THE POLICY OF DETERMINING SIGNIFICANT POLICY UNDER RULE 14A-8(I)(7)

I. INTRODUCTION

Shareholders of a publicly traded company have the right under Rule 14a-8 (the Rule) to include their proposals in the company's proxy materials. The presence of thirteen substantive grounds for omitting a proposal, however, limits this authority. "One of the most frequently applied, and controversial [exclusions] to 14a-8 is the [exclusion of] proposals that relate to 'ordinary business' matters."[1] The exclusion presumptively applies to any proposal that implicates the operations of the company.

The public policy exception has somewhat reduced the impact of the exclusion for "ordinary business" matters.[2] To the extent that a proposal relates to the company's operations but also raises important issues of public policy, the Securities and Exchange Commission (SEC or Commission) will not grant the requested no action relief. Nonetheless, the SEC's Staff (Staff or Division) has applied the exception in the absence of meaningful and objective standards, resulting in ambiguous and inconsistent interpretations.

This article seeks to examine the long history of the public policy exception to Rule 14a-8(i)(7). The exception appears nowhere in Rule 14a-8 but instead represents an interpretive gloss added by the Commission in 1976. Part II of this article traces the development of the social policy exception through the *Cracker Barrel* controversy. Part III focuses on modern interpretations of the social policy exception and its role in the specific cases of widespread public debate, proposals related to risk, climate change, and guns. Finally, part IV analyzes the exception and suggests some possible reforms.

II. ADMINISTRATIVE HISTORY

A. Development of the Exclusion

The public policy exception to Rule 14a-8 has a tortured history. The SEC added the shareholder proposal Rule in 1942.[3] Shareholders could submit proposals for inclusion in the proxy statement but only if a "proper subject for action."[4] The authority was not intended to permit debate on

1. Patricia R. Uhlenbrock, *Roll out of the Barrel: The SEC reverses its stance on Employment-Related Shareholder Proposals Under Rule 14a-8 —Again*, 25 DEL. J. CORP. L 277, 278 (2000).

2. This exception has also been referred to as the social policy exception and the significant policy exception.

3. In 1942, the shareholder proposal rule was titled "Rule X-14A." Solicitation of Proxies Under the Act, 7 Fed. Reg. 10,655–56 (Dec. 22, 1942).

4. *Id.*

issues of social importance. As the Staff made clear in interpreting the Rule, "'[P]roper subject for action' meant matters relating directly to the affairs of the particular corporation,"[5] and did not include matters of general political, social, or economic nature.[6] In 1952,[7] the Commission amended the Rule to make this interpretation explicit by authorizing the exclusion of proposals submitted "primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes."[8]

In 1954, the SEC added the "ordinary business" exclusion.[9] The exclusion allowed for the omission of proposals that implicated the duties and expertise of management.[10] The change reflected the position of most state incorporation laws that confined "solution[s] of ordinary business problems to the board of directors and place such problems beyond the competence and direction of shareholders."[11] The Commission further reasoned that it was "manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings."[12]

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5. The SEC Today Released An Opinion Of Baldwin B. Bane, Exchange Act Release No. 3638, at *1 (Jan. 3, 1945).

6. *Id.* ("The opinion of the Director interprets the phrase 'proper subject for action' to mean proposals which relate directly to the affairs of the particular corporation and concludes that proposals which deal with general political, social or economic matters are not, within the meaning of the Rule, 'proper subjects for action by security holders.'").

7. When the SEC amended the Rule in 1952, the specific section that would eventually transform into the modern 14a-8(i)(7) was refereed to a "Rule X-14A-7." *Id.*

8. Maya Mueller, *The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments*, 28 STETSON L. REV. 451, 460 n.68 (1998) (citing Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 113–114 (1988) (nothing the SEC codified this new exclusion as Rule 14a-8(c)(1) until 1954 when it became Rule 14a-8(c)(2)). Thereafter, courts deferred to the SEC's determination of proper subject for action, including the prohibition on matters of important public policy. Thus, in *Peck v. Greyhound*, 97 F. Supp. 679, 680 (S.D.N.Y. 1951), the federal court upheld the exclusion of a proposal seeking desegregation of buses as an improper subject for shareholders.

9. When the SEC specifically created the ordinary business exclusion, it was known as X-14A-8(c)(5). Solicitation of Proxies, 19 Fed. Reg. 246, 216 (Jan. 14, 1954). The SEC codified the ordinary business operation exclusion as Rule 14a-8(c)(5).

10. Notice of Proposed Amendment to Proxy Rules, Exchange Act Release No. 4950, at 2 (Oct. 9, 1953) ("In order to relieve the management of the necessity of including in its proxy material security holder proposals which relate to matters falling within the province of the management, it is proposed to amend this Rule so as to permit the omission of any proposal which consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.").

11. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Securities Holders, 47 Fed. Reg. 47,420-01, FN 45 (Oct. 26, 1982) (citing *Hearings on SEC Enforcement Problems Before the Subcommittee of the Senate Committee on Banking & Currency*, 85th Cong., 119 (1957) [hereinafter *Hearings*]). Former SEC Chairman J. Sinclair Armstrong explained the reasons underlying the provision before congress.

12. *Hearings*, *supra* note 11.

Shareholder pressure, including litigation, caused the SEC to rethink Rule 14a-8 and permit the inclusion of proposals involving matters of important public policy.[13] In Campaign GM,[14] shareholders submitted proposals calling for, among other things, the creation of a social responsibility committee. The SEC required inclusion of the proposals.[15] Thereafter, the SEC amended the Rule to permit proposals relating to any "general economic, political, racial, religious, social, or similar cause"[16] unless the proposals were "not significantly related to the business of the issuer or . . . not within the control of the issuer . . . ."[17]

The amendment, however, left the "ordinary business" exclusion unchanged. In 1976, the SEC acknowledged that the Rule had been "frequently used by issuers to exclude proposals that involve[d] matters of considerable importance to issuers and it shareholders."[18] Such use was not "in accord with the purposes for which Section 14(a) of the Exchange Act was enacted."[19] The Commission proposed amendments to the "ordinary business" exclusion that would limit the provision to proposals involving "routine, day-to-day matter[s] relating to the conduct of the ordinary business operations of the issuer."[20] Matters of public policy that did not involve micro managing would be permitted.[21]

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13. In 1970, the court in *Medical Committee for Human Rights v. SEC* (the "Dow Chemical Case") considered the application of the Rule with a critical eye. *See* Med. Comm. for Human Rights v. Sec. & Exch. Comm'n, 432 F.2d 659, 678 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972). There a Dow Chemical shareholder submitted a proposal to impose restrictions on the sale of napalm. The SEC permitted exclusion of shareholder proposal from the Dow Chemical 1969 proxy and the shareholder filed suit. As the D.C. circuit court described, the Rule allowed for the exclusion of "a matter of ordinary business operations properly within the sphere of management expertise and, at the same time," proposals that "clearly had been submitted primarily for the purpose of promoting general political or social causes." Judge Tamm, the author of the opinion, characterized the Rule as "carv[ing] out . . . the general requirement of inclusion, [which could] be construed so as to permit the exclusion of practically any shareholder proposal on the grounds that it is either 'too general' or 'too specific.'" The decision was eventually vacated by the Supreme Court. *See Comm. for Human Rights v. SEC*, 404 U.S. 403 (1972).

14. Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 421, 423 (1971).

15. *Id.* at 427.

16. Proposed Proxy Rules, 36 Fed. Reg. 25,432-02 (Dec. 22, 1971) ("the new proposed provision would apply to all proposals and would not be limited to those dealing with general economic, political, racial, religious, social, or similar causes."). During this time, the 14a-8 (c)(2)(ii) specifically referenced public and social policy issues, rather than the ordinary business exclusion under 14a-8 (c)(5).

17. Solicitation of Proxies, 37 Fed. Reg. 23,178-02, 23,179-02 (Sep. 22, 1972).

18. Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 relating to proposals by Security Holders, 41 Fed. Reg. 29,982, 29,984, at *7 (Jul. 7, 1976).

19. *Id.*

20. *Id.* at *8.

21. *Id.* ("The proposed new subparagraph, however, could not be relied upon to exclude proposals involving important business matters, notwithstanding the fact that such matters generally would relate to the conduct of the issuer's ordinary business operations.").

Ultimately, the Commission did not adopt the proposed revisions and left the "ordinary business" exclusion substantively unchanged.[22] The exclusion, however, would not apply to matters with significant policy, economic, or other implications.[23] As the Commission reasoned, "Economic and safety considerations" would elevate the matters beyond that of ordinary business operations.[24] Under the revised interpretation, the exclusion, for example, would not apply to proposals asking that a "utility company not construct a proposed nuclear power plant."[25]

Although making clear that the public policy implications of a proposal could result in non-exclusion, the release did not set out guidance for applying, or standards seeking to define, the public policy exception. The lack of guidance would become more significant with the increase in the number of proposals that appealed not only to shareholders but also to segments of the public.

The Staff applied the exception to a number of proposals that otherwise involved the company's ordinary business. These included, among others,[26] alternative energy programs,[27] bank lending in low-income

22. Ordinary business exclusion applied to proposals "involving business matters that are mundane in nature and… do not involve any substantial policy or other considerations." Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976). However, the Commission recast the numbers and the ordinary business exclusion became 14a-8(c)(7).

23. *Id.* ("[P]roposals of that nature…that have major implications, . . . will be considered beyond the realm of an issue's ordinary business operations, and future interpretive letters of the Commission's Staff will reflect that view. . . . [T]his should not be construed to mean that the provision will not be available for the omission of proposals that deal with truly "ordinary" business matters. Thus, where proposals involve business matters that are mundane in nature and do not involve any substantial policy or other considerations, the subparagraph may be relied upon to omit them.").

24. Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976).

25. *Id.*

26. *See* The Firestone Tire & Rubber Co., SEC No-Action Letter, 1972 WL 8534, at *17 (Dec. 28, 1976) (rejecting the omission of a proposal relating to executive compensation.; Marianist Society, SEC No-Action Letter, 1983 WL 30732, at *1 (Feb. 1, 1983) (rejecting the omission of a proposal for board selection criteria for military-related contracts and issue a report); McDonald's Corp., SEC No-Action Letter, 1977 WL 14478, at *2 (Mar. 29, 1977) (rejecting omission of a proposal concerning increased violence on television.).

27. *See* The Dayton Power & Light Co., SEC No-Action Letter, 1980 WL 15267, at *4 (Feb. 28, 1980) (rejecting omission of a proposal to implement alternative energy resources to replace nuclear power); Kansas Gas & Elec. Co., SEC No-Action Letter, 1980 WL 15391, at *2 (Mar. 27, 1980) (rejecting omission of a proposal requesting use of "alternative energy sources" in order to take advantage of state law); Cent. Main Power Co., SEC No-Action Letter, 1981 WL 26562, at *2 (Mar. 12, 1981) (rejecting omission of a proposal requesting modifications to nuclear power plants and "development if wind and solar power generated facilities"); Philadelphia Electric Co., SEC No-Action Letter, 1983 WL 30868, at *1 (Feb. 28, 1983) (rejecting omission of a proposal requesting "comprehensive conservation and alternative energy programs").

neighborhoods,[28] charitable giving, [29] and nuclear power plants.[30] Nonetheless, given the subjective and inconsistent standards,[31] changes in approach were not uncommon.[32] Reversals occurred in connection to proposals regarding executive compensation,[33] plant closings,[34] business with the Israeli government,[35] and tobacco products.[36]

Proposals regarding the cessation of production of tobacco products or cigarette advertisement to minors represented an example of this back and forth. Throughout the late 1980s, the Staff permitted the omission of

28. *See* First Union Bancorporation, SEC No-Action Letter, 1980 WL 15623, at *4 (Feb. 7, 1980); Boatmen's Banchshares, Inc., SEC No-Action Letter, 1980 WL 17574, at *1–2 (Feb. 12, 1980).

29. *See* Marriott Corp., SEC No-Action Letter, 1976 WL 14535, at *4 (Sept 17, 1976); W. Point-Pepperell, Inc., SEC No-Action Letter, 1979 WL 14535, at *2 (Oct. 2, 1979); Humana Inc., SEC No-Action Letter, 1979 WL 14436, at *3 (Oct. 10, 1979).

30. *See* Marshall & Illsley Corp., SEC No-Action Letter, 1980 WL 17891, at *2 (Feb. 11, 1980); The Dayton Power & Light Co., SEC No-Action Letter, 1980 WL 15267, at *4 (Feb. 28, 1980); Westinghouse Elec. Corp., SEC No-Action Letter, 1981 WL 26582, at *2 (Jan. 26, 1981).

31. Kevin W. Waite, *The Ordinary Business Operations Exception To The Shareholder Proposal Rule: A Return To Predictability*, 64 FORDHAM L. REV. 1253, 1256 (1995) ("The SEC Staff, through the no-action process, has attempted to define 'substantial policy issue' within the meaning of the ordinary business operations exception. Due to the subjectiveness of the exception, however, the SEC Staff has on numerous occasions reversed its position as to what constitutes a substantial policy issue. . . . Trying to define 'substantial policy' is very difficult, if not impossible, to do. Which policies are substantial will change over time. Further, the point at which a policy issue becomes 'substantial' is unclear. It is a subjective standard.").

32. *Id.*

33. *Id.* n.102107 (1995) (citing Transamerica Corp., SEC No-Action Letter, 1990 WL 285806 (Jan. 10, 1990).

34. *E.g.* Weyerhaeuser Co., SEC No-Action Letter, 1986 WL 67560 (Dec. 19, 1986)(allowing omission of a plant closing proposals); *But c.f.* Pacific Telesis Group, SEC No-Action Letter, 1980 WL 245523 (Feb. 2, 1989) ("In light of recent developments, including heightened state and federal interest in the social and economic implications of plant closing and relocation decisions, the Staff has reconsidered its position with respect to the applicability of Rule 14a–8(c)(7) to proposals dealing generally with the broad social and economic impact of plant closings or relocations. It is the Division's view that such proposals, including the one that is the subject of the Company's letter, involve substantial corporate policy considerations that go beyond the conduct of the Company's ordinary business operations. "); Allis-Chalmers, SEC No-Action Letter, 1983 WL 30919 (Mar. 16, 1983).

35. *E.g.* Am. Tel. & Tel. Co., SEC No-Action Letter, 1991 WL 176529 (Jan. 16, 1991) (finding that the proposal relating to sales to Israel must be included as it falls within a significant policy issue.); *See also* Am. Tel. & Tel. Co., SEC No-Action Letter, 1992 WL 18815 (Jan. 30, 1992) (allowing omission of a proposal relating to business services to the Israeli State).

36. *E.g.* W. Airlines Inc., SEC No-Action Letter, 1983 WL 30968 (Mar. 8, 1983) (allowing omission of proposal for installation of no smoking signs at airports, stating it relates to the ordinary business operations of the company including scheduling, announcing, and advertising of passenger flights); *See also* PSA, Inc., SEC No-Action Letter, 1983 WL 30961 (Mar. 8, 1983); Kimberly-Clark Corp., SEC No-Action Letter, 1987 WL 107672 (Feb. 26, 1987); Philip Morris Cos. Inc., SEC No-Action Letter, 1989 WL 246031 (Feb. 6, 1989); Philip Morris Cos. Inc., SEC No-Action Letter, 1990 WL 286063 (Feb. 22, 1990); Philip Morris Cos. Inc., SEC No-Action Letter, 1990 WL 286062 (Feb. 22, 1990); Philip Morris Cos. Inc., SEC No-Action Letter, 1990 WL 286170 (Feb. 22, 1990); UST, Inc., SEC No-Action Letter, 1991 WL 1178451 (Feb. 28, 1991); Mobil Corp., SEC No-Action Letter, 1991 WL 178534 (Feb. 28, 1991); Aetna Life & Casualty Co., SEC No-Action Letter, 1991 WL 178589 (Feb. 28, 1991) (preventing exclusion of a proposal for a report on the impact of smoking, claiming that smoking involves policy decisions beyond ordinary business operations).

tobacco related proposals under the ordinary business exclusion, concluding that they involved a company's product line.[37] In 1990, the Staff altered the interpretation, explicitly recognizing the significance of tobacco products as a social policy issue.[38] The Staff, however, still did not permit the inclusion of all tobacco related proposals in all cases,[39] particularly where only a small percentage of the company's business involved tobacco.[40]

Despite these examples, data suggested that the Staff employed a narrow construction of the public policy exception. In the late 1980s and early 1990s, the number of shareholder proposals addressing public policy issues dropped while the percentage involving governance issues increased.[41] As one commentator described, "Shareholders noticed that the Commission favored governance proposals over other proposals types like public policy proposals, which resulted in more corporate governance proposals as a means of shareholder influence."[42]

B. Rewriting the Public Policy Exclusion

Despite the narrow interpretation, the public policy exception allowed shareholders to sometimes insert ordinary business proposals into a company's proxy statement. Indeed, shareholders often targeted those aspects of a company's business that raised public policy concerns. As a result, a significant number of proposals have implicated both ordinary business and public policy.

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37. Kimberly-Clark Corp., SEC No-Action Letter, 1987 WL 107672 (Feb. 26, 1987); Philip Morris Cos., SEC No-Action Letter, 1989 WL 246031 (Feb. 6, 1989).

38. Philip Morris Cos. Inc., SEC No-Action Letter, 1990 WL 286063 (Feb. 22, 1990) (admitting a shareholder proposal to amend the articles of incorporation and have the board of directors to take steps to cease conducting any business in the production, marketing, and sale of cigarettes); Philip Morris Cos. Inc., SEC No-Action Letter, 1990 WL 286062 (Feb. 22, 1990) (admitting a shareholder proposal to create a review committee to issue a report on the impact of the company's product promotion activities on smoking by minors).

39. Philip Morris Cos. Inc., SEC No-Action Letter, 1990 WL 286170 (Feb. 22, 1990) (omitting a shareholder proposal requesting a report on the company's lobbying activities and expenditures to influence legislation regarding cigarette advertising because the lobbying activities regarding the company's products fell within the purview of ordinary business operations).

40. Mobil Corp., SEC No-Action Letter, 1991 WL 178534 (Feb. 28, 1991) (omitting a shareholder proposal requesting the board of directors adopt a policy leading to a cessation of involvement with production and marketing of cigarettes because such activities were less than one percent of the companies business).

41. Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 914 (1994). By 1992, the no-action letter inclusion rate for social and political proposals dropped to 33.3% from the 49.5% prior to the 1983 change in interpretation. The inclusion rate for corporate governance proposals increased to 44.8% from 33.3% in 1982. Shareholders noticed that the SEC favored governance proposals over other proposals types like public policy proposals, which resulted in more corporate governance proposals as a means of shareholder influence.

42. *Id.*

Pressure built on the Commission to minimize the application of the exception.[43] In response, the Commission tried to carve out areas of a company's business areas that were not subject to the public policy exception.[44] In *Capital Cities/ABC, Inc.*,[45] the Commission determined that "composition of [a] Company's work force, employment practices and policies and selection of program content" fell within a company's ordinary business operations, implicitly finding the public policy exception inapplicable.[46]

Not long afterwards, the Staff permitted the exclusion of a proposal submitted to Cracker Barrel that called for the implementation of employment policies that did not discriminate on the basis of sexual orientation.[47] In doing so,[48] the Staff asserted that "[i]n recent years . . . the line between includable and excludable employment-related proposals based on social policy considerations ha[d] become increasingly difficult to draw."[49] Pro-

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43. The Commission was prompted by pressure to change the proxy Rules due this increase and the average costs to issuers from proposals requiring special committees or dissemination of special reports. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Securities Holders, 47 Fed. Reg. 47,420–01, 47,424 (Oct. 26, 1982) ("The Commission is proposing . . . [to] reverse the existing interpretation that a proposal that either requests the issuer to prepare and disseminate a report to shareholders or recommends that a special committee be formed to examine a particular area of the issuer's business may not be excluded under Rule 14a-8(c)(&) as relating to the issuer's ordinary business. . . . [This] change, both in the Rule and the interpretations thereunder, reflect in large part, criticisms of the current Rule that have increased with the pressure placed upon the existing mechanism by the large number of proposals submitted each year and the increasing complexity of the issues involved in those proposals, as well as the susceptibility of certain provisions of the Rule and the Staff's interpretations thereunder to abuse by a few proponents and issuers.").

44. *See generally* Am. Tel. & Tel. Co., SEC No-Action Letter, 1988 WL 235275 (Dec. 21, 1988); Boeing Co., SEC No-Action Letter, 1989 WL 245652 (Feb, 8, 1989); Ruddick Corp., SEC No-Action Letter, 1989 WL 246671 (Nov. 20, 1989); Am. Tel. & Tel. Co., SEC No-Action Letter, 1990 WL 285776 (Jan. 1, 1990); V.F. Corp., SEC No-Action Letter, 1991 WL 178525 (Feb. 14, 1991); Dayton Hudson Corp., SEC No-Action Letter, 1991 WL 178560 (Mar. 8, 1991); United Techs. Co., SEC No-Action Letter, 1993 WL 44821 (Feb. 19, 1993);

45. Capital Cities/ABC, Inc., SEC No-Action Letter, 1991 WL 178633 (Apr. 4, 1991).

46. *Id.* ("Upon review, the Commission has reversed the Division's position concerning the proposal. It has been determined that the proposal may be omitted from the Company's proxy material in reliance upon Rule 14a-8(c)(7) since it appears to deal with matters relating to the conduct of the Company's ordinary business operations. In this regard, the proposal involves a request for detailed information on the composition of the Company's work force, employment practices and policies, and selection of program content."). Although the majority of legal scholarship focus on the Crack Barrel case as a turning point in Staff interpretation, cases prior to the Cracker Barrel October 1992 No-Action Letter demonstrate a Staff view that employment matters were outside the purview of the public policy exception. Specifically prior to Cracker Barrel, the Staff allowed the omissions of shareholder proposals calling for a report in employment information regarding sex, race, affirmative action programs, and actions to increase the number of women and minorities in management); *See* Wal-Mart Stores, Inc., SEC No-Action Letter, 1992 WL 78127 (Apr. 10, 1992); *See also* Capital Cities/ABC, Inc., SEC No-Action Letter, 1991 WL 178633 (Apr. 4, 1991).

47. Cracker Barrel Old Country Stores, Inc., SEC No-Action Letter, 1992 WL 289095, at *2 (Oct. 13, 1992).

48. *Id.*

49. *Id.* ("Notwithstanding the general view that employment matters concerning the workforce of the company are excludable as matters involving the conduct of day-to-day business, exceptions have been made in some cases where a proponent based an employment-related proposal on 'social policy' concerns.").

posals involving "a company's employment policies and practices with respect to its non-executive workforce" were viewed as "uniquely . . . relating to the conduct of the company's ordinary business operations."[50] As a result, the fact that the proposal also implicated an important "social issue" would:

> No longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals [were to] properly [be] governed by the employment-based nature of the proposal.[51]

Three months later, the Commission affirmed the position.[52]

This approach, however, created a number of interpretive issues. First, the SEC drew what appeared to be arbitrary lines and did not apply the analysis to all employment matters.[53] Second, nothing in the approach justified application only to employment matters. In the aftermath of the decision, issuers cited the *Cracker Barrel* rationale as a justification for excluding not only employment proposals related to sexual orientation, but also proposals related to matters such as the application of the McBride Principles in Northern Ireland[54] and affirmative action policies.[55]

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50. *Id*.

51. The Staff further provided examples of employment categorical topics that fell within the ordinary business exclusion. *See id.* ("Examples of the categories of proposals that have been deemed to be excludable on this basis are: employee health benefits, general compensation issues not focused on senior executives, management of the workplace, employee supervision, labor-management relations, employee hiring and firing, conditions of employment and employee training and motivation.").

52. *Id.* at *1; *See also* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, 821 F. Supp. 877, 889 (S.D.N.Y. 1993).

53. This is to be distinguished from proposals relating to the compensation of senior executives and directors. The Commission continues to regard issues affecting CEO and other senior executive and director compensation as unique decisions affecting the nature of the relationships among shareholders, those who run the corporation on their behalf and the directors who are responsible for overseeing management performance. Consequently, unlike proposals relating to the rank and file workforce, proposals concerning senior executive and director compensation are viewed by the Commission as inherently outside the scope of normal or routine practices in the running of the company's operations. Cracker Barrel Old Country Stores, Inc., SEC No-Action Letter, 1992 WL 289095, at *2 (Oct. 13, 1992).

54. *See* Unisys Corp., SEC No-Action Letter, 1993 WL 48814, at *1 (Feb. 19, 1993). The issuer made the same argument as that found in Sears, Roebuck & Co., SEC No-Action Letter, 1993 WL 31592, but the Staff, nonetheless, found in favor of exclusion for a proposal that "request[ed] the board of directors . . . make all possible lawful efforts to implement and/or increase activity on each of the nine MacBride Principles." *See also* United Techs. Co., SEC No-Action Letter, 1993 WL 48821, at *4 (Feb. 19, 1993); McDonald's Corp., SEC No-Action Letter, 1993 WL 376036, at *2 (Feb. 19, 1993); Pepsico Inc., SEC No-Action Letter, 1993 WL 90369, at *5 (Mar. 24, 1993).

55. *See* Amoco Corp., SEC No-Action Letter, 1993 WL 539686, at *2 (Dec. 29, 1993). The issuer argued that "[i]n the Staff gas sometimes viewed matters relating to affirmative action and equal opportunity as raising policy questions not related to ordinary business operations." The issuer then cited the Staff's decision in Cracker Barrel and the Commissions affirmation as basis for removing the proposal despite admission of it potentially falling within the realm of social policy. *See also* Mobil Oil Corp., SEC No-Action Letter, 1993 WL 31685, at *3 (Feb. 4, 1993).

The Staff applied the reasoning in *Cracker Barrel* to other employment related proposals.[56] Shareholders criticized[57] and brought suit over[58] the SEC's *Cracker Barrel* decision, causing the Commission to cease issuing no action letters pending resolution.[59] Growing concern led Congress to order the SEC to conduct a study on "the ability of shareholders to have proposals relating to corporate practices and social issues . . . ."[60] The resulting study[61] lead to amendment of the proxy Rules designed to reverse the interpretation.[62]

The 1998 amendments left the language of the ordinary business operations exclusion intact.[63] The adopting release, however, called for the return to the pre-1992, [64] two-prong,[65] case-by-case analysis approach for

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56. *E.g.* United Techs. Co., SEC No-Action Letter, 1993 WL 48821, at *1 (Feb. 19, 1993); Mobil Oil Corp., SEC No-Action Letter, 1993 WL 31685, at *1 (Feb. 4, 1993); McDonald's Corp., SEC No-Action Letter, 1993 WL 376036, at *1 (Feb. 19, 1993); Pepsico Inc., SEC No-Action Letter, 1993 WL 90369, at *1 (Mar. 24, 1993).

57. Michelle McCann, *Shareholder Proposal Rule: Cracker Barrel in light of Texaco*, 39 B.C. L. REV. 965, 988 (1998).

58. *See* New York City Employees' Retirement Sys. v. SEC, 843 F. Supp. 858 (S.D.N.Y. 1994), *rev'd*, 45 F.3d 7 (2d Cir. 1995). In May 1995, the Second Circuit found in favor of the Commission in the Cracker Barrel litigation. *See* N.Y.C. Emps. Ret. Sys. v. SEC, 45 F.3d 7 (2d Cir. 1995).

59. In 1994, the Cracker Barrel shareholders appealed the SEC Cracker Barrel decision. For the three years during the Cracker Barrel litigation period, the SEC ceased to issue No-Action Letters regarding 14a-8(c)(7). WAITE, *supra* note 29, at 1257 (citing Wal-Mart Stores, Inc., SEC No-Action Letter, 1994 WL 70004 (Mar. 8, 1994)); Staff Ordinary Business Stance Leaves Counsel Over a Barrel in Proxy Season, 26 Sec. Reg. & L. Rep. (BNA) No. 17, at 637 (Apr. 29, 1994)). The multi-year hold resulted in an increased importance and therefore increased frequency in the 14a-8(c)(5) not significantly related to the company's business exclusion. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 1 SEC. LAW HANDBOOK § 18:16 (2015).

60. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 510(b), 110 Stat. 3416 (1996).

61. "We received a total of 330 responses, including 172 responses from companies, and 149 from individual and institutional shareholders. We also heard from a handful of other types of institutions, such as a proxy solicitation firm, an investor relations consulting firm, and an economic consulting firm." Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50,682, 50,683 n.23 (Sept 26, 1997). "In response to the Questionnaire, 91% of companies favored excluding employment-related shareholder proposals raising significant social policy issues under the Cracker Barrel interpretation. Eighty-six percent of shareholders thought such proposals should be included." *Id.* at n.72.

62. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,106 (May 28, 1998).

63. The Commission adopted a change in format to the proxy Rules resulting in a restatement of the exclusions in question and answer format. This change recast the ordinary business operations Rule as 14a-8(i)(7). *Id. See also* Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50,682, 50,688 (Sept 26, 1997) (quoting Exchange Act Release No. 4950 (Oct. 9, 1953) [18 FR 6646]). The proposing release explained that there was no drafted guidance on the analysis of proposals falling simultaneously in the two categories. Further, the proposing release explained that the original purpose of the ordinary business exclusion "to relieve management of the necessity of including in its proxy material security holder proposals which relate to matters falling within the province of management" was complicated in the 1960s with the emergence of social policy proposals.

64. Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50,682, 50,688 (Sept 26, 1997).

65. "In an effort to end the confusion surrounding the ordinary business exception, the Commission set forth a new two-pronged test in 1976. For exclusion under Rule 14a-8(c)(7), the proposal must (1) 'involve business matters that are mundane in nature,' and (2) must not include "substantial policy or other considerations." Christine L. Ayotte, *Reevaluating the Shareholder Proposal Rule in the Wake of Cracker Barrel and the Era of Institutional Investors*, 48 CATH. U. L. REV. 511, 526 (1999).

employment related proposals.[66] The amending release clarified that the application of the public policy exception depended upon the subject matter of the proposal.[67] This renewed approach "relate[d] only to the employment-related proposals raising significant social policy issues."[68]

III. STAFF INTERPRETATIONS AFTER 1998 TO PRESENT DAY

A. Topics of Widespread Public Debate

In interpreting the public policy exception during the 1998 revisions, the Commission reiterated that certain issues "would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." This included matters of "widespread public debate."[69] The Staff applied the language in subsequent no action letters.[70] Moreover, a Staff bulletin reiterated "that the presence of widespread public debate regarding an issue is among the factors to be considered in determining whether proposals 'transcend the day-to-day business

66. Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50,682, 50,688 (Sept 26, 1997) ("Reversal of the Cracker Barrel no-action position will result in a return to a case-by-case analytical approach. In making distinctions in this area, the Division and the Commission will continue to apply the applicable standard for determining when a proposal relates to 'ordinary business.' The standard, originally articulated in the Commission's 1976 release, provided an exception for certain proposals that raise significant social policy issues.").

67. "The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposals. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. . . . However, proposal relating to such matters but focusing on sufficient significant social policies issues . . . generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998).

68. Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50,682, 50,688 (Sept 26, 1997) ("Going forward, companies and shareholders should bear in mind that the Cracker Barrel position related only to employment- related proposals raising certain social policy issues. Reversal of the position does not affect the Division's analysis of any other category of proposals under the exclusion, such as proposals on general business operations.").

69. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998). The Commission address the term "widespread debate" during its discussion of the reversal of the Cracker Barrel decisions, but makes no substantive description of the term or the requirements to rise to the level of "widespread debate".

70. After six years of the citations in no action letters including language of "widespread public debate" the Staff made its first recognition for a social policy falling under "widespread public debate" that fell outside of the of "executive and director compensation policies and practices." *See* General DataComm Industries, Inc., SEC No-Action Letter, 1998 WL 883796, at *1 (Dec. 9, 1998) (noting the Staff found option reprising as a topic of widespread public debate raising a significant policy issue). Based on a Westlaw search of SEC No-Action Letters using search terms: "advanced: 'widespread public debate,'" the "widespread public debate" language seems to have emerged in 1992 from a Staff decision in an IBM no action letter where the Staff found "executive and director compensation policies and practices" to be raise significant policy issues. Int'l Bus. Machines Corp., SEC No-Action Letter, 1992 WL 29999, at *1 (Feb. 13, 1992). From this letter through December 1998, the Staff seem to only apply the "widespread public debate" language to apply to proposals of the same nature as the in the IBM proposal.

matters'" and that the proposals had to "raise policy issues so significant that it would be appropriate for a shareholder vote."[71]

The early 2000s proxy seasons saw the emergence of a number of new topics that implicated the public policy exception, including genetically engineered crops,[72] analyst independence,[73] auditor independence,[74] workplace code of conduct,[75] and equity compensation plans.[76] The Staff declined to permit the exclusion of proposals requesting a report on a company's "glass ceiling progress . . . response standards to health pandemics of AIDS, tuberculosis, malaria in developing countries, and . . . charitable contributions program."[77] By mid-2002, equity compensation plans became a matter of widespread debate, leading the Staff to release a bulletin on the topic.[78] During this time, the Staff adopted a practice of providing "parenthetical categorizations" that indicated the area of "ordinary business" implicated by the proposals."[79]

B. Proposals related to Risk

In the early part of the new millennium, the Staff received a significant number of proposals addressing "environmental or health issues." A

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71. SEC Staff Legal Bulletin No. 14A, Release No. SLB – 14A (July 12, 2002), http://www.sec.gov/interps/legal/cfslb14a.htm#P18_1860.

72. See the attached appendix for a list of Staff letters permitting inclusion of proposals regarding genetically engineered crops, organisms, or products.

73. *E.g.* The Goldman Sachs Grp. Inc., SEC No-Action Letter, 2002 WL 171275, at *1 (Jan. 15, 2002); J.P. Morgan Chase & Co., SEC No-Action Letter, 2002 WL 253898, at *1 (Jan. 21, 2002).

74. *E.g.* Duke Energy Corp., SEC No-Action Letter, 2002 WL 471702, at *1 (Mar. 1, 2002) (permitting inclusion of a proposal for independent accountants due to "widespread public debate concerning the impact of non-audit services on auditor independence" raising significant policy considerations in light of the Enron debacle).

75. In early 2002, the Staff made several determinations calling for inclusion of proposals requesting implementation and enforcement of workplace codes of conduct based on the International Labor Organization's conventions on workplace human rights. See the attached appendix for a list of Staff letters permitting inclusion of proposals regarding Employee code of conduct from 2002 to 2007.

76. SEC Staff Legal Bulletin No. 14A, Release No. SLB – 14A (July 12, 2002), http://www.sec.gov/interps/legal/cfsl b14a.htm - P18_1860 ("In the 2001-2002 proxy season, shareholders submitted proposals to several companies relating to equity compensation plans.").

77. Robert J. Haft & Michele M. Hudson, Analysis of Key SEC No-Action Letters § 10:12. Grounds for exclusion under Rule 14a-8 – Ordinary Business Operations.

78. "[P]ublic debate regarding shareholder approval of equity compensation plans has become significant." SEC Staff Legal Bulletin No. 14A, Release No. SLB – 14A (July 12, 2002), http://www.sec.gov/interps/legal/cfsl b14a.htm - P18_1860.

79. A Wal-Mart proposal, for example, requested a report on the viability of Wal-Mart's UK cage-free egg policy. The parenthetical used was: "(i.e., sale of a particular product)." Harold S. Bloomenthal, 2008 Shareholder Proposal Season – Part I, 30 No. 5 Securities and Federal Corporate Law Report 1 (May 2008) (citing Wal-Mart Stores, Inc., SEC No-Action Letter, 2008 WL 809042 (Mar. 24, 2008)); *E.g.* Aetna Inc., 2005 WL 372286, 1 (Feb. 14, 2005), McGraw Hill Co.'s, Inc., 2008 WL 376143, 1 (Feb. 7, 2008), Chevron Corp., 2008 WL 769004, 1 (Mar. 21, 2008), Merck & Co., Inc. 2009 WL 631183, 1 (Feb. 3, 2009).

bulletin issued in 2005[80] sought to create another "bright line" test to facilitate the application of the ordinary business exclusion.[81] Proposals would be included to the extent specifically addressing a company's operations that could "adversely affect the environment or the public's health."[82] In contrast, the public policy exception did not apply to proposals focused on "an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health."[83] Although the Division provided examples, the purported difference between the two types of proposals remained unclear.[84]

As with *Cracker Barrel*, the position would ultimately be reversed. In the aftermath of the financial crisis of 2008, the Division readdressed its previous statements regarding environment, financial, and health risks, and reversed its 2005 statements.[85] Specifically, the Division noted that the earlier bulletin may have been too broad, thereby causing an "unwarranted exclusion of proposals that relate to the evaluation of risk but . . . focus on significant policy issue[s]."[86]

C. Climate Change and the Greenhouse Effect

Proposals on climate change and greenhouse gas emissions also became common in the new millennium. In February 2010, the Commission

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80. SEC Staff Legal Bulletin No. 14C (CF), Release No. SLB-14C (CF) (Jun. 28, 2015), https://www.sec.gov/interps/legal/cfslb14c.htm; *See also* the attached appendix for a list of Staff letters permitting inclusion of proposals regarding health and environmental concerns and consequences from 2000 to 2007.

81. SEC Staff, *supra* note 78.

82 "To the extent that a proposal and supporting statement focus on the company engaging in an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health, we concur with the company's view that there is a basis for it to exclude the proposal under Rule 14a-8(i)(7) as relating to an evaluation of risk. To the extent that a proposal and supporting statement focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health, we do not concur with the company's view that there is a basis for it to exclude the proposal under Rule 14a-8(i) (7)." *Id.*

83. "To the extent that a proposal and supporting statement focus on the company engaging in an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health, we concur with the company's view that there is a basis for it to exclude the proposal under Rule 14a-8(i)(7) as relating to an evaluation of risk. To the extent that a proposal and supporting statement focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health, we do not concur with the company's view that there is a basis for it to exclude the proposal under Rule 14a-8(i) (7)." *Id.*

84. The Division provided two examples to distinguish between the types of proposals. A proposal submitted to Xcel Energy, recommended "[t]hat the Board of Directors report . . . [on] the economic risks associated with the Company's past, present, and future emissions…and the economic benefits of committing to a substantial reduction of those emissions related to its current business activities." Another involved a proposal to Exxon Mobile requesting "a report on the potential environmental damage that would result from the company drilling for oil and gas in protected areas." *Id.*

85. SEC Staff Legal Bulletin No. 14E (CF), Release No. SLB-14E (CF), at *2 (Oct. 27, 2009), https://www.sec.gov/interps/legal/cfslb14e.htm.

86. *Id.* Recognizing that "most corporate decisions involve some evaluation of risk," the Division announced that "rather than focusing on whether a proposal relates to the company" evaluating a risk, it would use a "more appropriate framework for analyzing," and such proposals would "focus on the subject matter to which the risk pertains or that gives rise to the risk." Therefore, a "proposal generally [would] not be excluded . . . as long a sufficient nexus exists between the nature of the proposal and the company."

issued guidance for public companies regarding disclosures related to climate change.[87] The release suggested greater concern by the Commission with climate change issues. Perhaps as a result, the Staff rarely allowed for the exclusion as ordinary business to climate change.[88] The same was true for proposals requesting reports on fossil fuel usage, greenhouse gad emissions, company contributions to climate change, environmental impacts, renewable energy, and sustainability.[89]

D. Guns

The public policy exception has also arisen in the context of gun sales. Throughout the early 2000s the Staff saw proposals on a variety of topics related to gun control[90] and weapon sales to foreign countries.[91] Such proposals in general implicated a company's "ordinary business" but were viewed as matters of public policy.

In December 2013, Trinity Wall Street, a Wal-Mart shareholder, submitted a proposal requesting the Wal-Mart board of directors implement standards for determining whether the company should sell products that endangered public safety and well-being, impair the reputation of the company, or could be considered offensive to families' or communities' values.[92] Although the language of the proposal itself did not specifically discuss guns, the narrative portion specifically focused on whether Wal-Mart should sell high capacity magazines by balancing the risks and benefits of those sales with the Company's reputation.[93]

The proposal focused not only on guns, but also asked for a broad review of all products that posed a risk to Wal-Mart's reputation. The proposal, therefore, addressed some products, such as guns, that raised issues of widespread public debate, while others that did not. The Staff agreed

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87. "Climate change has become a topic of intense public discussion in recent years." Comm'n Guidance Regarding Disclosure Related to Climate Change, Exchange Release No. 61469, 75 Fed. Reg. 62,9001 (Feb. 2, 2010).

88. Brenda A. Olsen, Publically Traded Corporations Handbook §10:18. Exclusions based on Rule 14a-8(i)(7) – Management Functions (2015) (citing Alpha Natural Resources, Inc., SEC No-Action Letter, 2013 WL 1195295, 1 (Mar. 19, 2013); Devon Energy Corp., SEC No-Action Letter, 2014 WL 556450, 1 (Mar. 19, 2014); PNC Financial Services Group, Inc., SEC No-Action Letter, 2012 WL 6760041, 1 (Feb. 13, 2013).).

89. The Staff consistently interpreted climate change proposals as non-excludable under 14a-8(i)(7). Gen. Elec. Co., SEC No-Action Letter, 2006 WL 176621, at *1 (Jan. 17, 2006); Ford Motor Co., SEC No-Action Letter, 2006 WL 739898, at *1 (Mar. 6, 2006); Gen. Elec. Co., SEC No-Action Letter, 2008 WL 190372, at *1 (Jan. 15, 2008); Pulte Homes, Inc., SEC No-Action Letter, 2008 WL 384377, at *1 (Feb. 11, 2008).

90. *E.g.* Sturm, Ruger & Co., Inc., SEC No-Action Letter, 2001 WL 258493, at *12 (Mar. 5, 2001) (denying exclusion of a proposal requesting a report on policies aimed at stemming incidents of gun violence.).

91. *E.g.* ITT Corp., SEC No-Action Letter, 2008 WL 683614, at *1 (Mar. 12, 2008) (denying exclusion of a proposals requesting a comprehensive report on the Company's foreign sales of military and weapons-related . . . .).

91. Wal-Mart Stores, Inc., SEC No-Action Letter, 2014 WL 409085, at * 7–8 (Mar. 20, 2014)

93. *Id.* at at *8.

that "proposals concerning the sale of particular products and services are generally excludable under [the Rule] . . . ."[94]

In 2014, the shareholders filed suit challenging the exclusion of the proposal. The trial court found the proposal was improperly excluded in part because it focused on a significant policy issue.[95] On appeal, the Third Circuit found that the subject matter did not "transcend" ordinary business operations.[96] As a result, the public policy exception was not applicable. In October 2015, the Staff effectively overturned the Third Circuit's analysis.[97] Specifically, the Staff noted "a proposal may transcend a company's ordinary business operations even if the significant policy issues relates to the 'nitty-gritty of its core business.'"[98] The Bulletin, however, did not provide any additional insight into the meaning of the public policy exception.

IV. CONCLUSION

The "ordinary business" exclusion remains an interpretive nightmare for companies, shareholders, and the SEC's Staff. Shareholders submitting proposals involving the company's business typically choose topics that raise at least some public concern. As a result, almost every proposal implicating "ordinary business" must also be weighed against the social policy implications. The approach encourages challenges to these proposals, imposes the cost of defending a proposal on the proponent, and taxes the resources of the Staff.

One solution would be to allow reliance on the public policy exception in a less restrictive fashion. The exclusion could apply upon a showing of any widespread discussion of a particular issue. Matters of important social policy presumably have generated debate in public forums. The Staff could simply require evidence that the matter was mentioned multiple times in widely read blogs, newspapers, web sites, or other forms of popular media. The result would be fewer instances where the Staff had to determine whether a public debate was "widespread." Issuers and share-

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94. *Id.* at *1.

95. Trinity Wall St. v. Wal-Mart Stores, Inc., 75 F. Supp. 3d 617, 630 (D. Del. 2014) *rev'd*, 792 F.3d 323, 341 (3d Cir. 2015), *cert. denied*, 136 S. Ct 499 (2015).

96. 792 F.3d 323, 341 (3d Cir. 2015).

97. "The panel also considered whether the significant policy exception to the ordinary business exclusion applied. The majority opinion employed a new two-part test, concluding that 'a shareholder must do more than focus its proposal on a significant policy issue; the subject matter of its proposal must "transcend" the company's ordinary business.' The majority opinion found that to transcend a company's ordinary business, the significant policy issue must be 'divorced from how a company approaches the nitty-gritty of its core business.' This two-part approach differs from the Commission's statements on the ordinary business exclusion and Division practice." SEC Staff Legal Bulletin No. 14H (CF), 2015 WL 6503673 (Oct. 22, 2015), https://www.sec.gov/interps/legal/cfslb14h.htm; *see also* Trinity Wall St. v. Wal-Mart Stores, Inc., 75 F. Supp. 3d 617 (D. Del. 2014) *rev'd*, 792 F.3d 323, 341 (3d Cir. 2015), *cert. denied*, 136 S. Ct 499 (2015).

98. SEC Staff Legal Bulletin No. 14H (CF), 2015 WL 6503673, at *6 (Oct. 22, 2015), https://www.sec.gov/interps/legal/cfslb14h.htm;

holders would likewise know the type of evidence of public debate acceptable to the Staff. Shareholders would be more likely to draft proposals to meet the standard and issuers would be less likely to seek exclusion.

Alternatively, the staff could approach the issue by examining the importance to shareholders. The Staff has indicated that the policy applies to proposals that raise issues "so significant that it would be appropriate for a shareholder vote." Issues that both implicate some aspect of public policy and remain important to investors would not be subject to exclusion. The proposal at issue in *Wal-Mart* would likely fall into this category. The proposal sought to have the board broadly examine certain types of risk associated with product sales that could harm the company's business. The public policy interests implicated plus the direct nexus to the interests of owners would make the matter "appropriate for a shareholder vote."[99]

In any event, the Staff should at least explain the reasons for applying or not applying the public policy exception. The Staff typically uses phrases such as "does not seek to micromanage the company," or "we are unable to conclude that [company] has met its burden,"[100] or "we are unable to concur in your view that [company] may excluded the proposal under Rule 14a-8(i)(7)." These phrases, however, provide no guidance on the actual basis for the decision. A more complete analysis, even just a few sentences, would provide guidance and reduce uncertainty.

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99. *See* Rule 14a-8(i)(12), 17 C.F.R § 240.14a-8(i)(12).

100. *E.g.* J.B. Hunt Transp. Servs., Inc., SEC No-Action Letter, 2014 WL 7326031, at *1 (Jan. 12, 2015); Chesapeake Energy Corp., SEC No-Action Letter, 2010 WL 673784, at *1 (Apr. 13, 2010); Corrections Corp. of Am., SEC No-Action Letter, 2012 WL 6837534, at *1 (Feb. 10, 2012).

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