gild3988061-def14a.htm#d3988061a041.

[61] Id.

[62] Id.

[63] Eli Lilly and Co., supra note 27, at 101.

[64] Id. (emphasis added).

[65] Gilead Sciences, Inc., Current Report (Form 8-K) (May 5, 2022), https://www.sec.gov/Archives/edgar/data/882095/000110465922056435/tm2213708d1_8k.htm; Eli Lilly and Co., Current Report (Form 8-K) (May 4, 2023), https://www.sec.gov/Archives/edgar/data/59478/000005947823000165/lly-20230501.htm. Notably, under Gilead's rules, abstentions count as a vote against, otherwise the "for" votes would have received 50.2 percent of the votes. Gilead Sciences, Inc., 2022 Proxy Statement, supra note 60, at 99. While precatory, if a proposal receives a majority of "shares cast," proxy advisors may recommend voting against a board that fails to implement it. ISS, United States: Proxy Voting Guidelines Benchmark Policy Recommendations 13 (2023), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.

[66] See, e.g., Pfizer Inc., SEC Staff No-Action Letter, 2022 BL 80621 (Mar. 8, 2022); AbbVie Inc., SEC Staff No-Action Letter, 2022 BL 88092 (Mar. 11, 2022); Eli Lilly and Co., SEC Staff No-Action Letter, 2022 BL 80626 (Mar. 7, 2022).

[67] Reed F. Beall & Aaron S. Kesselheim, Tertiary Patenting on Drug-Device Combination Products in the United States, Nature Biotech. (Feb. 6, 2018), https://www.nature.com/articles/nbt.4078.epdf?author_access_token=k19w_aka6yYXhVtkaCGFOdRgNojAjWel9jnR3ZoTvoMGOAdGITA-e4stuwIqLoZGEo–17DL5n2Qg8u7csdohGlFGwUWdjvieJtiDwzfoldY3_E4HS6rf7Ybpkcyvl2u [https://perma.cc/JQ97–6TKN].

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do these patents extend a drug manufacturer's market power by delaying generic competition, but such patents can also be weaker, meaning they are more frequently invalidated.[68] Concerns about drug manufacturers' utilization of these practices to stymie competition motivated President Biden to direct the U.S. Food and Drug Administration and the Patent and Trademark Office to collaborate on addressing these issues.[69]

Concurrent to these regulatory efforts, shareholders requested that drug manufacturers report on their patenting practices and how concern for A2M is incorporated. A proposal filed with AbbVie is illustrative:

> RESOLVED, that shareholders of AbbVie Inc. ("AbbVie") ask the Board of Directors to establish and report on a process by which the impact of extended patent exclusivities on product access would be considered in deciding whether to apply for secondary and tertiary patents The report on the process should be prepared at reasonable cost, omitting confidential and proprietary information, and published on AbbVie's website.[70]

The resolution's supporting statement noted that one of AbbVie's products, Humira, had undergone 27 price increases and is protected by 130 patents.[71] The requested report, in the proponents' view, "would ensure that AbbVie considers not only whether it can apply for" these patents "but also whether it should," given the perception of "abusive patenting practices."[72] A significant minority – 28.9 percent – of AbbVie shareholders supported this proposal.[73]

20.4 REFLECTING ON THESE EFFORTS

Submission of shareholder proposals has increased over time, as has the weight they hold among management and boards.[74] Shareholder proposals today are considered a "powerful tool" for influencing corporate governance and conduct.[75] Yet, what makes a shareholder proposal "successful"? For A2M advocates, what are its relative

[68] Doni Bloomfield & Aaron S. Kesselheim, Biden Can Lower Drug Prices without Congress Doing Anything, Wash. Post (Jan. 5, 2021), https://www.washingtonpost.com/outlook/2021/01/05/drug-prices-patent-office-generics-biden/ (referencing work of Michael Frakes & Melissa Wasserman).

[69] Exec. Order No. 14,036, 3 C.F.R. 609 (2022); FDA, Letter from Janet Woodcock, M.D., Acting Comm'r of Food and Drugs, to Andrew Hirshfield, Performing the Functions and Duties of the Under Sec'y of Comm. for Intell. U.S. Pat. & Trademark Off. (Sept. 10, 2021), https://www.fda.gov/media/152086/download [https://perma.cc/X5UR-VPFQ].

[70] AbbVie Inc., supra note 28, at 83.

[71] Id.

[72] Id.

[73] AbbVie Inc., Current Report (Form 8-K) (May 10, 2023), https://www.sec.gov/Archives/edgar/data/1551152/000110465923058520/tm2315162d1_8k.htm.

[74] See Rose, supra note 8, at 2191.

[75] Kastiel & Nili, supra note 23, at 579.

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strengths and weaknesses as a reform tool? Are there aspects of these issues that shareholders are uniquely positioned to address through proposals?

20.4.1 *What Counts as Success?*

If "success" means getting onto the proxy *and* getting a majority vote, then drug-pricing and A2M shareholder proposals appear a fruitless exercise. No such proposals put to a vote at the 2023 annual meetings, for instance, appear to have passed.[76] A majority vote, however, is a sufficient but not necessary condition for success.

Shareholder proposals are attractive for their ability to facilitate direct corporate engagement. Indeed, the filing of resolutions often occurs when initial dialogues break down.[77] Withdrawn proposals and proposals that secure a significant, albeit non-majority vote can also signal success as shareholder proposals offer important leverage with management and the board.[78] The value of shareholder resolutions thus may most reside not in any "'short-term voting results,'" but in their "long-term ability" to foster dialogue that generates reassessment and reform.[79]

Regarding withdrawn proposals, parties negotiate after resolution filing. Through these negotiations, shareholders might be able to procure satisfactory concessions. As one shareholder explains, resolution withdrawal "typically means" dialogue "about moving the company into a better position; the company has agreed to further discussions; or the company has made changes in response to the shareholder request."[80]

Likewise, if a proposal attracts significant minority support, corporations often view this as an important signal.[81] With "say-on-pay" votes, for example, if 20 to 30 percent of shareholders object, companies will "reconsider and revise their compensation packages."[82] Many drug-pricing and A2M proposals have attracted substantial minority votes, including those discussed in this essay. For these reasons, drug-pricing resolutions appear to enjoy some degree of success.

[76] Rebecca E. Wolitz, Drug Pricing and Access to Medications Shareholder Proposals for 2023 Annual Meetings (Aug. 6, 2023) (hand-collected data on file with author).

[77] See, e.g., Shareholder Resolutions, Mercy Investment Services, Inc., https://mercyinvestmentservices.org/our-approach/shareholder-advocacy/shareholder-resolutions/ (last accessed Aug. 3, 2023).

[78] See, e.g., Goeman, supra note 2, at 784–85 (discussing the significance of withdrawal as indicating success).

[79] Goeman, supra note 2, at 785.

[80] Why We Withdraw Resolutions, Mercy Investment Services, Inc., https://www.mercyinvestmentservices.org/why-we-withdraw-resolutions.aspx [https://perma.cc/G3W6-XLGQ] (last accessed Aug. 3, 2023).

[81] Kastiel & Nili, supra note 23, at 626–27.

[82] Id.

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20.4.2 *Strengths and Weaknesses*

As a tool for improving A2M, shareholder proposals have comparative and intrinsic strengths and weaknesses. Comparatively, legislation is often the reform tool of choice. Yet, legislative reform frequently proceeds at a glacial pace, stymied by gridlock and special interests.[83]

Shareholder proposals, by contrast, may be nimbler, permitting relatively fast and direct engagement with drug manufacturers. Corporations pay attention to their shareholders, and so long as a proposal does not qualify for an exclusion, the issue *must* go on the proxy. Following an annual cadence, shareholder proposals are generally filed in the fall.[84] If there is friction with the company, SEC no-action letters are sought in winter.[85] The season concludes with voting on proposals at annual general meetings in the spring.[86] Rather than waiting decades for legislative reform, change could occur within a year.

Legislative reform and shareholder proposals can be complementary strategies. Shareholder proposals can, for instance, mirror legislative agendas. Consider California's passage of SB 17 in 2017. State legislative agendas at the time included drug price transparency laws, and SB 17 mandates notice and the collection of information pertaining to certain prescription drug price increases.[87] Concurrent to this legislative activity, shareholder resolutions were advanced at numerous drug manufacturers seeking corporate reporting on "product price increases, their rationale, and associated risks."[88] As another example, shareholder proposals focusing on potential anticompetitive activity and corporate patenting practices reflect similar themes of present interest to legislators and regulators.

Further, shareholder proposals – even when they mirror topics of external regulatory interest – are not merely redundant. They are symbolically important as the messenger's identity matters. An intrinsic strength of A2M shareholder proposals is that their critique of drug manufacturers' conduct is bound up with corporate self-determination. It matters that at least some shareholders are concerned about these

[83] States may be more agile than the federal government but must navigate additional barriers. Rebecca E. Wolitz, States, Preemption, and Patented Drug Prices, 52 Seton Hall L. Rev. 385 (2021).

[84] Laura D. Richman & Michael L. Hermsen, Proxy Season Legal Update, Harv. L. Sch. F. on Corp. Governance (Oct. 16, 2017), https://corpgov.law.harvard.edu/2017/10/16/proxy-season-legal-update/ [https://perma.cc/23NA-XLCG].

[85] See id.

[86] Laura D. Richman & Michael L. Hermsen, 10 Tips for Upcoming Annual Shareholder Meetings, Harv. L. Sch. F. on Corp. Governance (Apr. 11, 2018), https://corpgov.law.harvard.edu/2018/04/11/10-tips-for-upcoming-annual-shareholder-meetings/ [https://perma.cc/8WSX-JVNP].

[87] Rebecca E. Wolitz, Litigation Watch: California's Drug Pricing Transparency Bill SB-17, Stan. L. Sch. (Jan. 6, 2018), https://law.stanford.edu/2018/01/06/litigation-watch-californias-drug-pricing-transparency-bill-sb-17/ [https://perma.cc/APP3-MDH5].

[88] Wolitz, supra note 2, at 1211.

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corporations' conduct. Even if the public-minded end goal is the same as would-be legislation, the questions posed by shareholders versus non-shareholders concerned about A2M have an inherently different orientation. Shareholders can ask *themselves* and those who serve the corporation: who do we want to be as a company? What norms, values, and codes of conduct ought we to comply with? Even if, for instance, the law permits secondary patenting, should we participate? These questions are distinct from those of the regulator charged with determining which constraints best serve the public.

Consequently, shareholder proposals may be uniquely positioned to address those aspects of A2M challenges overlapping more squarely with internal governance questions.[89] Some view shareholder proposals as an economic accountability mechanism and agency-cost corrective.[90] Similar accountability issues, however, arguably could be at play for nonfinancial (or, not purely financial) considerations as well. If shareholder proposals are conceived as a tool to discipline the relationship between principals and agents, then they would appear to be particularly well targeted to those places where A2M challenges intersect with matters seemingly more appropriate for private ordering. There may be no "pure" such examples. Executive compensation proposals, however, might serve as candidates for further consideration. Given firm specificity, providing individualized incentives to executives to improve A2M may be more appropriately the dominion of shareholders for some degree of oversight rather than regulators.[91]

The distinct orientation of these considerations intersects with three weaknesses of shareholder proposals as a mechanism for drug-pricing reform.[92] First, to be included in the proxy, shareholder resolutions must navigate a complex regulatory scheme sensitive to the division of labor between boards and shareholders. Thus, proposals frequently take the form of requesting increased transparency through a report. While increased transparency and information gathering are crucial, those seeking immediate bold reforms might view such constraints as tepid, rendering this tool substantively weaker. Second, in contrast to external regulation, this vehicle is only available to shareholders and reform takes place company by company. While there appear to be coordinated efforts, shareholder proposals are not an efficient tool for systemic, industry-wide regulation. There are differences in how corporations react to such proposals and distinct shareholder voting patterns on nearly identical proposals.[93] On proposals for reporting on political spending, for example, the

[89] The line between "social" and "governance" proposals can be blurry. See, e.g., Rose, supra note 8, at 2208.

[90] Id. at 2217.

[91] There are considerable criticisms, however, of this approach. See, e.g., Bebchuk & Tallarita, supra note 44, at 40–42.

[92] Additionally, the SEC's no-action letter determination is not devoid of politics.

[93] See, e.g., Goeman, supra note 2, at 782 (tabulating voting on 2015 proposals). Some corporate engagement, further, might forestall filing a proposal.

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proposal at Gilead received 49.8 percent of votes and Eli Lilly received 22.4 percent. Regarding individualized responses, with secondary patenting proposals filed with AbbVie and Amgen, both companies initially sought SEC no-action letters. The AbbVie resolution went to a vote, but the Amgen resolution was "[w]ithdrawn due to agreement with company."[94]

The third weakness of shareholder proposals as a reform tool is that to the extent the goal is *societal* drug price reform in the public interest, shareholder proposals offer an awkward fit. Although pragmatists might think, "well, whatever gets the job done," there are significant underlying questions of allegiance, authority, and expertise. Shareholders of drug companies are generally private actors with divided interests; they are not elected officials charged with protecting and promoting the public good. That the lives, health, and fate of so many should depend upon a shareholder vote is unsettling, if not inappropriate.

The example of COVID-19 vaccine equity highlights this point. Given that many throughout the world have lacked access to COVID-19 vaccines, Oxfam submitted proposals to Moderna and Pfizer requesting feasibility studies of transferring pertinent intellectual property.[95] Such knowledge transfers would ideally expand worldwide manufacturing capacity and save lives.[96] In an "unprecedented" move, the WHO Director-General even backed the Moderna resolution and spoke on its behalf at the annual meeting.[97] Though a significant contingency (24 percent and 27 percent of shareholders at Moderna and Pfizer, respectively) supported the proposals, the resolutions failed.[98]

Though these losses seemed like a public health failure, they put pressure on the tool itself.[99] As Els Torreele notes, despite there being well-meaning investors, "the key issue is that pharmaceutical companies and their investors should not . . . hav[e] the power to decide about public health issues . . . It painfully shows, once again, how financial interests pursued by private companies, investors, asset managers, and speculators eclipse decision-making informed by public health experts, even during

[94] Shareholder Resolutions: Amgen, Inc., Mercy Investment Services, Inc., https://www.mercyinvestmentservices.org/shareholder-resolutions-detail.aspx?bid=400815 [https://perma.cc/9E2B-KDB3] (last accessed Aug. 3, 2023).

[95] Jonathan Josephs, Investors Lose Vote to Share Covid Know-How, BBC (Apr. 29, 2022), https://www.bbc.com/news/business-61262065 [https://perma.cc/93XD-22ZD].

[96] Els Torreele, Global Health Should Not Be Determined by Pharma Investors and Shareholders, STAT (May 3, 2022), https://www.statnews.com/2022/05/03/pharma-investors-shareholders-should-not-determine-global-health/ [https://perma.cc/4FTB-V37E].

[97] Josephs, supra note 95.

[98] Id. Proxy advisor ISS supported these proposals (Glass Lewis only supported Moderna). Hannah Kcuhler, Pfizer and Moderna Urged to Share Vaccine Technology With Developing World, Irish Times (Apr. 19, 2022), https://www.irishtimes.com/business/health-pharma/pfizer-and-moderna-urged-to-share-vaccine-technology-with-developing-world-1.4856720 [https://perma.cc/Z4ZH-QDY9].

[99] Torreele, supra note 96.

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the biggest global health crisis of our lifetime."[100] In other words, relying on shareholder proposals to pursue A2M reform emerges from a context of failed public institutions and failed framing. If public institutions charged with protecting and promoting the interests of each of us to equitable A2M were successful, there would be no need for private actor intervention. Patients would not look toward the private "largess" of some shareholders to be drug-pricing reformers and rely on their talents to convince the majority of shareholders who are not.

20.5 CONCLUSION

Matters of important public policy should not be vulnerable to the whims of shareholders. While this background critique looms large, the foregrounded question is what shareholder resolutions offer by way of drug-pricing and A2M reform. Despite indications of some general shareholder population ambivalence about A2M, given voting outcomes and the limitations discussed above, shareholder proposals have many comparative and intrinsic strengths. They add important voices seeking improved A2M and may be particularly well suited to address certain corners of these issues. At the very least, these shareholder efforts complement external reforms, and the existence of such proposals signals a more complicated narrative of shareholders' relationship to drug-pricing challenges.

[100] Id.

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