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# THE “UNORDINARY BUSINESS” EXCLUSION AND CHANGES TO BOARD STRUCTURE

## I. INTRODUCTION

Rule 14a-8 allows shareholders to include proposals in the company’s proxy statement.<sup>1</sup> The provision also provides thirteen substantive grounds for the exclusion of proposals. In particular, Rule 14a-8(i)(7) permits the exclusion of proposals addressing the company’s “ordinary business” operations. The provision is the most commonly used substantive basis for excluding shareholder proposals.<sup>2</sup>

The exclusion was arguably unnecessary. Since inception, Rule 14a-8 permitted the exclusion of proposals deemed an improper subject matter for shareholder action.<sup>3</sup> Efforts by shareholders to usurp the role of the board in managing the company, therefore, could already be prevented. State law, however, did not prohibit shareholders from making proposals phrased as recommendations or requests.<sup>4</sup> In adding the “ordinary business” exclusion in 1954, the Commission explicitly intended to permit the exclusion of proposals phrased as a recommendation or request.<sup>5</sup>

The limitation was eventually dropped. The Commission, however, left the phrase “ordinary business” undefined, leaving the interpretation to the staff of the Division of Corporate Finance (staff). The staff applied the exclusion in a broad fashion. “Ordinary business” ultimately came to encompass almost any matter effecting directly or indirectly the business activities of the company whether advisory or mandatory.

This paper will first examine the administrative history of the ordinary business exclusion. The next section will examine staff interpretations of the exclusion in the context of proposals that request changes to board structure and the formation of board committees. The last section will discuss critiques of the ordinary business exclusion, the interpretation of the exclusion, and the implication of the approach.

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1. 17 C.F.R. § 240.14a-8(i)(7) (2011).

2. See *infra* notes 40–42.

3. Amendments To Rules on Shareholder Proposals, Exchange Act Release No. 4979, 1954 WL 5772, at \*1 (Jan. 6, 1954) (noting that state law determined the “proper subjects for action”).

4. *Proxy Rule 14a-8: Omission of Shareholder Proposals*, 84 HARV. L. REV. 700, 709 (1971) (“Under this view almost every matter relating to the corporation’s business could form the basis of a stockholder proposal if phrased in advisory terms.”).

5. See Release No. 4979, *supra* note 3 at \*1.

## II. ADMINISTRATIVE HISTORY: 14A-8(I)(7)

The Commission adopted Rule 14a-8 in 1942.<sup>6</sup> As originally implemented, the provision allowed for the inclusion of proposals deemed “a proper subject for action” by shareholders, a limitation controlled by state law.<sup>7</sup> State law, however, allowed shareholders to submit proposals in the form of recommendations, even when involving the business of the company.<sup>8</sup> To restrict this right, the Commission added an exclusion for matters involving the “ordinary business” operations of the company. The amendment only applied to proposals phrased as a recommendation or request.<sup>9</sup> The Commission reasoned that these proposals fell within the “province of management,”<sup>10</sup> and that it was “manifestly impracticable in most cases for shareholders to decide management problems at corporate meetings.”<sup>11</sup>

Although commentators and the Commission<sup>12</sup> sometimes suggested that the meaning of “ordinary business” depended on state law,<sup>13</sup> the

6. See 17 C.F.R. § 240.14a-7 (2008); see also SEC Release Notice, Securities Exchange Act Release No. 3347, 1942 WL 34864 (Dec. 18, 1942).

7. Release No. 4979, *supra* note 3 at \*2.

8. *Proxy Rule 14a-8: Omission of Shareholder Proposals*, *supra* note 4, at 709 (“Under this view almost every matter relating to the corporation’s business could form the basis of a stockholder proposal if phrased in advisory terms.”).

9. As the provision provided: “If the proposal 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.” Release No. 4979, *supra* note 3 at \*4 (adopting Rule X-14A-8(c)(5)); see also Proposed Amendment To Rule 14a-8, Securities Exchange Act Release No. 4950, 1953 WL 5756, at \*2 (Oct. 9, 1953).

10. See Release No. 4979, *supra* note 3 at \*2; Release No. 4950, *supra* note 9 at \*2 (“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. *Hearing on a Report from the SEC on Its Problems in Enforcing the Securities Laws Before a Subcomm. of the Senate Comm. on Banking and Currency*, 85th Cong. 118 (1957) (“The policy motivating the Commission in adopting the Rule . . . is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders. The basic reason for this policy is that it is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings.”).

12. *Id.* at 118 (“The policy motivating the Commission in adopting the Rule . . . is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders.”); see *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 678 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972) (quoting a Senate hearing on amendments to Rule 14a-8, where it was stated that “[w]hile Rule X-14A-8 does not require that the ordinary business operations be determined on the basis of State law, the premise of Rule X-14A-8 is that the propriety of . . . proposals for inclusion in the proxy statement is to be determined in general by the law of the State of incorporation. . . . Consistency with this premise requires that the phrase ‘ordinary business operations’ in Rule X-14A-8 have the meaning attributed to it under applicable State law. To hold otherwise would be to introduce into the rule the possibility of endless and narrow interpretations based on no ascertainable standards.”).

13. See *Proxy Rule 14a-8: Omission of Shareholder Proposals*, *supra* note 4, at 719; see also Proposed Amendments to Rule 14a-8, Exchange Act Release No. 19135, 1982 WL 600869, at \*16 (Oct. 14, 1982) (noting that the exclusion “is based on the requirements of most state laws that the

history of the proposal suggested otherwise.<sup>14</sup> Indeed, from the outset, the exclusion was intended to bar proposals that were otherwise permitted under state law.<sup>15</sup> Undefined and untethered from state law, the phrase was therefore left entirely to the interpretation and development of the staff.

Given the lack of any meaningful standards, staff rulings were sometimes inconsistent<sup>16</sup> and often applicable to matters that did not implicate the board’s ability to manage the company.<sup>17</sup> Thus, the exclusion extended to proposals affecting the annual meeting process<sup>18</sup> and to the preparation of reports by the board of directors, even though neither “interfere[d] with management’s ability to make decisions.”<sup>19</sup>

Efforts to clarify the meaning of the exclusion occasionally surfaced. In 1976, the Commission addressed the application of the “ordi-

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business affairs of the corporation be conducted ‘by’ or ‘under the direction of’ the board of directors.”); *see also* Amendments To Rules on Shareholder Proposals, Exchange Act Release No. 39093, 1997 WL 578696, at \*4 (Sept. 18, 1997) (“The ‘ordinary business’ exclusion is based in part on state corporate law establishing spheres of authority for the board of directors on one hand, and the company’s shareholders on the other.”).

14. *Proxy Rule 14a-8: Omission of Shareholder Proposals*, *supra* note 4, at 718–19 (The provision was designed to prevent precatory proposals. These proposals were permitted under state law.).

15. The SEC clearly assumed that the exception for recommendations concerning ordinary business matters would permit omission of some proposals which were proper under state law and which management previously was required to include in the proxy materials. *Proxy Rule 14a-8: Omission of Shareholder Proposals*, *supra* note 4, at 708–09.

16. *Hearing on a Report from the SEC on its Problems in Enforcing the Securities Laws Before a Subcomm. of the Senate Comm. on Banking and Currency*, 85th Cong. *supra* note 11, at 118; *see also Med. Comm. for Human Rights*, 432 F.2d at 678 (quoting a Senate hearing on amendments to Rule 14a-8, where it was stated that “[w]hile Rule X-14A-8 does not require that the ordinary business operations be determined on the basis of State law, the premise of Rule X-14A-8 is that the propriety of . . . proposals for inclusion in the proxy statement is to be determined in general by the law of the State of incorporation . . . Consistency with this premise requires that the phrase ‘ordinary business operations’ in Rule X-14A-8 have the meaning attributed to it under applicable State law. To hold otherwise would be to introduce into the rule the possibility of endless and narrow interpretations based on no ascertainable standards.”).

17. *See Corporate Political Affairs Programs*, 70 YALE L.J. 821, 848 (1961) (Although proposals involving false advertising are excluded as ordinary business, “it is difficult to see how false advertising could be said to be an ordinary practice of the corporation”).

18. *Id.* (“The Commission has invoked the ordinary-business-operations test to strike down proposals requesting more detailed annual reports, or a rule that shareholder proposals be answered by the president or vice president within ten days.”). Nor has the staff been consistent in this area. Thus, at one time proposals seeking to designate the location of the annual meeting of shareholders were not subject to exclusion. *Compare* CF&I Steel Corp., SEC No-Action Letter, 1991 WL 178531 (Feb. 14, 1991) (in considering proposal to change the location of the annual meeting, “[i]n the staff’s view, the subject of the proposal involves a significant question and concerns decisions dealing with the relationship between management and stock holders which involve matters beyond the Company’s business operations”) *with* Apple Computer, Inc., SEC No-Action Letter, 1997 WL 675187 (Oct. 29, 1997) (“There appears to be some basis for your view that the first proposal may be omitted from the Company’s proxy materials under rule 14a-8(c)(7), as relating to its ordinary business operations (e.g. the location of the Company’s annual shareholders meeting”).

19. *Id.* at 822 (“Even if corporate politicking were as “ordinary” as any other business operation, a resolution requiring reporting does not interfere with management’s ability to make decisions. At most, it may require changes in accounting procedure.”).

nary business” exclusion to matters of public policy<sup>20</sup> and proposed to limit the provision to “routine, day-to-day matter[s].”<sup>21</sup> The Commission ultimately declined to adopt this language, finding that the revisions would be “overly restrictive and difficult to apply.”<sup>22</sup> Instead, matters involving “ordinary business” were not subject to exclusion to the extent that they involved important matters of public policy.

Likewise, the staff did not initially apply the exclusion to proposals that sought reports or the formation of special board committees.<sup>23</sup> “Requests for disclosure,” the staff reasoned, did not implicate the ordinary business of the company<sup>24</sup> and efforts to do so could involve “important policy matters.”<sup>25</sup> As the staff recognized, a “proposal which [did] not request that the management take any specific action with respect to the matters raised, but rather recommends that information about a specific areas of the Company’s business be disclosed, does not . . . relate to . . . ordinary business operations.”<sup>26</sup>

In 1982, however, the Commission significantly expanded the reach of the “ordinary business” exclusion. The Commission did so by deleting the language “recommendation, request, or mandate”<sup>27</sup> and applying the exclusion to proposals calling for reports and special committees.<sup>28</sup> In

20. See Statement of Informal Procedures for the Rendering of Staff Advice with Respect To Shareholder Proposals, Exchange Act Release No. 9344, 1976 WL 160411 (July 7, 1976); see also *Med. Comm. for Human Rights*, 432 F.2d at 678.

21. Proposed Amendments to Rule 14a-8, Exchange Act Release No. 9343, 1976 WL 160410, at \*8 (July 7, 1976) (The proposing release suggested changing the language to permit exclusion of a proposal only if it deals with a “routine, day-to-day matter relating to the conduct of the ordinary business operations of the issuer”). In this proposal, the Commission reasoned this change would better distinguish between matters of “little interest to security holders” and “important business matters,” such that the exclusion could not be relied on to exclude proposals involving the latter. *Id.*; see also Release No. 39093, *supra* note 13, at \*12 (citing Proposed Amendments to Rule 14a-8, Exchange Act Release No. 9343, 1976 WL 160410 (Nov. 22, 1976)).

22. Release No. 39093, *supra* note 13, at \*12 (citing Proposed Amendments to Rule 14a-8, Exchange Act Release No. 9343, 1976 WL 160410 (Nov. 22, 1976)).

23. See Release No. 19135, *supra* note 13, at \*17; see also Amendments to Rule 14a-8, Exchange Act Release No. 20091, 1983 WL 33272, at \*7 (Aug. 16, 1983) (“In the past, the staff has taken the position that proposals requesting issuers to prepare reports on specific aspects of their business or to form special committees to study a segment of their business would not be excludable under Rule 14a-8(c)(7) . . .”).

24. *E.g.*, Avon Products, SEC No-Action Letter, 1980 WL 15588, at \*2 (Jan. 31, 1980); Florida Power Corp., SEC No-Action Letter, 1981 WL 26583, at \*3 (Jan. 21, 1981).

25. *E.g.*, Addressograph-Multigraph, SEC No-Action Letter, 1977 WL 11113, at \*5 (Aug. 31, 1977) (“Because of the relative rarity and uniqueness of such procedures, the determination whether to adopt them when proposed by a shareholder would seem to involve an important policy matter.”); United Brands Co., SEC No-Action Letter, 1978 WL 12464, at \*4 (Mar. 16, 1978); The Southern Co., SEC No-Action Letter, 1977 WL 12865, at \*8 (Mar. 14, 1977); General Dynamics Corp., SEC No-Action Letter, 1981 WL 26195, at \*2 (Mar. 3, 1981).

26. *E.g.*, Nat’l City Corp., SEC No-Action Letter, 1981 WL 26566, at \*2 (Mar. 4, 1981); United Brands Co., *supra* note 25, at \*4.

27. See Release No. 19135, *supra* note 13, at \*17.

28. The Commission described the failure as the elevation of “form over substance.” Release No. 19135, *supra* note 13, at \*17. As the Commission reasoned, the “existing interpretation that a proposal that either requests the issuer to prepare and to disseminate a special 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.” *Id.* at \*14.

applying the exclusion, the staff was instructed to “consider whether the subject matter of the special report or the committee involves a matter of ordinary business.”<sup>29</sup>

The staff quickly implemented interpretation. The staff allowed for the exclusion of a proposal calling for the creation of a special committee “to investigate and report on certain corporate activities.”<sup>30</sup> In *Southern California Edison Co.*, the proposal sought the appointment of a committee of “experts” to review the employee benefits program.<sup>31</sup> The staff determined that the proposal dealt “with a matter relating to the conduct of the Company’s ordinary business operations (i.e., employee benefits).”<sup>32</sup> Moreover, while the 1982 release only dealt with formation of committees, the staff permitted the exclusion of proposals seeking to assign tasks to existing committees.<sup>33</sup>

In 1997, the Commission proposed to amend the exclusion to include examples of “ordinary business” matters that did not raise public policy considerations.<sup>34</sup> They included: “whether a company charges an annual fee for use of its credit card, the wages a company pays its non-executive employees, and the way a company operates its dividend reinvestment plan.”<sup>35</sup> The examples sought to provide guidance on “how to analyze proposals relating simultaneously to both an ‘ordinary business’ matter and a significant social policy issue.”<sup>36</sup> Companies and shareholders alike objected to the proposed revision<sup>37</sup> and, as a result, the Com-

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29. Release No. 20091, *supra* note 24, at \*7.

30. Newport Pharm. Int’l, Inc., SEC No-Action Letter, 1984 WL 45581, at \*1 (Aug. 10, 1984); *see also* PacifiCorp, SEC No-Action Letter, 1988 WL 234219, at \*1 (Apr. 14, 1988) (allowing for the exclusion of proposal under (c)(7) proposal that “relates to the creation of a committee to investigate all filings with the Commission since 1984 by the Company, its subsidiaries and other companies within the Company’s control”). The staff offered similar explanations in other no-action letters relating to requests for committee formations. *E.g.*, Mobil Corp., SEC No-Action Letter, 1989 WL 245661, at \*1 (Feb. 13, 1989); V.F. Corp., SEC No-Action Letter, 1987 WL 107651, at \*1 (Feb. 19, 1987); Boeing Co., SEC No-Action Letter, 1987 WL 107632, at \*1 (Feb. 17, 1987); Eastman Kodak Co., SEC No-Action Letter, 1985 WL 53845, at \*1 (Feb. 20, 1985); S. Cal. Edison Co., SEC No-Action Letter, 1983 WL 28962, at \*1 (Dec. 16, 1983); Standard Oil Co. of Cal., SEC No-Action Letter, 1983 WL 30723, at \*1 (Feb. 4, 1983).

31. S. Cal. Edison Co., *supra* note 30, at \*1.

32. *Id.*

33. *See generally* Release No. 19135, *supra* note 13.

34. *See* Release No. 39093, *supra* note 13, at \*7.

35. *Id.*

36. *Id.* at \*12 (noting the original mission of the “ordinary business” exclusion, 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 management . . . became more complicated with the emergence of proposals focusing on social policy issues”).

37. Amendments To Rule 14a-8, Exchange Act Release No. 23200, 1998 WL 254809, at \*2 (May 21, 1998) (“Several companies and shareholders nonetheless objected to the proposed revisions, particularly the elimination of the ‘ordinary business’ language, on the ground that most participants in the shareholder proposal process are now so familiar with the ‘ordinary business’ language that they might misconstrue the revisions as signaling an interpretive change.”); Cracker Barrel Old Country Stores, Inc., SEC No-Action Letter, 1992 WL 289095 (Oct. 13, 1992). The Commission reversed the position taken by the SEC in Cracker Barrel that social policy issues are excludable under the ordinary business exception. The Commission reaffirmed the traditional public policy analysis, and in so doing, overturned the earlier staff interpretation in Cracker Barrel.

mission made no material changes to the provision.<sup>38</sup> The text of the exclusion in Rule 14a-8, therefore, remained largely unchanged from the version adopted in 1976.

### III. STAFF INTERPRETATION

The ordinary business exclusion represents a commonly used basis for exclusion under Rule 14a-8. During the 2015 proxy season, the staff received 318 no-action requests. Of the 130 that were excluded, 32% were on the basis of the ordinary business exclusion.<sup>39</sup> In 2013, 18% of the no-action letters were decided on this basis,<sup>40</sup> compared with 14% in 2014.<sup>41</sup>

#### A. Board Committees

The widespread use of the exclusion can be explained by an extraordinarily broad interpretation of “ordinary business.” The staff has interpreted the provision to apply to almost any proposal that implicates the operations of the company, which can be seen with respect to proposals seeking changes in board structure. Shareholders sometimes submit proposals seeking the formation of a committee to monitor corruption or the establishment of board policies.<sup>42</sup> To the extent the task assigned to the board is deemed to involve the company’s ordinary business, subsection (i)(7) is triggered.

For example, the staff allowed for the exclusion of a proposal requesting that the board create a committee to evaluate and report on risks arising from matters such as the customer base, fee structure, community

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38. Release No. 23200, *supra* note 37, at \*2 (noting “[i]ndeed, since the meaning of the phrase ‘ordinary business’ has been developed by the courts over the years through costly litigation and essentially has become a term-of-art in the proxy area, we recognize the possibility that the adoption of a new term could inject needless costs and other inefficiencies into the shareholder proposal process”) (also noting concern about the adopt of a new term “inject[ing] needless costs and other inefficiencies into the shareholder proposal process”) (also changed format of 14a-8 to plain English answer and question format).

39. See Elizabeth Ising, *Shareholder Proposal Developments During the 2015 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG (July 17, 2015), <http://corpgov.law.harvard.edu/2015/07/17/shareholder-proposal-developments-during-the-2015-proxy-season/>. Additionally, the staff did not exclude 24% of proposals relating to ordinary business. *Id.* Thus, of the proposals considered by the Staff during the 2015 proxy season, 56% of proposals involved “ordinary business” arguments. *Id.*

40. *Shareholder Proposal Developments During the 2013 Proxy Season*, GIBSON DUNN (July 9, 2013), <http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-2013-Proxy-Season.aspx>.

41. *Shareholder Proposal Developments During the 2014 Proxy Season*, GIBSON DUNN (June 25, 2014), <http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-During-2014-Proxy-Season.aspx>.

42. *E.g.*, Monsanto Co., SEC No-Action Letter, 2005 WL 6065453 (Nov. 3, 2005); Gen. Motors Corp., SEC No-Action Letter, 2005 WL 704112 (Mar. 24, 2005); Farmer Bros. Co., SEC No-Action Letter, 2004 WL 2248177 (Oct. 4, 2004); Xcel Energy, Inc., SEC No-Action Letter, 2003 WL 1560177 (Mar. 17, 2003); Deere & Co., SEC No-Action Letter, 2000 WL 1762368 (Nov. 30, 2000); Chase Manhattan Corp., SEC No-Action Letter, 2000 WL 223746 (Feb. 14, 2000).

and customer good will, and growing competition.<sup>43</sup> Similarly, proposals seeking to assign committees the task of governing and evaluating employment practices have been treated as “ordinary business.”<sup>44</sup> In making these determinations, the Commission has focused on the whether the substance of the request – i.e. the topic of the board report or the proposed duties of a committee – related to routine business matters.<sup>45</sup> The approach has applied to efforts by shareholders to have the board form a committee on corporate responsibility,<sup>46</sup> sustainability,<sup>47</sup> ethics oversight,<sup>48</sup> compliance,<sup>49</sup> and in at least some cases, risk.<sup>50</sup>

### B. *Trinity Wall Street v. Wal-Mart Stores*

The application of the “ordinary business” exclusion to committees arose in *Trinity Wall Street v. Wal-Mart Stores*.<sup>51</sup> In that case, Trinity requested that Wal-Mart’s Board of Directors develop and implement standards to determine whether to sell a product that (1) “especially endangers public safety”; (2) “has the substantial potential to impair the reputation of Wal-Mart”; and (3) “would reasonably be considered by

43. See *W. Union, Co.*, SEC No-Action Letter, 2011 WL 916163, at \*1 (Mar. 14, 2011).

44. See *Farmer Bros. Co.*, *supra* note 42.

45. E.g. *Marriot Int’l, Inc.*, SEC No-Action Letter, 2011 WL 202113 (Mar. 16, 2011); *Monsanto Co.*, *supra* note 42; *General Motors Corp.*, *supra* note 42; *Farmer Bros. Co.*, *supra* note 42; *Xcel Energy, Inc.*, *supra* note 42; *Deere & Co.*, *supra* note 42; *Chase Manhattan Corp.*, *supra* note 42.

46. See *Verizon Commc’ns, Inc.*, SEC No-Action Letter, 2007 WL 624305, at \*1 (Feb. 23, 2007) (allowing for the exclusion of a proposal calling for the creates a “Corporate Responsibility Committee” consisting of directors to “monitor the extent to which Verizon lives up to its claims pertaining to integrity, trustworthiness, and reliability”).

47. See *Sunoco, Inc.*, SEC No-Action Letter, 2008 WL 384378, at \*1 (February 8, 2008).

48. See *Monsanto Co.*, *supra* note 42, at \*1.

49. *Hormel Foods Corp.*, SEC No-Action Letter, 2005 WL 3198972, at \*1 (Nov. 10, 2005) (proposal to establish committee to investigate effect of “factory farming” on animals whose meat is used in Company products, and make recommendations concerning how the Company can encourage the development of more humane farming techniques); In *ConocoPhillips, SEC No-Action Letter, 2008 WL 653403, at \*1* (Mar. 7, 2008), the Staff granted no action relief in connection with a shareholder proposal seeking to require that the board of ConocoPhillips establish a special committee to address the company’s alleged involvement with states that have sponsored terrorism. To support its theory, the Company cites *FedEx Corp.* (July 14, 2009) where the Staff concurred with the exclusion of a proposal that “urge[d] the board to establish an independent committee to prepare a report that discusses the compliance of the company and its contractors with state and federal laws . . .” Far from asking the Company to establish a new committee, the Proposal asks Comcast for transparency regarding a specific Company activity – mitigation of risk of a very specific type of lawsuit; see also *Gen. Motors Corp.*, *supra* note 42 (concurring with the exclusion of a shareholder proposal to establish a committee to review the customer relations policies of a subcontractor of the company); see also *Goodyear Tire and Rubber Co.*, SEC No-Action Letter, 1991 WL 176590 (Jan. 28, 1991) (concurring with the exclusion of a shareholder proposal to establish a committee of independent directors to study the handling of consumer and shareholder complaints); In *H&R Block, Inc.*, SEC No-Action Letter, 2006 WL 1816943 (June 26, 2006), the Staff permitted exclusion of a proposal seeking to establish a special committee to review the company’s sales practices, allegations of fraudulent marketing and provide a report to shareholders, where H&R Block, Inc. argued that “the examination of company practices for compliance with various regulatory requirements should properly be left to the discretion of the company’s management and board of directors.”

50. See *The W. Union Co.*, *supra* note 43.

51. See *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (July 6, 2015).



many offensive to the family and community values integral to the Company's promotion of its brand."<sup>52</sup> The proposal specifically linked the request to Wal-Mart's sale of high-capacity firearms.<sup>53</sup>

Wal-Mart sought no-action relief, arguing that the proposal could be excluded as "ordinary business." The staff agreed, noting that the proposal concerned the sale of particular products and services.<sup>54</sup> Rather than accept the result, Trinity filed suit to enjoin Wal-Mart's exclusion of the proposal.<sup>55</sup> The District Court found that the proposal was not excludable under (i)(7) because the proposal "wasn't a directive to management but to the Board to 'oversee the development and effectuation of a Wal-Mart policy.'"<sup>56</sup> While the proposal "could shape what products are sold by Wal-Mart . . . [it is] best viewed as dealing with matters that are not related to Wal-Mart's ordinary business operations."<sup>57</sup>

On appeal, Wal-Mart argued that the proposal requested a committee of the board to review matters that constituted ordinary business.<sup>58</sup> Wal-Mart Stores pointed to prior staff interpretations granting no-action relief where the proposal requested the establishment of a "risk oversight committee," but did not prescribe a specific ordinary business matter to be reviewed by the committee.<sup>59</sup> In comparison, the staff had generally excluded proposals that request the establishment of a "risk oversight committee" and prescribe an "ordinary business matter to be reviewed by the committee."<sup>60</sup> The Third Circuit, relying on the position of the staff,<sup>61</sup> agreed.<sup>62</sup>

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52. *Id.* at 327.

53. Wal-Mart Stores, Inc., SEC No-Action Letter, 2014 WL 409085, at \*8 (Mar. 20, 2014) ("This oversight and reporting is intended to cover policies and standards that would be applicable to determining whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition ("high capacity magazines") and to balancing the benefits of selling such guns against the risks that these sales pose to the public and to the Company's reputation and brand value.").

54. *See id.* at \*1 ("[W]e note that the proposal relates to the products and services offered for sale by the company. Proposals concerning the sale of particular products and services are generally excludable under rule 14a-8(i)(7). Accordingly, we will not recommend enforcement action to the Commission if Walmart omits the proposal from its proxy materials in reliance on rule 14a-8(i)(7).").

55. Trinity Wall Street v. Wal-Mart Stores, 75 F. Supp. 3d 617 (D. Del. 2014), *rev'd*, No. 12-4764 (3rd Cir. Apr. 14, 2015).

56. *Id.* at 22 (quoting Trinity Wall Street v. Wal-Mart Stores, 75 F. Supp. 3d 617 (D. Del. 2014)).

57. Wal-Mart Stores, 75 F. Supp. 3d at 630.

58. Brief for Appellant at 26, 29, Trinity Wall Street v. Wal-Mart Stores, No. 12-4764 (3rd Cir. July 6, 2015).

59. *Id.* at 29 (citing *PepsiCo, Inc.*, 2012 WL 542708 (Feb. 16, 2012)).

60. *Id.* (citing *W. Union Co.*, 2011 WL 916163 (Mar. 14, 2011)).

61. *See id.* at 25 (citing SEC Release No. 34-20091, 1983 WL 33272, (Aug. 16, 1983)); *see also* SEC Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2005), *available at* [www.sec.gov/interps/legal/cfs14h.htm](http://www.sec.gov/interps/legal/cfs14h.htm) ("This conclusion was the same as our conclusion when responding to Wal-Mart's no-action request. We believe our analysis in this matter is consistent with the views the Commission has expressed on how to analyze proposals under the ordinary business exclusion, i.e., the analysis should focus on the underlying subject matter of a proposal's request for board or committee review regardless of how the proposal is framed.").

## IV. ANALYSIS

The “ordinary business” exclusion has generated significant controversy. Indeed, some commentators have argued for the elimination of the ordinary business exclusion.<sup>63</sup> Much of the controversy has centered around the uncertainty over the public policy exception.<sup>64</sup> A significant number of proposals in this area are deliberately written to implicate important social issues. Yet the widespread use of the exclusion has another explanation. It can be traced to the increasingly broad interpretations of the term “ordinary business” by the Commission and the staff.

As originally adopted, the ordinary business exclusion applied in a very limited fashion. Proposals phrased in mandatory terms did not implicate the exclusion. As a result, shareholders could relatively easily draft around the provision, limiting its affect. Those days, however, are gone. “Ordinary business” now extends to any proposal, whether mandatory or advisory, whether merely seeking information or consideration of a matter by the board.<sup>65</sup>

Most fundamentally, however, has been the failure to limit application to “ordinary” business matters.<sup>66</sup> The exclusion has been applied to proposals involving actions that are neither routine nor usual nor beyond the capacity of shareholders to understand or address.<sup>67</sup> The staff has treated as “ordinary” the selection of outside auditors,<sup>68</sup> a policy of auditor rotation,<sup>69</sup> the impact of legislative reform on the company,<sup>70</sup> efforts

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62. See *Wal-Mart Stores, Inc.*, *supra* note 42, at 342. The court also declined to find the public policy exception because it did not “transcend” the business activities of the company. The SEC, however, rejected this approach.

63. See Patricia, R. Uhlenbrock, *Roll Out the Barrel: The SEC Reverses Its Stance on Employment-Related Shareholder Proposals Under Rule 14a-8—Again*, 25 DEL. J. CORP. L. 277, 298–301 (2000) (citing Kevin W. Waite, *The Ordinary Business Operations Exception To the Shareholder Proposal Rule: A Return To Predictability*, 64 FORDHAM L. REV. 1253 (1995)).

64. *Id.* at 298–301; Marilyn B. Cane, *The Revised SEC Shareholder Proxy Proposal System: Attitudes, Results, and Perspectives*, 11 J. CORP. L. 57, 72–73 (1985).

65. See *Auer v. Dressel*, 306 N.Y. 427, 432 (N.Y. 1954) (“The stockholders, by expressing their approval of Mr. Auer’s conduct as president and their demand that he be put back in that office, will not be able, directly, to effect that change in officers, but there is nothing invalid in their so expressing themselves and thus putting on notice the directors who will stand for election at the annual meeting.”).

66. See Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 907 (1994). (“[M]atters once considered ‘significantly related’ and ‘extraordinary’ are now excludable as ‘ordinary business matters’ including: corporate charitable contributions; the manufacture of tobacco-related products; and affirmative action plans and equal employment policies.”); see also J. Robert Brown, Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501 (2012).

67. See Brown, *supra* note 66, at 510 (“Disconnected from state law and devoid of any real standards, application of the “ordinary business” exclusion developed in an ad hoc and inconsistent fashion that could result in tenuous determinations.”).

68. Brown, *supra* note 66, at 525 (“The proposal seemed uncontroversial. Most companies already allowed for shareholder ratification. . . . Nonetheless, a number of companies petitioned the SEC for the right to omit the proposals, relying in part on Sarbanes-Oxley.”).

69. See *Kimberly-Clark Corp.*, SEC No-Action Letter, 2004 WL 2977547 (Dec. 21, 2004).

to prevent tax inversion transactions with foreign companies,<sup>71</sup> limits on stock buyback programs,<sup>72</sup> and the consideration of strategic alternatives where the proposal “relate[s] in part to non-extraordinary transactions.”<sup>73</sup> The staff has treated as “ordinary” matters that are uniquely suited for shareholder consideration and matters that address the “relationship between management and stock holders.”<sup>74</sup>

The interpretive approach is not limited by state law.<sup>75</sup> State law does not prohibit “recommendations” concerning the company’s ordinary business or changes to the structure of the board. Delaware law permits the adoption of bylaws by shareholders that do not “mandate how the board should decide specific substantive business decisions, but rather . . . define the process and procedures by which those decisions are made.”<sup>76</sup> Thus, under Delaware state law, shareholders can enact bylaws dealing with board committees without impermissibly interfering with the board’s authority.<sup>77</sup>

Likewise, the staff interpretation has untethered the provision from its original purpose. The exclusion for “ordinary business” was designed to remove matters “manifestly impracticable” for shareholders to decide.<sup>78</sup> The staff, however, routinely includes as “ordinary business” matters that fall within the traditional purview of shareholder authority. Rotating auditors and selecting the location of the annual meeting are examples. Moreover, proposals that call for board study of a matter do not involve efforts by shareholders to resolve “impracticable” issues but to obtain information that can influence such traditional functions as the election of directors.

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70. See Bear Stearns Co. Inc., SEC No-Action Letter, 2007 WL 571094 (Feb. 14, 2007); Merrill Lynch & Co., Inc., SEC No-Action Letter, 2007 WL 162271 (Jan. 11, 2007); Lehman Bros. Holdings Inc., SEC No-Action Letter, 2007 WL 162249 (Jan. 11, 2007); Morgan Stanley, SEC No-Action Letter, 2007 WL 80457 (Jan. 8, 2007).

71. See Pfizer Inc., SEC No-Action Letter, 2014 WL 7474127 (Feb. 24, 2015).

72. See LTV Corp., SEC No-Action Letter, 2000 WL 34034332 (Mar. 13, 2000).

73. Telular Corp., SEC No-Action Letter, 2003 WL 22900984, at \*1 (Dec. 5, 2003). The proposal sought consideration of strategic alternatives, “including, but not limited to, a sale, merger, spin-off, split-off or divestiture of the Company or a division thereof.” Apparently, the inclusion of “a division” rendered the proposal non-extraordinary in part.

74. See *Corporate Political Affairs Program*, *supra* note 17, at 836.

75. Release No. 19135, *supra* note 13 at \*16 (“State law precedent, however, is rarely conclusive as to what is or is not ordinary business, and the staff generally has had to make its own determination as to whether a proposal involves an activity relating to the issuer’s ordinary business.”).

76. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 235 (Del. 2008).

77. *Id.* at n. 18 (citing Hollinger Intern., Inc. v. Black, 844 A.2d 1022, 1079 (Del. Ch. 2004)).

78. *Hearing on a Report from the SEC on its Problems in Enforcing the Securities Laws Before a Subcomm. of the Senate Comm. on Banking and Currency*, 85th Cong., *supra* note 11, at 118 (“The policy motivating the Commission in adopting the Rule . . . is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders. The basic reason for this policy is that it is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings.”).

At the same time, the broad interpretation of “ordinary business” has effectively altered the structure of Rule 14a-8. Subsection (i)(1) prohibits proposals that would be improper under state law. Interference in the “ordinary business” can also violate state law.<sup>79</sup> By relying on the “ordinary business” exclusion rather than the “improper” exclusion, however, companies avoid the need for an opinion of counsel<sup>80</sup> and need not make the case that the content of the proposal actually violates state law.<sup>81</sup>

The problems have resulted in calls for the elimination of subsection (i)(7). In 2002, the chairman of the SEC raised the possibility.<sup>82</sup> As Chair, Harvey Pitt explained, “It is my hope that we can eliminate this exception, making shareholder suffrage a reality, and sparing our Staff from trying to resolve what is, or isn’t, within the purview of ordinary business issues facing public companies.”<sup>83</sup> His critique of (i)(7) reflected the assessment of many that the exclusion was too broad.

Repeal would be one possibility. Such an approach would not provide shareholders with license to submit proposals that interfered with the board’s duties. Companies would still be able to argue that a proposal interfering in the board’s duties violated state law under subsection (i)(1). A less dramatic approach, however, would be to reduce staff discretion by placing greater emphasis on the need for the subject matter to be deemed “ordinary.”

Such an approach would, for example, remove changes to board structure from the exclusion. Likewise, the approach would remove proposals seeking reports or proposals addressing issues that govern the relationship between management and shareholders. These reforms would permit the inclusion of proposals that do not take away decision-making power from the board.

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79. See DGCL 141(a); see also *CA, Inc.*, A.2d at 235.

80. See 17 C.F.R. § 240.14a-8(j)(2)(iii) (2011); see also 17 C.F.R. § 240.14a-8(j)(2)(iii) (2011).

81. See 17 C.F.R. § 14a-8(i)(1) (2011); see also 17 C.F.R. § 240.14a-8(i)(1) (2011).

82. Harvey Pitt: Remarks Before the Council of Institutional Investors’ Fall Conference, (Sept. 23, 2002) <http://www.sec.gov/news/speech/spch582.htm>.

83. *Id.*

<sup>†</sup> J.D. Candidate, May 2017.