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SEC RULE 14A-8(I)(5): IS IT STILL RELEVANT?

I. INTRODUCTION

Rule 14a-8 (the Rule) requires that public companies include proposals submitted by shareholders in their proxy statement.¹ A company may, however, exclude a proposal on one of thirteen substantive grounds.² While the Rule permits owners and managers to debate business activities of the company, the exclusions prevent shareholders from usurping management's role in the corporation.³ As part of this approach, subsection (i)(5) allows for exclusion of proposals that are not "significantly related to the company's business."⁴

First adopted in 1972, the exclusion sought to limit the reach of the shareholder proposal rule to initiatives deemed irrelevant to the company's business.⁵ Companies could exclude matters that implicated an insignificant segment of the activities of the company.⁶ The provision, however, raised difficult interpretive issues.⁷

The concept of "significance" had a both a subjective and objective component. As a subjective matter, a proposal could have considerable importance even if involving only a small amount of the company's business. Uncomfortable with assessing the qualitative importance of a proposal, the Securities and Exchange Commission (the Commission or SEC), at various times over the history of the exclusion sought to impose

1. 17 C.F.R. § 240.14a-8 (2012).

2. *Id.*

3. Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365, 374-85 (2006) (discussing the history of shareholder proposals related to corporate social responsibility and citing Phillip R. Stanton, *SEC Reverses Cracker Barrel No-Action Letter*, 77 WASH. U.L.Q. 979, 982 (1999)).

4. 17 C.F.R. § 240.14a-8(i)(5) (2012). The proposal may be excluded from corporate proxy materials where it "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business."

5. Exchange Act Release No. 34-9784, 1972 WL 125400 (Sept. 22, 1972).

6. *Id.*

7. Interview with [William] Bill Morley conducted by Mary Beach, Peter Romeo, Paul Belvin, and David Martin, (June 11, 2003) available at: SEC Historical Society, <http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/morley061103Transcript.pdf> (last visited Apr. 8, 2016). Mickey Beach was Associate Director of the SEC Division of Corporation Finance, Peter Romeo was Chief Counsel of the Division of Corporation Finance, Paul Belvin was Director of the Office of Small Business Policy, and David Martin was an attorney with the SEC. William Morley was Deputy Chief Counsel of the SEC. In the interview, Bill Morley explains that prior to 1971 no-action letters were not publicly available as the Freedom of Information Act did not yet exist. Consequently, only large firms were able to archive examples of no-action letter decisions from their own client files. Once the letters became publicly available, he notes that questions arose over different Staff interpretation to substantially similar fact patterns.)

objective criteria, typically judging significance on the basis of a percentage of the company's assets or earnings. The approach, however, was generally unsuccessful. Even small portions of a company's business could implicate public policy concerns.

This article will first examine the administrative history of Rule 14a-8(i)(5). The paper will also consider Staff interpretation of the provision, particularly the efforts to define "significant."⁸ This will include an examination of no action letters after 2000. Finally, the paper will suggest some reforms in the Staff interpretation of the exclusion.

II. ADMINISTRATIVE HISTORY OF THE RELEVANCE EXCEPTION

Early History of Social and Political Proposals

Congress delegated authority to the SEC to enact proxy rules as part of the Securities Exchange Act of 1934.⁹ The Commission adopted the shareholder proposal rule in 1942.¹⁰ The rule required companies to "include in management proxy statements proposals intended to be presented by a stockholder which are a proper subject for action."¹¹ Proper subject was defined as "proposals which related directly to the affairs of the particular corporation and not proposals with general political, social, or economic matters."¹²

The "proper subject" language was addressed in *Peck v. Greyhound Corp.*¹³ A shareholder requested the issuer include in proxy materials a proposal seeking to end segregated seating on buses in the South.¹⁴ The *Peck* court upheld the company's right to exclude the proposal as not a

8. The SEC renumbered the relevance exception over time. From 1972 to 1976, the rule was numbered 14a-8(c)(2)(ii). During that period, the rule specified "(c) Notwithstanding the foregoing the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances: (2) If the proposal: (ii) consists of a recommendation, request, or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer." Beginning in 1976, the SEC renumbered the exception as 14a-8(c)(5) Insignificant Matters. "(c) The management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances. (5) If the proposal deals with a matter that is not significantly related to the issuer's business."

9. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78pp. (2012).

10. Exchange Act Release No. 34-3347 (1942). Rule X-14A-7 (currently Proxy Rule 14a-8) addressed the concern that proxy materials could be misleading by requiring the inclusion of shareholder proposals in proxy statements.

11. *Id.* (noting "In the event that a qualified security holder of the issuer . . . intends to present . . . a proposal which is a *proper subject for action* by the security holders, the management shall set forth the proposal.") (emphasis added)

12. An Opinion of Baldwin B. Bane, Exchange Act Release No. 34-3638, 1945 WL 27415 (Jan. 3, 1945). Courts upheld this position. *See generally, Peck v. Greyhound Corp.*, 97 F. Supp. 679, 680 (S.D.N.Y. 1951) (upholding exclusion of a proposal requesting that Greyhound Corp. evaluate the idea of abolishing segregated busing. This proposal was typical of those submitted during this time period which addressed public policy issues).

13. 97 F. Supp. 679, 680 (S.D.N.Y. 1951).

14. *Id.*

proper subject for shareholders.¹⁵ The court reasoned the Commission was best able to evaluate whether the proposal was excludable.¹⁶ Shortly afterwards, the Rule was amended to explicitly bar proposals “promoting general economic, political, racial, religious, social, or similar causes.”¹⁷

Pressure, however, built on the Commission to permit the inclusion of proposals that implicated issues of public policy. A series of shareholder proposals submitted in the late 1960’s and early 1970’s addressed public policy concerns.¹⁸ To limit these types of proposals, the Commission sought to restrict Rule 14a-8 to initiatives deemed irrelevant to the company.¹⁹ The Commission, therefore, added an exclusion for proposals “not significantly related to the business of the issuer.”²⁰ The standard applied to all proposals, including those involving “general economic, political, racial, religious, social, or similar causes.”²¹

The amendment provided no insight into the meaning of “significantly related.” As an initial threshold, the Staff required management to

15. *Id.* at 681.

16. *Id.*

17. Amendment of Proxy Rules, Exchange Act Release No. 34-4775, 1952 WL 5254 (Dec. 11, 1952) (also renumbering Rule X-14A-7 Proposals of Security Holders, as Rule X-14A-8.)

18. *See generally, SEC v. Med. Comm. for Human Rights*, 432 F.2d 659, 674 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (This case addressed a proposal to a company producing napalm during the Vietnam War. The shareholder proposal requested the company amend its certificate of incorporation to prohibit the sale of napalm, except where it would not be used against human beings. The SEC upheld the company’s decision to omit the proposal from its proxy statement and the stockholder petitioned the federal court to review the SEC’s decision. The Court of Appeals concluded the SEC’s determination was “dubious,” especially since the Commission did not provide the company any reasoning for its decision. After the Supreme Court granted certiorari, the corporation included the proposal in the shareholder materials and fewer than 3% of voting shareholders supported the proposal. Consequently, the SEC permitted the corporation to exclude similar proposals from proxy materials for a three-year period.)

19. The SEC proposed these amendments to the Proxy Rules with Proposed Proxy Rules, Exchange Act Release No. 34-9432, 1971 WL 126135 (Dec. 22, 1971), to amend Rule 14a-8(c)(2). Rule 14a-8(c)(2) provided a security holder’s proposal may be omitted from the management’s proxy material “if it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.” The SEC advanced this amendment in order to replace the “subjective terms of the provision with objective standards and thereby create greater certainty in the application of the rule.” The Release continued, “Accordingly, the words “clearly appears,” “primarily,” “purpose,” and “promoting” have been deleted and the standards “not significantly related to the business of the issuer” or “not within the control of the issuer” have been proposed” (emphasis added). This Release was the first time the SEC used the phrase “not significantly related to the business of the issuer.” The SEC incorporated this language into the final proxy rule amendments adopted with SEC Securities Exchange Act Release No. 34-9784, 1972 WL 125400 (Sept. 22, 1972). Importantly, the final rule further expanded the application to all proposals submitted, not simply those offered for the purpose of promoting general public policy causes.

20. Solicitations of Proxies, Exchange Act Release No. 34-9784, 1972 WL 125400 (Sept. 22, 1972) (renumbering the rule as 14a-8(c)(2)(ii)). In 1976, the Commission split out the section of this rule addressing proposals “not within [the company’s] control” and created a new exclusion: 14a-8(c)(6) “If the proposal deals with a matter that is beyond the issuer’s power to effectuate.”

21. *Id.*

establish the insignificance of the proposal.²² For example, the Staff declined to permit exclusion where management failed to provide evidence regarding the financial impact of the proposal on the company's business.²³

The Commission also experimented with a bright line economic test. In the context of proposals arising out of the Arab boycott of Israel,²⁴ the Staff permitted omission where issuers had "less than one percent of their business with Arab nations or with Israel."²⁵ Throughout the early 1970's, the Staff used the 1% test in the context of other shareholder proposals, including those involving human rights, equal employment opportunities for women and minorities,²⁶ company investment in South Africa (apart-
heid),²⁷ and the use of infant formula in developing nations.²⁸

The test was rigidly applied. Where the percentages exceeded the bright-line threshold, the Staff was "unable to conclude these figures taken as a whole [were] insignificant to the Company's overall business."²⁹ Thus, where the assets of the business in question accounted for more than 1% but less than 2% of total assets, the proposal could not be excluded.³⁰

22. IpcO Hospital Supply Corporation, SEC No-Action Letter, 1974 WL 8327 (Aug. 16, 1974) ("Although the proposal may be deemed to relate to a social or similar cause, we do not believe you have provided sufficient justification for your view that it is not significantly related to the business of the company. That is, you have not provided any statistical support for your view that the subject matter of the proposal (viz., aid to the Cancer Institute) is *not significantly related to the business* of a hospital supply corporation." (emphasis added)).

23. *Compare* Standard Oil Company of California, SEC No-Action Letter, 1975 WL 9859 (Aug. 30, 1975) (where the company did not provide financial data in support of its assertion the proposal, to provide a report on strip mining on the Northern Cheyenne reservation, it was "otherwise significantly related" to company operations. The Staff noted, as "a consequence" of not providing financial data, the company could not rely on the relevance exclusion.), *with* Libbey-Owens-Ford Company, SEC No-Action Letter, 1976 WL 10926 (Feb. 3, 1976) (where the company provided financial data in regard to a proposal to report on the issuer's operations in Arab countries and Israel, the Staff commented on, "the very small percentage of its overall business operations" and that they believed it "appropriate to focus on percentage figures rather than actual dollar amounts in determining the applicability" of the rule.)

24. Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 427 (1984) (explaining the "massive number" of proposals related to the Arab boycott necessitated development of a more efficient method of evaluation; thus, resulting in the economic test. *See* article note 72.)

25. *Id.*

26. CBT Corporation, SEC No-Action Letter, 1973 WL 9152 (Mar. 7, 1973) (This proposal from an individual requested the company fill the next opening on the Board with either a "black" man or a woman.)

27. Ford Motor Company, SEC No-Action Letter, 1977 WL 12888 (Mar. 14, 1977) (A group of religious organizations proposed Ford Motor Company cease operations in South Africa. The Staff found although operations in South Africa accounted for less than one-percent of Ford earnings, the assets constituted between one and two percent and thus were not excludable under this basis.)

28. *See e.g.*, American Home Products, SEC No-Action Letter, 1975 WL 9172 (Mar. 4, 1975) (This proposal requested the company report on the operations related to sales, manufacturing, packaging, and distribution of infant formula. Since the company did not provide any financial information, they did not meet their burden and the proposal was not excludable under the Rule.)

29. *Id.*

30. *Id.*

In Tenneco, Inc., for example, the religious proponents requested a report on company land holdings currently being farmed.³¹ Tenneco asserted that the “agricultur[al] activities . . . constitute[d] a relatively small portion of the general business of the Company” or less than 2.5% of total consolidated revenue and 0.86% of gross income.³² The Staff nonetheless denied the requested no action relief.³³

Additional revisions to the exclusion occurred in 1976.³⁴ The Commission deleted the references in the former rule to “economic, political, racial, religious, social, or similar causes,” and noted these “illustrative references” were “superfluous and unnecessary.”³⁵ The SEC considered, but declined to adopt, an entirely objective test, noting, “Many instances [occur] in which the matter involved in a proposal is significant to an issuer’s business, even though such significance may not be apparent from an economic viewpoint.”³⁶ The release conceded that economic data could be relevant³⁷ but “the significance of a particular matter to an issuer’s present or prospective business depend[ed] upon that issuer’s individual circumstances, and that there [was] no specific quantitative standard . . . applicable in all instances.”³⁸

Proposals continued to be evaluated in part on their economic significance. In Long Island Lighting Company, an individual investor sought an annual report to shareholders on conservation and alternative energy, as well as a halt to further development of nuclear power plants.³⁹ The Staff reiterated that companies had the burden of establishing that “the subject matter of the instant proposal is not significantly related” to their

31. Tenneco, Inc., SEC No-Action Letter, 1975 WL 9273 (Feb. 7, 1975).

32. *Id.*

33. *Id.*

34. Exchange Act Release No. 34-12999 (1976) (noting that the deletion of the list of general causes should not be “construed as an implication that a different standard” would be used in evaluating shareholder proposals.)

35. *Id.*

36. Proposed Amendments to Rule 14a-8, Exchange Act Release No. 19602 (July 7, 1976) (The Commission noted that these instances included: “proposals dealing with cumulative voting rights or the ratification of auditors” and are not typically economically relevant, but are important to security holders in their overall evaluation of the company.)

37. *Id.* (commenting, “[we] recognize that there are circumstances in which economic data may indicate a valid basis for omitting a proposal under this provision.”)

38. *Id.*

39. Long Island Lighting Company, SEC No-Action Letter, 1981 WL 24718 (Feb. 5, 1981) (Staff noted the issuer failed to provide any discussion of economic significance or provide any financial information and thus did not meet its burden in asserting Rule 14a-8(c)(5) that the subject matter of the proposal was not significantly related to the Company’s business.) *But see* Peoples Energy Corporation, SEC No-Action Letter, 1994 WL 666100 (Nov. 29, 1994) (This proposal requested the issuer eliminate two in-person customer service branches in order to reduce operating expenses. Staff noted the Company’s representation that the amounts of revenue, earnings, and assets attributable to the two offices was less than five percent and thus was not otherwise significantly related to the Company’s business.)

business and that in this case Long Island Lighting had failed to demonstrate the lack of “economic significance of nuclear power plants” to its business.⁴⁰

Consistent with the 1976 revisions, however, the Staff did not always apply objective standards. A proposal submitted to Marriott Corporation sought to prohibit charitable contributions.⁴¹ Although not a large percentage of revenues or profits, the Staff declined to permit exclusion.⁴² The Staff reasoned:

Although the representations made by the Company's counsel as to the percentage of revenues and profits represented by charitable contributions tend to indicate that the subject matter of this proposal is not of economic significance to the Company's business, this is not the sole consideration under Rule 14a-8(c)(2)(ii). . . . [T]here are many instances in which the matter involved in a proposal is significant to an issuer's business, even though such significance may not be apparent from an economic viewpoint. Accordingly, in our view the significance of this proposal to shareholders would appear to transcend its economic impact and thus preclude management's reliance upon Rule 14a-8(c)(2)(ii) as a basis for its omission.⁴³

Formal Economic Test Adopted in 1983

The attraction of an objective numerical test, however, remained. In 1982, the Commission proposed amendments that sought to add explicit economic standards to the exclusion.⁴⁴ The proposing release acknowledged that, under the existing interpretation, proposals reflecting “social or ethical issues, rather than economic concerns, raised by the issuer's business” could not be excluded to the extent “the issuer conduct[ed] any such business, no matter how small.”⁴⁵

Although recognizing that “a totally objective standard” was not feasible, the Commission suggested amendments that would “incorporate economic factors” into the rule.⁴⁶ A Commission memorandum framed the internal Staff discussion around revising this exclusion,

While we do not propose to change this paragraph, that conclusion is a very difficult one. Since the reversal of the so called 1% test in 1978 there have been complaints [from the issuer community] that there is no objective test for exclusion under paragraph (c)(5) and that the provision no longer provides a viable basis for excluding proposals. As a result, issuers have frequently suggested that the staff should revise the

40. *Id.*

41. Marriott Corporation, SEC No-Action Letter, 1976 WL 11078 (Sept. 17, 1976).

42. *Id.*

43. *Id.*

44. Proposed Amendments to Rule 14a-8 Relating to Proposals by Security Holders, Exchange Act Release No. 19,135, 1982 WL 600869 (Oct. 14, 1982).

45. *Id.*

46. *Id.*

rule to specifically provide that proposals which are not economically significant may be omitted, and to establish an objective test for economic significance.⁴⁷

The final rule allowed for the exclusion of proposals that related to less than 5% of a company's total assets, gross revenue, or net earnings, but retained the requirement that they not otherwise be "significantly related to the issuer's business."⁴⁸

The exclusion occasionally found its way into court. In *Lovenheim v. Iroquois Brands, Ltd.*, shareholders challenged the exclusion of a proposal relating to the force feeding of geese as not significantly related to the business of the company.⁴⁹ The court reversed, stating that social concerns were significant to a company's business, and noting the proposal "represent[ed] a close question given the lack of clarity in the exception itself."⁵⁰ Nonetheless, the court held that "in light of the ethical and social significance" of the proposal, it could not be excluded from shareholder proxy materials.⁵¹

The amendments notwithstanding, the Staff rarely relied on the exclusion.⁵² For the most part, the Staff found that proposals involving a small percentage of earnings or assets, but that nonetheless raised im-

47. Memorandum from [William] Bill Morley and [Michael] Mike Kargula to Lee B. Spencer, Jr., John Huber, and Linda Quinn, (Mar. 18, 1982) regarding "Proposed Revision of Rule 14a-8" available at: SEC Historical Society, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1982_0318_MorleyKargula.pdf (last visited Feb. 20, 2016). At the time, William Morley was Deputy Chief Counsel and Michael Kargula was Special Counsel. Lee B. Spencer, Jr. was SEC Director of Corporation Finance, John J. Huber was Deputy Director, and Linda C. Quinn was an Associate Director. The memorandum begins by noting "In most instances the problems we are encountering are not problems with the rules, but problems with the Staff interpretation of the provisions."

48. Amendments to Rule 14a-8 Relating to Proposals by Security Holders, Exchange Act Release 34-20091, 1983 WL 33272 (Aug. 16, 1983). The final version of the rule explained this exclusion did not apply to "such matters as shareholders' rights, e.g. cumulative voting."

49. *Lovenheim v. Iroquois Brands, Ltd.*, 618 F.Supp. 548, 556 D.C. (Mar. 28, 1985).

50. *Id.* at 559 (distinguishing this case from *Med. Comm. for Human Rights* (see *supra* note 18) since the motivation of the proponents in that case was political, although the proposal in both cases was economically insignificant. In *Lovenheim*, the proponent requested a report on the methods used by the issuer's supplier of pâté de foie gras. In both cases, the court held the proposal should not be omitted since it was socially significant.)

51. *Id.*

52. The proposals for which the Staff declined to recommend enforcement action in the 1980's included: 1) Iroquois Brands which requested no-action relief for a proposal from attorney Peter Lovenheim who asked for a study of the production methods of the company's pâté de foie gras supplier, Iroquois Brands, Ltd., SEC No-Action Letter, 1984 WL 45764 (Feb. 22, 1984). 2) Green Mountain Power which petitioned for the exclusion of a proposal requesting all company directors disclose personal and family business interests and political and social contacts, Green Mountain Power Corp., SEC No-Action Letter, 1985 WL 54071 (Apr. 3, 1985). and 3) United Technologies which requested a proposal from the trustee by the New York City Employees Retirement System for increasing and/or implementing the MacBride Principles in Northern Ireland not be included. United Technologies Corp., SEC No-Action Letter, 1987 WL 108923 (Feb. 19, 1987).

portant social issues were significantly related to the company's business.⁵³ The Staff did so when the proposal involved important matters of public policy, whether disinvestment from South Africa⁵⁴ or application of the McBride Principles.⁵⁵

Congressional Oversight of the Shareholder Proposal Process

Concerns nonetheless arose from the issuer community that the Staff's interpretation of the exclusion "require[d] them to include too many proposals of little or no relevance to their business."⁵⁶ In response, the Commission proposed revisions that sought to "streamline" the relevance exclusion.⁵⁷ The economic thresholds proposed were to be lowered to the lesser of \$10 million or 3% in gross revenues or total assets.⁵⁸ In return for the "expanded, economic test," the Commission proposed the elimination of the subjective phrase "otherwise significantly related."⁵⁹ The proposal would "make it easier for companies to exclude economically insignificant proposals" but would only apply to shareholder "proposals relating to quantifiable matters, such as operations in a specific foreign country, a specific product line, or a specific retail store or set of stores."⁶⁰

Issuers, however, asserted that "the proposed amendments . . . could, in fact, broaden the range, and therefore the number of proposals required

53. Boeing Company, SEC No-Action Letter, 1989 WL 245652 (Feb. 8, 1989) (This proposal requested a report on company activity with a particular supplier known for discriminatory practices. The Staff noted "It appears that the proposal relates to operations that may not be of economic significance to the Company. However, in light of the Company's business relationship with [the supplier] and the social policy issues inherent in the proposal, we are unable to concur in your view the proposal is "not otherwise significantly related" to Company business." (emphasis added).)

54. Harsco Corporation, SEC No-Action Letter, 1993 WL 2622 (Jan. 4, 1993) (This proposal, from the New York State Common Retirement Fund, requested the issuer refrain from new or expanded capital investment in South Africa. The Staff noted the proposal was "otherwise significantly related" to the Company's business and could not be excluded using 14a-8(c)(5) [currently 14a-8(i)(5)] as a basis for omission.)

55. United Technologies, SEC No-Action Letter, 1987 WL 107707 (Mar. 10, 1987) (This proposal from the New York City Employees' Retirement System and co-sponsored by the Oblates of Mary Immaculate, requested the company implement the MacBride Principles in Northern Ireland. The MacBride Principles consist of nine fair employment principles and are considered a corporate code of conduct for companies doing business in Northern Ireland.)

56. Proposed Rule: Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093 (Sept. 18, 1997).

57. The economic test proposed (but not enacted in the final revision) would have allowed a company to exclude proposals relating to matters involving the purchase or sale of services or products that represent \$10 million or less in gross revenue or total costs, whichever was appropriate, for the company's most recently completed fiscal year. Moreover, an additional economic test lower than \$10 million would have applied if 3% of the company's gross revenue or total assets (whichever was higher), for its most recently completed fiscal year, results in a number lower than \$10 million. The test would also have been subject to an "override" mechanism where the proposal would be includable if at least 3% of the company's outstanding voting shares supported the submission of the proposal to shareholder vote.

58. *Id.*

59. *Id.*

60. *Id.*

to be included in the proxy materials.”⁶¹ Commenters further raised concern over the possibility of increased costs to issuers without commensurate benefit to shareholders.⁶² In particular, issuers expressed that the design of the override mechanism provided significant benefit to the sponsors of social policy-type proposals, which did not have a material effect on the corporation.⁶³ As a result, the SEC decided against the streamlined version of the relevance exclusion and kept the rule basically the same as it had been since 1983.⁶⁴

III. STAFF INTERPRETATION OF THE CURRENT RULE

The failure to adopt the 1997 proposed revisions left in place the subjective standard for interpreting the exclusion. Economic thresholds remained relevant, but proposals still could only be excluded if “not otherwise significantly related to the company's business.”⁶⁵ As a result, the Staff continued to issue unclear and inconsistent decisions.

For example, two no action letters calling for a company to reduce investments in Israel received differing Staff treatment. The Staff found “some basis” for excluding a proposal submitted in 2003.⁶⁶ Four years later, however, the Staff was “unable to concur” that a similar proposal could be excluded as “not otherwise significantly related” to the company's business.⁶⁷

In other cases, the Staff sought to avoid the need to determine the significance of a proposal to a company's business. The Staff largely limited no action relief to proposals that did not implicate any area of the company's business. To the extent a proposal was “completely unrelated”

61. P. Alan Bulliner, Comment Letter on SEC Proposed Rule, File No. S7-25-97 (Nov. 13, 1997) (This commenter went on to state, “The proposed quantifiable economic significance test, for proposals relating to the purchase or sale of products and services, of the lesser of \$10 million in gross revenues or 3% of the higher of gross revenues or total assets, is ludicrous in the context of large corporations.”)

62. *Id.*

63. *Id.*

64. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 1998 WL 254809 (May 21, 1998).

65. *Id.*

66. Hewlett-Packard Company, SEC No-Action Letter, 2003 WL 122322 (Jan. 7, 2003) (Staff found “some basis” for excluding the proposal under 14a-8(i)(5). The proposal requested the issuer divest or close offices in Israel and send a letter to the United Nations related to Israel's violation of international human rights in Palestine.)

67. Bank of America Corporation, SEC No-Action Letter, 2007 WL 528626 (Feb. 12, 2007) (including Staff response to no-action relief dated Jan. 12, 2007, from proponent requesting company “reduce investment in Israel by 5% annually until the State of Israel cease military, economic, and political attacks on the Palestine Authority.” Staff was “unable to concur the proposal [was] not otherwise significantly related” to company business, thus requiring its inclusion. The Staff, however, allowed for the omission of these proposals under other subsections. *See also* College Retirement Equities Fund, SEC No-Action Letter, 2011 WL 1761354 (May 6, 2011) (excluded as ‘ordinary business’ under (i)(7)); College Retirement Equities Fund, SEC No-Action Letter, 2013 WL 1948395 (May 10, 2013). Both proposals requested the company end investments in Israel or with companies contributing to the Israeli ‘occupation’ of Palestine. Both proposals were excludable under the ‘ordinary business’ exclusion.)

to the issuer's activities,⁶⁸ the proposal would be excluded even if raising an important issue of public policy. Thus, proposals not implicating a company's business were excluded despite raising concerns over "forced" labor,⁶⁹ human embryonic stem cell research,⁷⁰ investment in Israel,⁷¹ pollution,⁷² and corporate gifts.⁷³

Nonetheless, the Staff rarely used the exclusion. From 2000 to 2009, the Staff allowed for the exclusion of only nine proposals under subsection (i)(5).⁷⁴ In the second decade of the new millennium, the Staff used the exclusion even less. Companies sought the exclusion of proposals addressing a variety of corporate social responsibility topics. Proposal topics included corporate activities in Northern Ireland⁷⁵ and Sri Lanka,⁷⁶ and investments in regions where genocide and crimes against humanity were said to occur.⁷⁷ Companies also proposed excluding proposals addressing

68. Fleet Services Corp., SEC No-Action Letter, 1998 WL 17949 (Jan. 20, 1998) (Staff noted in particular "the proposal is completely unrelated to the Company's business." The shareholder proposal requested the issuer investigate and publish a report regarding a Korean Airlines crash.).

69. BellSouth Corp., SEC No-Action Letter, 1998 WL 75812 (Feb. 19, 1997) (The proposal requested the issuer adopt policies to ensure it does not deal in goods or services produced by forced or slave labor in China. Staff noted in particular, the Company represented "none of its operations in China use products or services produced by forced or slave labor.").

70. See e.g., Proctor & Gamble, SEC No-Action Letter, 2003 WL 21919560 (Aug. 11, 2003) (The proposal requested the company adopt a policy forbidding human embryonic stem cell research. In allowing the issuer to rely on 14a-8(i)(5), the Staff noted the company's representation that it doesn't perform any human embryonic stem cell research.).

71. Hewlett-Packard Company, SEC No-Action Letter, 2003 WL 122322 (Jan. 7, 2003) and *supra* note 67.

72. Arch Coal, Inc., SEC No-Action Letter, 2007 WL 224980 (Jan. 19, 2007) (The proponent requested the company prepare a report addressing emissions from the company's power plant operations. In permitting the issuer to rely on 14a-8(i)(5) Relevance, the Staff noted the company's representation that it did not have any power plant operations.).

73. Merck & Co., Inc., SEC No-Action Letter, 2005 WL 3695277 (Jan. 4, 2006) (The proposal requested the board adopt a policy banning thank-you gifts to organizations in the People's Republic of China. Staff did not provide an explanation for permitting the company to exclude the proposal under 14a-8(i)(5); however, the company asserted the thank-you gifts provided to Chinese organizations amounted to 0.0001 percent of net income.).

74. Of 166 proposals asserting 14a-8(i)(5) relevance, during the 2000's, 39 were found otherwise significantly related by the Staff, nine proposals were permitted for exclusion under the relevance provision, and 118 were found excludable under other provisions.

75. Corning Incorporated, SEC No-Action Letter, 2014 WL 6999584 (Feb. 11, 2015) (The proposal requested the board implement or increase activity on eight principles related to religious discrimination in Northern Ireland. Staff was unable to concur the proposal could be excluded under either 14a-8(i)(5) Relevance or 14a-8(i)(10) Substantially implemented.)

76. The Gap, Inc., SEC No-Action Letter, 2012 WL 167220 (Mar. 14, 2012) (The proponent requested the board institute procedures to end trade with Sri Lanka until the Sri Lankan government ceased human rights violations. The Staff noted none of the asserted provisions: 14a-8(i)(3) Violation of proxy rules, 14a-8(i)(5) Relevance, or 14a-8(i)(7) Ordinary business operations, could be relied upon as a basis for omitting the proposal.)

77. JP Morgan Municipal Money Market Fund, SEC No-Action Letter, 2014 WL 1511146 (Apr. 15, 2014) (The proposal focused on company procedures related to investment in companies substantially contributing to genocide or crimes against humanity such as occurred in Sudan. Staff could not concur the fund could rely on 14a-8(i)(5) relevance although the fund met all the 5% threshold tests.)

animal rights, such as the need for cage free eggs,⁷⁸ animal testing,⁷⁹ and the purchase or sale of furs.⁸⁰ Proposals related to reporting lobbying contributions and expenditures⁸¹ and on pollution caused by company activity were also proposed for exclusion.⁸² During this period, the Staff allowed for the exclusion of just one proposal under subsection (i)(5).⁸³

IV. ANALYSIS

The shareholder proposal rule has allowed owners to provide to management with their collective views on corporate matters. Shareholders often seek to include proposals that implicate matters of important public concern. Some of the proposals, however, only implicate, as a matter of economics, an insignificant portion of a company's business. In these circumstances, the argument can be made that the company's proxy statement may not be an appropriate vehicle for debating the matter.

In fact, however, the history of (i)(5) suggests that this is not a particularly useful basis for determining whether to exclude a proposal. To the extent proposals sought to target an uncontroversial aspect of a company's business, the idea that the subject matter was insignificant as an economic matter made sense. Even if the proposal was implemented, the outcome would be immaterial. Yet shareholders seldom submit these types

78. Bob Evans Farms, Inc., SEC No-Action Letter, 2011 WL 2281670 (June 6, 2011) (Proposal from the Humane Society of the United States encouraged the board to phase in the use of cage free eggs for Bob Evans restaurants. The issuer asserted 14a-8(i)(3) Violation of proxy rules, 14a-8(i)(5) Relevance, 14a-8(i)(7) Ordinary business operations, or 14a-8(i)(10) Substantially implemented, as a basis for exclusion. Staff was unable to concur with any of these bases.)

79. Revlon, Inc., SEC No-Action Letter, 2014 WL 1292240 (Mar. 18, 2014) (Proponent requested an annual report disclosing company policy on animal testing. The company requested exclusion under 14a-8(i)(4) Personal grievance, 14a-8(i)(5) Relevance, 14a-8(i)(7) Ordinary business operations, or 14a-8(i)(10) Substantially implemented. The Staff could not concur that any of these bases were appropriate to support the proposal's omission.)

80. Coach, Inc., SEC No-Action Letter, 2010 WL 3374169 (Aug. 19, 2010) (People for the Ethical Treatment of Animals encouraged the board to enact a policy to ensure no fur products were acquired or sold by the company. Coach asserted 14a-8(i)(3) Violation of proxy rules, 14a-8(i)(5) Relevance, 14a-8(i)(7) Ordinary business operations as appropriate bases for omission. Staff could not concur. Thus the proposal was includable in shareholder materials.)

81. Devon Energy, SEC No-Action Letter, 2012 WL 748853 (Mar. 27, 2012) (Proponents requested the board prepare a report on company lobbying contributions and expenditures. The issuer asserted 14a-8(i)(3) Violation of proxy rules, 14a-8(i)(5) Relevance, and 14a-8(i)(7) Ordinary business operations. Staff was unable to concur any were an appropriate basis for excluding the proposal.)

82. Arch Coal, Inc., SEC No-Action Letter, 2012 WL 6723091 (Jan. 31, 2013) (The proposal by the New York State Common Retirement Fund requested a report on the pollution resulting from Arch's removal of mountaintop land and effective means to mitigate the effects of company activities. Staff was unable to concur the proposal could be omitted under 14a-8(b) or 14a-8(i)(5).)

83. Goldman Sachs Group Inc., SEC No-Action Letter, 2012 WL 6723108 (Feb. 19, 2013) (This proposal requested the Company's board analyze whether Goldman Sachs, as a "person," could run for electoral office. Staff noted the issuer's representation the Company "currently has no involvement, never has had any involvement, and has no plans to become involved in the business of running for political office.")

of proposals. When they do, subsection (i)(5) is unnecessary. The “ordinary business” exclusion guarantees their omission.⁸⁴

To the extent that a proposal involves a company’s business and implicates public policy, the percentage of revenues or assets rarely matters. The manufacture of napalm, the use of pâté from force fed geese, or the sale of weapons, may not have a material impact on a company’s earnings but nonetheless can have a significant potential effect on reputation.

All of this suggests the need to either repeal or substantially narrow this exclusion. At most, this exclusion should be limited to matters where the company did not engage in the type of business addressed by the proposal. Matters of public policy may be worthy of debate but the debate should be centered on companies that engage in the controversial activities. Other types of proposals can be resolved under the ordinary business exclusion, with the degree of impact on the company’s earnings and revenues playing no role in the analysis.

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84. Rule 14a-8(i)(7), 17 CFR 240.14a-8(i)(7). Indeed, the Staff commonly resolves proposals involving the company’s business under the ordinary business exclusion. *See e.g.*, Catellus Development Corporation, SEC No-Action Letter, 2005 WL 517866 (Mar. 3, 2005) (The proposal submitted requested the company attempt to trade federal land for coastal property sacred to a Native American tribe. The company asserted 14a-8(i)(6) Absence of power/authority, 14a-8(i)(5) Relevance, 14a-8(i)(4) Personal grievance or special interest, and 14a-8(i)(7) Ordinary business operations. Staff found the proposal could be omitted under 14a-8(i)(6) and did not find it necessary to address the additional bases asserted by the issuer. This situation is typical of proposals on which issuers requested no action relief in the 2000’s. The Staff found other bases for exclusion appropriate over two-thirds of the time that another basis was asserted by the issuer in addition to relevance.)

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